Declaration

This thesis has been composed by the candidate and has not been accepted in any previous application for a degree.

The work has been done by the candidate. All quotations have been distinguished by quotation marks and the sources of information specifically acknowledged.

Jennifer G Riddell
Abstract

Rwanda experienced horrific genocide in 1994. In its aftermath, national and international trials were established but these trials failed to deal expeditiously with the large numbers of suspects awaiting trial. To combat this, Rwanda introduced an innovative participative justice mechanism, Gacaca. Modern Gacaca is based on a traditional Rwandan restorative justice mechanism of the same name. Its rooting in Rwanda's history makes Gacaca a much more acceptable form of justice to the Rwandan people than international trials given the international community's abandonment of Rwanda during the genocide. While Gacaca falls short of many international fair trial standards it remains Rwanda’s best hope as a wholly Rwandan process. But, Gacaca is more than just a judicial instrument, it has restorative justice at its origin and seeks, as its ultimate aim, to reconcile Rwanda’s divided communities. To reach this aim, Gacaca has several other objectives including discovering the truth of what happened in 1994, ending impunity which has plagued Rwanda since independence and allowing the Rwandan population to participate in the search for justice at a local level. This thesis studies the importance of these aims to Gacaca and whether the Gacaca courts are meeting their optimistic objectives in order to evaluate whether Gacaca is succeeding in Rwanda. Research was conducted through interviews throughout Rwanda and much civil society research was studied as well as material discussing the objectives from a more conceptual perspective.

Gacaca's potential is outstanding and its objectives all play a very important role which, if met, will secure a much more stable future for Rwanda. In practice, however, these objectives are not being met. The population is not actively participating in the trials thus the truth is not aired. Moreover, the perception of victor's justice hampers the ability of Gacaca to end impunity in Rwanda.
### Addressing Crimes Against International Law in Rwanda: Rwanda’s Gacaca in Practice

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Chapter 1  Introduction

Gacaca, meaning ‘on the grass’ and pronounced ga-cha-cha, is a traditional form of participative justice currently employed in Rwanda to handle the vast numbers of suspects still awaiting trial after the 1994 genocide. Gacaca is a familiar form of justice to Rwandans, having been used since pre-colonial times to resolve civil, and sometimes criminal, disputes within communities. Although commentators disagree as to the extent of its use in serious criminal matters, traditional Gacaca was not previously used in crimes of the magnitude of genocide. Nonetheless, the Rwandan Government has adapted the paradigm of traditional Gacaca to respond to Rwanda’s genocide. This modern Gacaca is a hybrid justice mechanism with a restorative, reconciliatory aspect combined with retributive punishments.

By using Gacaca to try these genocide suspects, the Rwandan Government is taking an enormous risk. If the innovation of Gacaca fails, the security of the whole country is at risk. However, if the Gacaca experiment is a success then suspects will be tried, innocent detainees released, guilty detainees punished and ultimately rehabilitated back into the community, victims and survivors will have had the cathartic opportunity to tell their story and have it recognised, and most importantly, polarised communities will be reconciled. Additionally, every community in Rwanda will benefit through the community service element of Gacaca’s sentencing. If Gacaca is a success, communities will start to rebuild mutual trust as they work together to establish the truth of what happened on every hillside in Rwanda in 1994. Once relationships are rebuilt, the prospect of a repeat of the 1994 genocide is greatly diminished. Moreover, this is an experiment, which, if successful, could be a model to be followed in other countries which are in the midst of transition between mass atrocity and democracy and normalcy. Of course every justice system employed in such a transitional situation must be adapted to its specific context but Gacaca’s potential as a model, a blueprint, is exceptional. The stakes are therefore high, not just for Rwanda but for all countries seeking a meaningful mode of transitional justice. The key question studied in this thesis, in chapter 6, is whether Gacaca meets its objectives and thereby lives up to its potential.

Chapter 2 introduces the Rwandan context. Firstly, it sets out the background to the genocide. The controversial issue of whether, from a legal perspective, there was a
genocide is then briefly addressed. The classification of the Tutsi group as an ethnical group is rarely questioned but it is fundamental to know whether the crimes committed in 1994 fit into the Genocide Convention’s definition of genocide. This is followed by a short analysis of the various options proposed to respond to the genocide, punitive and non-punitive, and includes the international responses of the International Criminal Tribunal for Rwanda and Universal Jurisdiction, Rwanda’s ordinary courts and Gacaca. Commentators have discussed and argued at length over whether modern Gacaca is a suitable form of justice to respond to the post-genocide Rwanda problem. Critics such as Jeremy Sarkin believe that the Rwandan justice problem could much better be solved through a South African style Truth and Reconciliation Commission\(^1\), Drumbl argues that reintegrative shaming could work well in the Rwandan context\(^2\) and Daly posits that there should be an amnesty granting power integrated in the Gacaca system\(^3\). The bottom line, according to Gerald Gahima, Rwanda’s former chief prosecutor, is that the “courts cannot do this job, a truth commission is unacceptable to the Rwandan people and Gacaca is the only chance”.\(^4\)

Chapter 3 introduces Gacaca as a judicial system. This chapter initially looks at an organic law passed in 1996 criminalising genocide and crimes against humanity and specifically studies the innovation of categorisation of suspects and the important confession and guilty plea procedure. An explanation of traditional Gacaca follows and an assessment is made of the link between traditional Gacaca and modern Gacaca. Importantly, the aims and hopes of Gacaca are noted here. There follows a description with intermittent analyses of the mechanics of Gacaca: from the role of the community to the punishments that can be imposed by the lay Gacaca judges. Lastly, this chapter briefly studies the various pre-trial meetings and work are involved.

No critic claims that Gacaca goes far enough in ensuring that fair trial standards are observed: Gacaca denies many of these protections to detainees. The extent to which Gacaca flouts international fair trial safeguards will be studied in Chapter 4. Well-

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\(^2\) M Drumbl “Punishment, postgenocide: from guilt to shame to civis in Rwanda” (2000) *NYULRev* 75 1221.

\(^3\) E Daly, “Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda” (2002) 34 *NYUJIntL&Pol* 355

\(^4\) Interview with Gerald Gahima, http://news.bbc.co.uk/1/hi/world/africa, 07.01.2003
recognised protections such as the presumption of innocence and the right to defence counsel will be assessed. Notwithstanding patent shortcomings, from an economic and human resources perspective, Gacaca is Rwanda’s best option, if not only option, for a future which recognises the rule of law and the humanity of every individual: survivor, bystander or perpetrator. It will therefore be argued that some of these international safeguards should be flexible and can be prioritised to allow the pragmatic tool of Gacaca to be employed in a country of few resources where tens of thousands of people are still awaiting trial.

In view of the fact that the advantages and disadvantages of using modern Gacaca have been thoroughly discussed by many critics it is suggested that little gain can be made by further analysing the system from a pre-practice standpoint. The overall aim of this dissertation is to discover whether Gacaca is fulfilling its many objectives. A study of how effective Gacaca has been at meeting its objectives is presented in Chapter 5. Each of the six main objectives are studied in turn. The objective is analysed as to its importance in the Rwandan context and as to whether it is being achieved.

An evaluation of the practice of Gacaca is carried out in Chapter 6. This chapter concludes the thesis by drawing together an assessment of Gacaca from the perspective of international fair trial standards and an assessment of how well Gacaca has met each of its objectives.

The research methods used were: (1) interviews carried out with parties including participants in Gacaca and representatives of NGOs; (2) observation of Gacaca proceedings; and (3) documentary research. Appendix 2 outlines the research methods in more detail.

The following research is based on the operation of the 2001 Gacaca Law up to mid 2004. The Rwandan Parliament passed a new Gacaca Law in 2004. This law has not yet been fully implemented and therefore its effect on the practice of Gacaca is not yet known. A brief discussion of the potential impact of this new law is set out in the Postscript and, where necessary, references are made to the Postscript throughout the main body of the dissertation.
Chapter 2  The Rwandan Context

2.1 Introducing Rwanda

“Never Again!” resounded in the corridors of the Nuremberg and Tokyo Tribunals at the birth of modern international criminal law. Fifty years later it happened again in Rwanda. During one hundred days between April and July 1994, approximately 850,000 people were killed in an attempt to wipe out the Tutsi population of Rwanda. The Republic of Rwanda was decimated. The dead of Rwanda accumulated at nearly three times the rate of the Jewish dead during the Holocaust. It was the most efficient mass killing since the atomic bombings of Hiroshima and Nagasaki. The killings were not chaotic or unplanned but organised, intentional and the result of plans that had been simmering for months. Although organised by the inner circle of Hutu power, the Ikazu, the killings were carried out by the Interahamwe (‘those who attack together’, a Hutu youth militia), the impuzamugambi (another youth militia) and peasants. Killing was civic duty. The word ‘work’ in Kinyarwanda was used by Hutu power to describe the duty to kill. The Rwandan atrocities are a clear example of Kant’s “radical evil”: violence in situations where acting violently is simply not deviant. The killers knew their victims: they were neighbours, friends, colleagues or in-laws. Everyone was involved: the Hutu either killed, acquiesced or provided sanctuary for escaping Tutsi, risking death. Every Tutsi or Inyezi was hunted.

Pre-colonial Rwanda was an incredibly structured, almost feudal, country. Rwandans were split into three groups: the Hutu, the Tutsi and the Twa. The Twa were forest pygmies who generally kept to themselves but there was great interaction and movement between the Hutu and the Tutsi. Originally, the Hutu were farmers and the Tutsi cattle-breeders, cattle being a sign of wealth. Later, as the Kingdom of Rwanda became militarised, the term

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5 An estimated 800,000 Tutsi were killed and between 10,000 and 30,000 Hutu were killed: G Prunier, The Rwandan Crisis: History of a Genocide (2002) 265
6 P Gourevitch, We wish to inform you that tomorrow we will be killed with our families: stories from Rwanda (1999) 4
7 M Drumbl, “Punishment, postgenocide: from guilt to shame to civis in Rwanda” (2000) NYU Law Rev Vol.75 1221, 1223
8 The most widely spoken official language in Rwanda. English and French are also official languages in Rwanda. “Gukora” described this work in Kinyarwanda.
10 meaning cockroach, part of the Ikazu’s attempt to dehumanise the Tutsi through propaganda.
‘Tutsi’ came to denote warriors, and ‘Hutu’ non-warriors. Prior to colonisation, ‘Tutsi’ meant landowners who used the term ‘Hutu’, a pejorative term meaning peasant or yokel, to refer to anyone subservient to the Tutsi. Thus the ruling class and warriors were Tutsi. These Tutsi tended to be tall with lighter skin. The peasants, the Hutu, were generally much stockier and shorter. However, these classifications were not rigid. Movement between the ‘ethnicities’ was possible on accumulation or loss of wealth and status. Intermarriages were common. These physical descriptions were, therefore, simply a rough guideline of what group a Rwandan belonged to. The different groups in Rwanda were described as castes, races, ethnicities, and social classes by different anthropologists.

Rwanda, a small, central African country was first colonised by Germany following the Berlin Conference in 1885. After the First World War, it became Belgian. Both colonisers used ‘divide and rule’ tactics to split a harmonious, co-existent population into two distinct ethnic groups, the Hutu and the Tutsi. The Belgians favoured the Tutsi minority as closer to the white race and thus superior to the purely African races of the Hutu and Twa. The Tutsi were more intelligent, worked harder and more loyal than the Hutu and the Twa wrote Pagès in 1933. Crucially, the Belgians introduced an identity card system which indicated ethnicity. The Belgians classified Rwandans on physical appearance; measuring among other things, a person’s height, the shape of their nose and the colour of their skin. The distinct, rigid, ethnic groups of Hutu and Tutsi were thus established. The two groups became polarised and a climate of fear, jealousy, hatred and suspicion grew up between them. The Belgians favoured the Tutsi but on leaving Rwanda, left power with the majority Hutu.

The first sign of Hutu opposition to Tutsi superiority was in 1959, an opposition which started peacefully but transgressed into a massacre of more than 20,000 Tutsi. The problems worsened following independence in 1962. There were similar atrocities in the early seventies and again during the early nineties culminating in the genocide of 1994.

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11 F Digneffe and J Fierens (eds), Justice et Gacaca: L’expérience rwandaise et le génocide (2003) 11, 20
13 F Digneffe and J Fierens (eds), Justice et Gacaca: L’expérience rwandaise et le génocide (2003) 9
14 F Digneffe and J Fierens (eds), Justice et Gacaca: L’expérience rwandaise et le génocide (2003) 9
15 Although the Hutu group formed the majority of the population, the Tutsi had been favoured by the Colonial powers and therefore had received the best education and were in the best jobs. Leaving the power to the Hutu led to a small elite group of educated Hutu running the country who then introduced a complex quota system giving the majority of school, university and civil service places to Hutu individuals.
Very few of the pre-1994 ethnic crimes were punished leading to a culture of impunity in Rwanda which undoubtedly increased participation in the ultimate genocide in 1994.\footnote{1,240 people of all ethnicities were tried with 1,146 found guilty of ethnic crimes in respect of the 1959 massacres but few were after this time, F Digneffe and J Fierens (eds), \textit{Justice et Gacaca: L’expérience rwandaise et le génocide} (2003) 35} The co-existence of different social groups or castes metamorphosed into an ethnic problem with an overwhelmingly racist dimension.

The term genocide, coined by Raphaël Lemkin in response to the Holocaust, comes from the Greek ‘genos’ meaning race or tribe and the Latin suffix ‘cide’ meaning to kill.\footnote{L Sunga, \textit{The Emerging System of International Criminal Law: Developments in Codification and Implementation} Kluwer Law International (1997) ch I} The Holocaust was such an affront to humanity that almost every state member of the international community adopted the Genocide Convention of 1948\footnote{Convention on the Prevention and Punishment of the Crimes of Genocide, approved by the General Assembly of the United Nations in Resolution 260 A (III) of 9 December 1948. It came into effect on 12 January 1951. At the time of the Rwandan genocide, it had been ratified by 120 countries. Rwanda became a Contracting Party in 1975.} , binding themselves to its obligations.

The genocide in Rwanda started almost immediately after the President’s plane was shot down on 6 April 1994 as it approached Kigali airport, further supporting the supposition that the genocide was systematic. President Habyarimana was returning from a meeting in Tanzania where he had been discussing the Arusha Accords, a power sharing agreement to be implemented that year. This agreement detailed how the current government was to share power with the rebel Tutsi forces, the Rwandan Patriotic Front (the “RPF”) and other Tutsi exiled in Uganda; all refugees from the various waves of ethnic violence in Rwanda.

Rwanda’s genocide was the first set of atrocities to be described as genocide by the United Nations since the adoption of the Convention.\footnote{Given the legal obligations attached to describing a situation as genocide, the United Nations is slow to assign conflict with such a term. It was several weeks after the start of the genocide before the UN admitted there was a genocide taking place and it took even longer for states to react and fulfil their consequent obligations. See R Dallaire, \textit{Shake Hands with the Devil} (2004).} But this description came too late for hundreds of thousands of Tutsi and moderate Hutu. During the atrocities, by refusing to accept that they amounted to genocide, the Security Council avoided otherwise mandatory

\footnote{Whether the two groups constitute ethnic groups was discussed in \textit{The Prosecutor v Jean-Paul Akayesu} (ICTR-96-4-T) and while they are not proper ethnic groups, the intention of the Hutu regime to wipe out the Tutsi was held to satisfy the Genocide Convention.}
intervention.\textsuperscript{20} The UNAMIR forces who were in Rwanda to oversee the implementation of the Arusha Accords were cut from 2,500 to 270 despite repeated requests from General Dallaire, for more troops.\textsuperscript{21} The existence of genocide was finally accepted three weeks after the killings had started. However, the international community was slow and inconsistent in its response. Rwanda was freed from the clutches of the Hutu militia on July 18 1994, not by UN forces but by the RPF who promptly established an interim Government.

There have been many suggestions as to the cause of the genocide with overpopulation and slumping cash crop prices primarily advocated. The poverty throughout Rwanda was harnessed by the Hutu elite who, through propaganda, imparted the belief that if the Tutsi were eradicated, the Hutu would live a more prosperous life. The Hutu elite were heavily involved in the increase in propaganda and in dehumanising the Tutsi. Kangura, a propaganda newspaper, published the infamous Hutu Ten Commandments in 1992 in which the Hutu were told that the Tutsi would get them if they did not kill the Tutsi first: “therefore Hutu, wherever you may be, wake up! Be firm and vigilant. Take all necessary measures to deter the enemy from launching a fresh attack”. The Hutu were urged to “cease feeling pity for the Tutsi!”. One of the Hutu Ten Commandments tells the Hutu to “be firm and vigilant towards their common Tutsi enemy”.\textsuperscript{23} Their powerful propaganda encouraged the belief that if the Hutu did not kill the Tutsi now, the Tutsi would kill them in the future. Rwanda is a highly communitarian society with survivors and perpetrators living side by side. Many have been killed since 1994 as a result of instability: both from revenge attacks and from continued interahamwe killings.\textsuperscript{24} Fear, suspicion, hatred and vengeance are rife. Rwanda cannot survive without long-term peace, security and reconciliation. On assuming power in 1994, the transitional Government of National Unity made it a priority to address these needs, through justice and accountability. Their aim was to ensure that justice was seen to be done, curbing the cycle of genocide. In their eyes,

\textsuperscript{20} Article I, American officials were even ordered not to use the word genocide: A Destexhe, \textit{Rwanda and Genocide in the Twentieth Century} (1995) 35.
\textsuperscript{21} Field Commander of the UN operation in Rwanda, UNAMIR. See R Dallaire, \textit{Shake Hands with the Devil} (2004).
\textsuperscript{22} \textit{The Last Just Man}, film shown at Human Rights Watch Film Festival, London March 18 2003
\textsuperscript{23} \textit{The Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze} (2003) ICTR-99-52-
\textsuperscript{T}
\textsuperscript{24} The Rwandan Government’s primary reason for its presence in the DRC is the continued attacks from the \textit{Interahamwe} who are hiding in South East Kivu and in the Virunga mountains.
reconciliation is impossible without visible justice. National and international solutions have been established to encourage reconciliation, peace and justice. President Kagame’s Government implemented a new genocide law through its domestic courts in 1996 and in 2001 introduced the Gacaca innovation. The United Nations set up the International Criminal Tribunal for Rwanda in 1996 in an attempt to foster reconciliation and eradicate impunity for genocidal actions.

Rwanda has recently ended its transition period and held multi-party elections at the end of 2003. This transition posed many challenges including the creation of new governing bodies and the writing of new laws. But the greatest challenge facing this nascent liberal Government is one that receives insufficient attention: if the values of the new Government are to take root, the new leaders must transform the culture in which they operate. The society must respect both human rights and the rule of law; it must attack the culture of impunity and promote accountability.

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26 Genocide is not subject to statute of limitations: UN GA Res 2391 (XXIII), 26 Nov 1970.
27 E Daly, “Transformative Justice: Charting a Path to Reconciliation” (2002) 12 International Legal Perspectives 73
28 This has been the cause of many ‘revenge’ wars including the Bosnian conflict, see E Neuffer, The Key to my Neighbour’s House: seeking justice in Bosnia and Rwanda (2003).
2.2 Was it Really Genocide?

The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the UN General Assembly on 9 December 1948 and came into effect on 12 January 1951. Rwanda ratified the convention in 1975. Article II of the Convention defines genocide as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.”

For genocide to be committed, one of the above acts must be carried out with a special intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Traditionally, an ethnic group shares ancestry, language, cultural background and geographic origin. From this description, the Tutsi, Hutu and Twa people groups of Rwanda are of the same ethnic group. The separation between the three groups was more political, than ethnical. Manipulated in the divide and rule techniques of the Germans and, in particular, the Belgians, the groups became politically separated. Through the use of identity cards, the different ethnicities were politically established but legal establishment is required to prove genocide.

Schabas suggests that “determining the meaning of groups protected by the Convention seems to dictate a degree of subjectivity… it is the offender who defines the individual victim’s status as a member of the group protected by the Convention”. Under this subjective definition the people groups in Rwanda are different ethnic groups. The ICTR has reached inconsistent conclusions in determining why the Tutsi massacres constitute genocide.

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29 “ethnic” shares a dictionary definition with “ethnical”.
31 W A Schabas, Genocide in International Law (2000) 109
The Chamber in the Akayesu\textsuperscript{32} case elaborated on the meaning of each group and held that a “stable and permanent group, whose membership is largely determined by birth, with the exclusion of the more ‘mobile’ groups which one joins through individual voluntary commitment such as political and economic groups” should be recognised in “order to respect the intention of the drafters of the Genocide Convention, which…was patently to ensure the protection of any stable and permanent group”\textsuperscript{33}. It stated that a common criterion in the four types of group is that membership of such groups is not normally challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner. While this brings the specific Rwandan situation into the definition of genocide, the Chamber excluded virtually all other ‘stable and permanent groups’ limiting its impact.

In Kayishema and Ruzindana\textsuperscript{34} the Tribunal disregarded the notion of an extra ‘stable and permanent group’ and found that the Tutsi were an ethnic group. It held that an ethnic group could be “a group identified as such by others, including perpetrators of the crimes” it concluded that the Tutsi were an ethnic group based on the existence of Government-issued official identity cards describing them as such following the subjective definition.\textsuperscript{35} This approach deals with the special intent required for genocide but strays from the strict definitions required by the Genocide Convention. It appears that this was more of a political decision, to ensure that the Tribunal could try perpetrators of the Rwandan tragedy for genocide.

It is well-documented that the majority of killings were carried out by the interahamwe and the impuzamugambi. These youth militias recruited among the poor and gave previously marginalised people power to take revenge on their socially superior neighbours where these neighbours were either Tutsi or anti-Hutu domination. As Prunier observes, “the political aims pursued by the masters of this dark carnival were quite beyond their scope. They just went along knowing it would not last.”\textsuperscript{36} The members of these youth militias did not always, therefore, kill with the aim of eradicating the Tutsi but rather often killed as

\textsuperscript{32} The Prosecutor v Jean-Paul Akayesu (1998) ICTR-96-4-T
\textsuperscript{33} paragraph 516 of the judgment.
\textsuperscript{34} The Prosecutor v Clément Kayishema and Obed Ruzindana (1999) ICTR-95-1-T
\textsuperscript{35} Case No. ICTR-95-1-T paragraphs 98, 523.
a way to lord power over their former superiors and as a means to loot people and property removing the special intent.

Another issue questioning whether the Rwandan killings were really genocide is duress. Prunier records the testimony of a génocidaire captured by the RPF, “I regret what I did […] I am ashamed, but what would you have done if you had been in my place? Either you took part in the massacre of else you were massacred yourself. So I took weapons and I defended the members of my tribe against the Tutsi”37. Fear, not hatred caused them to kill. Fear of their enemy, the Tutsi who were going to attack, and fear of their leaders. In order to reduce evidential difficulties for the Rwandan courts and to ensure as many people as possible are punished for their actions during the genocide, the Rwandan legislature has stated that for all relevant crimes committed during the genocide period, the special intent of genocide will be presumed given the context. If the génocidaire acted under an imaginary ‘self-defence’, encouraged by the severe propaganda telling the Hutu of Rwanda to fight the Tutsi as they were all part of the invading RPF army, it is clear that civilian Tutsi, living in Rwanda, did not pose a military threat and were again, killed because they were Tutsi. Notwithstanding the fact that they were killed as a means to rid Rwanda of the threat of a future invasion, Tutsi men, women and children were killed as part of a systematic plan to kill all Tutsi. This is genocide, no matter the excuse. The notion of attributing the special intent to all acts of criminality committed during the genocide serves a useful purpose in ensuring the excuses do not become valid and lead to impunity. This is a pragmatic albeit illegitimate solution to assigning a complex intention as required by law.

While Prunier posits that a genocide can contain political elements, “[t]he Rwandan genocide is of a mixed type – partly classical genocide with the systematic massacre of an allegedly racially alien population, and partly political with the systematic killing of political opponents”38, this is controversial. Indeed there was great discussion as to whether the Genocide Convention should include political killings but this was opposed by some governments involved in the negotiations.39 It is more appropriate, therefore, to describe the killing of Tutsi as genocide and the killing of Hutu moderates as a Crime Against Humanity given that the definition of Crimes Against Humanity includes political groups.

39 http://www.preventgenocide.org/law/convention/drafts
2.3 Addressing the Crime of Genocide and Crimes Against Humanity: the Options

“For all the fine sentiments inspired by the memory of Auschwitz, the problem remains that denouncing evil is a far cry from doing good”40

The large number of génocidaires has led to a profound culture of fear, suspicion and hatred on the hills of Rwanda. To mend the social fabric, it is imperative for the guilty to be punished, the innocent freed41, and for the truth to be known. Numerous options have been suggested to deal with the 1994 genocide and to bring about reconciliation. Both retributive and restorative justice have had their virtues extolled as have non-judicial methods such as a Truth Commission. The importance of truth, justice, accountability and reconciliation must be understood and sought in whatever mechanism is adopted. The truth is important as it should facilitate an open and honest dialogue, effecting a catharsis and preventing collective amnesia through an official acknowledgement of the atrocities. Justice is critical to instil respect for the rule of law and a culture of human rights, necessary to deter future atrocities. Accountability is key to preventing impunity and establishing a notion of wrongdoing within a society where brutality was normalised. Not all leaders of the former Nazi regime were prosecuted but the fact that some were illegitimating their ideology. Trying war criminals furthers the goal of justice by assigning specific, individual guilt and acknowledging the victims. Establishing an accurate historical record of the atrocities is equally important and reconciliation is vital to rebuild and restore Rwanda. The solution for Rwanda requires punitive and non-punitive methods in a contextual balancing act.

Whatever is finally used, it must be perceived to be legitimate. To be an effective tool of reconciliation, justice must be perceived as fair by all members of the community42, only then can it truly achieve peace and reconciliation. If trials are simply a perpetuation of human rights abuses where due process is rarely guaranteed and ex post facto laws applied then this amounts to no more than victor’s justice and will have a negative impact on

40 P Gourevitch, *We wish to inform you that tomorrow we will be killed with our families: stories from Rwanda* (1999) 170
41 In Gitarama, for example, it is estimated that 60% of detainees were either falsely accused or guilty of property (Category Four) crimes which do not result in imprisonment. www.hrw.org/africa/rwanda. See Appendix 1.
reconciliation. War Crimes trials, as with all trials, rarely meet the hopes and expectations of the victims who are generally excluded from proceedings but do they play an important role in preventing future repression and internationally acknowledging the atrocities. A contextual approach must be taken to the problem of justice in Rwanda in order to achieve the very complex goals of peace, justice and reconciliation. No other instance of genocide in history has witnessed the mass participation and acquiescence that Rwanda experienced. No other genocide has been carried out at the lowest community level, with killers often knowing their victims. No other genocide used the ordinary, non-military citizens to accomplish its heinous tasks.
2.3.1 Punitive Measures: Retributive Justice

“For there can be no healing without peace; there can be no peace without justice and there can be no justice without respect for human rights and the rule of law” Kofi Annan

Destexhe urges that the perpetrators of the Rwandan genocide be tried for humanity itself. At Nuremberg, it was held that the real plaintiff was Civilisation itself, so it should be again today. The urgent need for reconciliation in Rwanda must not be met at the expense of justice. Those guilty of the *jus cogens* crime of genocide must be held to account. Accountability is the process of making persons answerable to the community for their criminal offences. With so many perpetrators, it is impossible to convict all guilty parties but a judicial response should still be made, especially in respect of the planners and instigators. This is necessary, firstly, for the victims: Grotius stated that punishment is necessary to defend the honour of the injured party who would otherwise be degraded if no punishment were accorded to his aggressor. By bestowing dignity and recognition on the victim, forgiveness and reconciliation should be more forthcoming. Secondly, it is necessary to have a judicial response for civilisation as a whole. Lastly a judicial response is a political necessity in order to show the Rwandan population that such crimes will not remain unpunished.

Assigning individual responsibility is very important, “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” Ascribing individual responsibility will put an end to the current tendency to conclude that all Hutu were responsible. While many undoubtedly were, Gerald Gahima, Rwanda’s former Prosecutor-General, estimates that one or two million people played a part in the genocide, a large proportion of Hutu either protected Tutsi or, at worst, acquiesced to the atrocities.

A trial has an important symbolic impact; it can set standards, create precedent and establish a real respect for the rule of law. The UN Security Council believes that

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43 At the Inauguration Ceremony for the ICTR, ICTR publications
45 A Destexhe, *Rwanda and Genocide in the Twentieth Century* (1995) 64
46 International Military Tribunal for the Trial of German War Criminals. The Law of the Charter 30 September 1946
47 www.bbc.co.uk, *Rwandan genocide suspects set free* (10.01.03)
prosecutions will lead to peace. The ICTR has chosen the route of trying a small number of the most important individuals in order to ensure their prosecution and to declare a warning to other world leaders that the international community will not let such actions go unpunished. But, while trials which target too few individuals are logically feasible, their deliberations may be too contained. Conversely, if trials target a large number of individuals, they become logically infeasible and very limited deliberations ensue. This latter approach of trying thousands of individuals is Rwanda’s approach.

48 Preamble to the ICTR statute
49 M Drumbl, “Punishment, postgenocide: from guilt to shame to civis in Rwanda” (2000) NYU Law Rev Vol.75 1221, 1280
A collective international response to genocide and crimes against humanity is the favoured solution of most Western jurists.\textsuperscript{50} Genocide is one of the “most serious crimes of concern to the international community”\textsuperscript{51} and consequently the international community has ratified treaties giving it the mandate to set up war crimes tribunals. The ICTR was inaugurated in 1995 to “prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and in neighbouring states by Rwandan citizens between 1\textsuperscript{st} January 1994 and 31\textsuperscript{st} December 1994”. It was to act as a deterrent against serious violations of international law, to bring to justice persons responsible for these crimes and to aid reconciliation and the restoration and maintenance of peace in Rwanda. Its ability to achieve the latter aim has been limited by three conflicts with the Rwandan government.\textsuperscript{52}

First, the pragmatic conflict over the manner and pace of justice in Arusha, undermining its credibility. The ICTR’s temporal jurisdiction extends from January 1 1994 to December 31 1994.\textsuperscript{53} The Rwandan Government would like it to commence in 1990 to take account of the planning of the genocide and genocide related propaganda.\textsuperscript{54} If it ran to 1995 could include a number of RPF atrocities.\textsuperscript{55} The jurisdiction seems inconsistent with the desire to reign in impunity from both perspectives.

The pragmatic conflict is further entrenched in the decision to seat the Tribunal in Arusha, Tanzania. Only the Investigation Centre and Archive Centre are in Kigali. The Rwandan Government insisted that the Tribunal sits in Rwanda, stressing the preventive role it was to play there\textsuperscript{56}. However, the Security Council decided that for geographical, economic and political considerations, the seat of the Tribunal should be Arusha.\textsuperscript{57} According to the

\textsuperscript{50} Cassese argues that justice is better than revenge, forgetting and amnesty and that international justice is better than national justice: M Drumbl, “Punishment, postgenocide: from guilt to shame to civis in Rwanda” (2000) \textit{NYU Law Rev} Vol.75 1221, 1228


\textsuperscript{52} V Peskin, “Conflicts of Justice – An Analysis of the Role of the International Criminal Tribunal for Rwanda” (2000) \textit{International Peacekeeping} 6/4-6

\textsuperscript{53} ICTR Statute Article 6(1)

\textsuperscript{54} Letter sent by the Rwandan Government to the UN Security Council explaining why Rwanda will not vote for the ICTR.

\textsuperscript{55} See the Impunity section for further information.

\textsuperscript{56} O Dubois “Rwanda’s national criminal courts and the International Tribunal” (2002) 84 \textit{IRRC}, 720

\textsuperscript{57} Resolution 977 of 22 February 1995.
UN Secretary-General, justice and equity required that the trials take place on neutral territory.\textsuperscript{58} This is questionable. A seat in Kigali could have tempered criticisms of victor’s justice since Rwandans, including the Hutu majority, would take more account of proceedings within Rwanda. Economically, the argument also fails since much work was required in Arusha to get the court ready, the costs of transferring witnesses is larger and most importantly, if the seat had been in Kigali, the infrastructure and facilities created would have contributed to the local economy. Interestingly, the new ICTR prosecutor is currently transferring 45 investigated cases of key genocide planners to Rwanda for trial.

Visibility was acknowledged by Goldstone, as imperative.\textsuperscript{59} The choice of seat was the first setback in achieving high visibility. The issue was then sidelined for many years but the Press and Public Affairs Unit has recently been pro-active, visiting Rwanda to explain what is happening in Arusha. It has also set up an Archive and Information Centre in Kigali, increased access for journalists at the Tribunal, translated the website into Kinyarwanda\textsuperscript{60} and produced many leaflets in the four main languages.\textsuperscript{61} Most importantly for the largely illiterate Rwanda, the Tribunal now has regular access to Radio Rwanda and judgments are often transmitted live.

The lack of direct access to the Tribunal is another element to this pragmatic conflict as a victim cannot initiate criminal proceedings along the lines of the civilian \textit{partie civile} mechanism used in Rwanda itself.\textsuperscript{62} The Tribunal’s procedure does not reflect the ordinary criminal procedure used in Rwanda. Former ICTR President Laity Kama singled this out as one of the Tribunal’s major shortcomings.\textsuperscript{63}

The second conflict between the ICTR and the Rwandan government is a political conflict: the international community’s failure to intervene in 1994 reduced its moral acceptance in Rwanda. If the Government believes in the ICTR it will convince the Rwandan people. The Tribunal relies on government permission to investigate crimes and requires witnesses to be allowed to travel to Arusha. Good co-operation between the ICTR and Rwanda is

\textsuperscript{58} O Dubois “Rwanda’s national criminal courts and the International Tribunal” (2002) 84 \textit{IRRC}, 721  
\textsuperscript{59} J-F Dupaquier (ed) \textit{La Justice Internationale face au Drame Rwandais} (1996) 141  
\textsuperscript{60} However, in a country where less than 4\% own a television, internet access is very limited.  
\textsuperscript{61} English, French, Kinyarwanda and Kiswahili.  
\textsuperscript{62} Code of Criminal Procedure Articles 71-72, 76, 84 and 90.  
vital but relationships have been strained from the outset. A major source of this strain is the ICTR’s primacy. Article 8(2) of the ICTR statute grants the Tribunal primacy over all national courts and Article 28 demands co-operation from all UN member states. Rwanda, however, relies on a series of ad-hoc bilateral extradition treaties. This power is extremely relevant as most of the major perpetrators escaped amongst the two million refugees who fled the country in 1994. The ICTR exercises primacy with a policy of “stratified concurrent jurisdiction”; it seeks to try the leadership-level of defendants, leaving the followers to be tried in national courts. This results in extradition battles and it aggravates bad feeling in Rwanda as it leads to “anomalies of inversion… in which these crucial advantages flow to the leaders who are most responsible for the mass crimes while the followers are subject to harsher treatment”. The ICTR’s exercise of primacy has resulted in a lack of leaders to prosecute on the public, visible Rwandan stage and has contributed to strained relations between Rwanda and the Tribunal. Alvarez suggests that “since the post-genocide Rwandan courts have acquitted a number of Hutus, one might have thought that ICTR proceedings would take precedence only as needed, as when a country refuses to extradite a particular perpetrator or after a particularised finding that Rwandan courts would not grant a fair trial”. Primacy, therefore, is probably a necessary evil but more diplomacy could mitigate its competitive effect. Alvarez’s logic should be adopted.

Lastly, the philosophical conflict concerning conflicting concepts of justice, undermines the justice provided. Peskin observes that this ‘conflict’ concerns the “divergent orientation and interests that differentiate the [two forms] of justice…creating a barrier that renders it difficult for either side to accept the other side’s judicial process as fully legitimate”. A clear example is Rwanda’s ultimate punishment: the death penalty. Capital punishment was accepted at Nuremberg but public opinion has changed and the UN now discourages its use. The ICTR’s maximum punishment is therefore life imprisonment. Rwandan law provides for death penalty for those found guilty of Category 64 M Morris, “Rwandan justice and the International Criminal Court”, 5 ILSA J Int’l & Comp L, 354
65 Such as that over Category One suspect, Frodauld Karamira, hiding in Ethiopia.
In Rwanda, the death penalty lies at the heart of what it means to deliver justice. Rwandans are extremely sceptical of a judicial system that refuses to punish by death. Thus, instigators and planners tried in Arusha will avoid death whilst the less important officials risk this punishment in Kigali. In practice the death penalty is more a symbolic tool in Rwanda as it has not been used for a number of years in Rwanda.

Overall, the ICTR’s major achievement has been in the development of international law and its success in apprehending the major genocide suspects rather than its impact in Rwanda. Considering the few precedents it has had to follow, the ICTR has had a very short time to develop. Its decisions need to stand the test of time and will have great influence on the development of international jurisprudence. Thus, it had to ensure that these decisions were made on sound legal grounds. The ICTR’s remit alone expands international law by allowing it to reach internal conflicts. Moreover, it has contributed to the expansion of international law through its jurisprudence. Over 1,000 decisions have been taken by the Tribunal since its inauguration, establishing important precedents for the future. The Tribunal has also confirmed that genocide is a crime of individual responsibility. Two judgments have had a particularly significant impact on international law: the Kambanda judgment and the Akayesu judgment. The Kambanda judgment represents the first guilty plea of genocide and establishes that genocide can be committed by omission. Moreover, this is the first time a head of government has been sentence for crimes of genocide and crimes against humanity, ensuring that immunity does not extend to these crimes. Most importantly for Rwanda, it confirms not only that genocide occurred in Rwanda but that it was the result of planning, organising and

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69 Rwandan Penal Code, Article 26. Notably, Gacaca Tribunals do not have the power to hand down a death sentence since they have no jurisdiction over Category One suspects.


71 Kagame: “Il a poursuivi que certaines personnes étaient même sceptiques vis-à-vis du Tribunal pénal international pour le Rwanda à cause de son incapacité à imposer la peine de mort. Elles se sont demandées comment un tribunal jugeant les pires crimes contre l’humanité pouvait accorder aux cerveaux de ces crimes non seulement le luxe de ne pas avoir à faire face à la peine de mort mais aussi qu’ils jouissent de conditions de détention relativement confortables”. IRIN April 10 2002: La formation des juges des tribunaux gacaca commence.

72 The Tribunal has focused its efforts on the leaders of the five main, influential, groups in Rwanda: politicians, army chiefs, local government, the media and the clergy: individuals.


74 Prosecutor v Jean-Paul Akayesu (1998) ICTR-96-4-T.

75 Kambanda did try to ‘undo’ his guilty plea but his request was denied. Despite his guilty plea, Kambanda received the maximum penalty of life imprisonment. The Trial Chamber explained that proportionality required a stiff sentence given the shocking gravity of his crimes.

76 The Genocide Convention denies impunity for public officials, even rulers in Article IV.
instigating at the highest levels of government, thus destroying the claims of revisionists. The Akayesu case is significant on many counts: for its contribution to the expansion of the crime of genocide; by establishing how to infer genocidal intent without a confession; and by conceptualising sexual violence as an act of genocide. Rape has been considered a crime against humanity for many years\(^{77}\) but in this groundbreaking case, the Tribunal, \textit{sua sponte}, considered sexual violence an act of genocide provided it was committed with the intent to destroy a group. Akayesu was no more than a local politician but his case sets an historic precedent.

Whether all of the accusations levied against the Tribunal are merited does not matter in terms of acceptance of the Tribunal’s Rwandan legacy, what matters is the fact that they have been raised, jeopardising the Tribunal’s credibility in Rwanda. “Long term success of the trials is predicated on their perceived legitimacy. The perception of justice is as important as its delivery. If the average Rwandan cannot understand the process or views the decision-making process as ‘unfair’, then convictions will be perceived as revenge, acquittals as the continuation of impunity, with no relation to justice.”\(^{78}\) The Tribunal is an alien institution as regards its location and in its procedure. As the standard bearer of UN inefficiency and bureaucracy and in its apparent indifference to Rwanda’s wishes, it is neither efficient nor effective in delivering justice, fostering reconciliation and restoring peace. The Tribunal’s major success lies in its impact on international criminal law. As Ferstman observes, an international tribunal can never replace the potency of domestic trials.\(^{79}\) There is a place for both courts: international tribunals and national courts must act as different elements of a long-range and comprehensive strategy to respond to the Rwandan situation.

\(^{77}\) Article 3(g) of the ICTR punishes rape as a crime against humanity: T Meron \textit{War Crimes Law Comes of Age: Essays} (1998) 204.
\(^{79}\) Ferstman, Carla \textit{Domestic Trials for Genocide and Crimes Against Humanity: the Example of Rwanda} 9 RADIC 1997 at 877.
2.3.1.2 An Individual International Response: Universal Jurisdiction

The doctrine of universal jurisdiction allows a prosecutor from any state to prosecute individuals for crimes committed outside the state’s territory which are not linked to that state by the nationality or residence of the suspect or of the victim or by harm to the state’s own national interests. The doctrine is based on the claim that certain crimes are considered to be crimes against humanity which any state is authorised to punish. Universal jurisdiction was officially recognised by the Geneva Convention and can be applied to genocide prosecutions. Universal jurisdiction in the Rwandan context refers to states, other than Rwanda, prosecuting individuals accused of genocide.

Perhaps one reason for the use of universal jurisdiction to deal with the Rwandan genocide is the acceptance of responsibility by the international community, in particular, on the part of Belgium and France in particular for the instigation of the prejudice and for the prolongation of the atrocities respectively. If Rwandans view it in this way, they may begin to rebuild their trust in the West, shattered when all but a few Westerners left in 1994. Unfortunately, disparity in sentencing may worsen the problem and result in a lucky bag of punishments. The US was the first to assume jurisdiction in the civil case of . Criminal prosecutions followed in France, Switzerland, and Canada. The Swiss trial of Fulgence Niyonteze in April 2000 was the first conviction of a Rwandan genocide suspect in the national jurisdiction of a foreign country, however the main players in this regard are the Belgians.

- Belgium the busybody

In 2001, in an organised, efficient and almost sterile Brussels courtroom, two Roman Catholic nuns and two ethnic Hutu militants were convicted for their part in the genocide.

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80 Geneva Convention IV Art.146
81 The Attorney General v Adolph Eichmann, Criminal Case 40/61, 12 Dec 1961 paragraph 19
82 The UN Secretary-General in 1994, Boutros-Ghali, has admitted that the International Community had failed the people of Rwanda, as did US President Bill Clinton, the Belgian Senate and the French National Assembly.
84 In the cases of Wenceslas Munyeshyaka (see Father Wenceslas Munyeshyaka: in the Eyes of the Survivors of Sainte Famille, African Rights publication 1999), Fulgence Niyonteze and Léon Mugesera respectively.
85 Two earlier attempts to exercise universal jurisdiction in Switzerland failed: Félian Kabuga and Alfred Musemba.
86 Sister Gertrude, Sister Maria Kisito, Alphonse Higaniro and Vincent Ntezimana: Le dossier 30.97.1558/95 – n° 37/95 à charge de NTEZIMANA Vincent et de HUGANIRO Alphonse and le dossier 52.99.3260/95 - N°
This used the 1993 law giving Belgian courts universal jurisdiction over grave breaches of the Geneva Convention and Protocol I and violations of Protocol II, expanded to genocide in 1999. A congratulatory message was sent to Belgium by the Rwandan Government; a vital sign of acceptance of the doctrine of universal jurisdiction by Rwanda.

- **Consequences of recent developments**

The ICJ’s judgment of *DRC v Belgium*\(^87\) limits the effectiveness of universal jurisdiction by securing immunity from prosecution for crimes against humanity committed in an official capacity. The Court found that Belgium had failed to respect immunity from criminal jurisdiction and the inviolability which the incumbent Foreign Minister of the Democratic Republic of Congo, Abdoulaye Yerodia Ndombasi, enjoyed under international law. Belgium argued that the shield of immunity falls when the official is suspected of having committed war crimes or crimes against humanity. Despite national legislation, State practice and existing decisions such as *Pinochet*\(^88\), the ICJ held that customary international law respects immunity from criminal jurisdiction.\(^89\) As was stated in *In re Doe*\(^90\), the “scope of [head-of-state] immunity is in an amorphous and undeveloped state”. Leaving the responsibility for prosecution in the hands of the DRC, however, is unlikely to result in conviction.\(^91\) Belgium’s next attempt at prosecuting officials for crimes against international law is underway as they investigate the 1982 Sabra and Chatila killings and indict, amongst others, the Israeli former Prime Minister, Ariel Sharon. The Cour de Cassation recently permitted an inquiry into the 1982 massacre but declared that Sharon enjoys immunity while he serves as Prime Minister respecting the ICJs judgment.\(^92\)

Political pressure has since caused the Belgian universal jurisdiction law to be amended. The Belgian courts will no longer hear cases where the victim’s home state protects the right to a fair trial and in June 2003, faced with a threat by the United States to remove NATO headquarters from Brussels, the Belgian Government announced that it would only

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\(62/95 \text{ à charge de MUKANGANGO Consolata (sœur Gertrude) et MUKABUTERA Julienne (sœur Maria Kisito)}\)  
\(^87\) Referred to as the *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*  
No.P.021139.F/1  
\(^88\) *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet (No.3)* [2000] 1 AC 147  
\(^89\) see the dissenting opinion of Judge Van den Wyngaert  
\(^90\) 860 F.2d 40, 44 (2d Cir. 1988)  
\(^91\) Belgium has since amended its anti-atrocity law to take account of this ruling.  
\(^92\) *Belgium v Ariel Sharon and Others* No.P.02.1139.F/1 (February 12, 2003)
hear cases involving a Belgian national or resident as victim or accused. Nonetheless, universal jurisdiction plays an important role in international justice and Belgium’s attempts to uphold it, often a lone voice, are welcomed. Since neither the statutes of the ad-hoc tribunals nor the Rome Statute respect official immunities, it is hoped the ICJ will distinguish the DRC case in future judgments. The status quo is a recipe for impunity.

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2.3.1.3 A Domestic Response: the Ordinary Courts

The Penal Code for Congo, based on the Belgian Penal Code, was introduced in Rwanda in 1940. Rwanda introduced its own Penal Code in 1980. The 1980 Code tried to consolidate the African and European approaches to criminal law so although Rwandan law is based on a civilian approach, it does not fit neatly into the civilian or the common law box.\textsuperscript{94} Rwanda ratified the Genocide Convention in 1975\textsuperscript{95} but took no domestic action to implement it. However, the ratification and customary international law were regarded as sufficient for the Rwandan Parliament to pass its 1996 Genocide Law.\textsuperscript{96}

Post-genocidal Rwanda was the poorest country on earth\textsuperscript{97}. The country was in tatters and the infrastructure destroyed. The genocide left only 244 judges compared to 785 prior to April 1994\textsuperscript{98} as the prisons filled up. The domestic legal system, renowned for its corruption, lacked authority and resources in Rwanda.\textsuperscript{99} Great efforts were made to improve the judicial process: more police, prosecutors, investigative judges, clerks and judges were trained. By 1999 there were 842 judges in Rwanda thanks to the combined efforts of the Government of Rwanda and the International Community.\textsuperscript{100} The improvements made by 1996 allowed Rwanda to pass its Genocide Law, inspired by its own criminal law and international law.\textsuperscript{101} Prior to the genocide, these courts in Rwanda were plagued with corruption,\textsuperscript{102} and while their perceived legitimacy has increased in Rwanda since 1994, they are poorly regarded by the international community who only see

\textsuperscript{94} Alongside the recent categorisation and Gacaca laws, the main source for information on this section was a highly researched book: M Imbleau and W Schabas, \textit{Introduction au droit rwandais} (1999) and an interview conducted by the author with a Rwandan Attorney-General, Emmanuel Rukangira.

\textsuperscript{95} Particularly, the Convention on the Prevention and Punishment of the Crime of Genocide 1948 which was ratified by the Belgians on behalf of Rwanda in 1951 (\textit{B.O.}, 1952, 2403). In a Presidential Declaration in 1962, Rwanda agreed to respect the conventions ratified on its behalf by Belgium. Importantly, Rwanda ratified the Genocide Convention in 1975 (\textit{J.O.}, 1975, 230): Décret-loi 8/75 of the 12th February 1975.

\textsuperscript{96} Organic Law No. 08/96 on Genocide and Crimes Against Humanity

\textsuperscript{97} According to the World Bank, P Gourevitch, \textit{We wish to inform you that tomorrow we will be killed with our families: stories from Rwanda} (1999) 270.

\textsuperscript{98} \textit{The Gacaca Courts as an Alternative Solution to the Genocide Cases}, Republic of Rwanda Supreme Court (2003) 6

\textsuperscript{99} Interview conducted by the author with former Prosecutor-General of Kigali, François-Xavier Nsanzeruwa. Also, Y Bahizi, \textit{L’Indépendance de la Magistrature Debout Face à l’Exécutif en Droit Judiciaire Rwandais}, National University of Rwanda (1998)

\textsuperscript{100} \textit{The Gacaca Courts as an Alternative Solution to the Genocide Cases}, Republic of Rwanda Supreme Court, (October 2003) 6

\textsuperscript{101} Organic Law No. 08/96 on Genocide and Crimes Against Humanity

\textsuperscript{102} J Sarkin, “Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda’s Approach Using Community Based Gacaca Tribunals to Deal with the Past” \textit{IntLForum} 112, 114
due process violations.\textsuperscript{103} Moreover, the courts cannot handle the vast numbers of detainees awaiting trial. The criminal justice system alone cannot solve Rwanda’s problem.

\textsuperscript{103} Amnesty International, AFR 47/008/2004 \textit{Rwanda: The enduring legacy of the genocide and war}
2.3.2 Non-Punitive measures\textsuperscript{104}: Restorative Justice

Retributive justice focuses on, amongst other things, the deterrent effect of punishment derived from the utilitarian retributivist notion that if people fear punishment they rationally choose not to act criminally. However, in Rwanda, where brutality was normalised, there was little fear of eventual apprehension. Some other technique must be employed to bring home the notion of wrongdoing and rewrite the moral standards for the country.

Restorative justice is a process whereby:
(i) all the parties with a stake in a particular conflict or offence come together to resolve collectively how to deal with the aftermath of the conflict of offence and its implications for the future; and
(ii) offenders have the opportunity to acknowledge the impact of what they have done and to make reparation, and victims have the opportunity to have their harm to loss acknowledged and amends made.\textsuperscript{105}

The appeal of restorative justice lies in its association with the intuitively attractive ideas of empowerment, democracy, community, autonomy, healing, reconciliation and crime reduction.\textsuperscript{106} It holds the injury to individuals and communities as its primary consideration while the concurrent injury to the state or international order is secondary. Its aim is to restore peace by repairing injury, encouraging atonement, promoting rehabilitation and eventually facilitating reintegration.\textsuperscript{107} In addition, restorative justice is best suited to dealing with post-conflict societies such as Rwanda where reparation is perceived as an important element of justice. Truth commissions and re-integrative shaming are two examples of restorative justice.

\textsuperscript{104} Questions as to the legality of such measures are acknowledged but due to constraints of space will not be discussed here.
\textsuperscript{105} Restorative Justice Consortium: http://www.restorativejustice.org.uk
\textsuperscript{107} M Drumb, “Punishment, postgenocide: from guilt to shame to civis in Rwanda” (2000) NYU Law Rev Vol.75 1221, 1222
2.3.2.1 Truth Commission with Amnesty: Paper Tigers?

A truth commission is a commission of enquiry exposing and documenting torture, murder and other human rights violations which would otherwise be denied and covered up by repressive regimes. These commissions generally collect testimonies from survivors and sometimes perpetrators which are then collated in a published report.

The aim of most truth commissions is to expose evil outside the criminal justice system where it will be recognised by the public, accepted by perpetrators and will lead to the discovery of the structural and societal causes of atrocities. They promote collective accountability, prevent collective amnesia, and fulfill a therapeutic purpose for the victims, allowing their stories to be heard. Many truth commissions use an amnesty as the incentive for telling the truth.

Often described as a “third course”, the truth commission paradigm has been employed in many countries emerging from internal unrest, civil war or dictatorship with South Africa’s widely regarded as the most successful. But a truth commission would not meet the specific requirements of the Rwandan context, as a Rwandan Minister commented, “we don’t need truth, we know who did what”. This is the fundamental distinction between the Rwandan atrocities and those in South Africa. While the South African abuses were cloaked in secrecy and lies, the Rwandan genocide took place in the open, by locals, almost always in daylight. Advocates of such a commission for Rwanda claim it would mitigate the possibility of vengeance; allow the human and civil dignity of survivors to be restored as they relate their experiences; and begin the healing process but admit that, for the project to be successful, all sectors of the population must accept and endorse it.

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109 E Daly, “Transformative Justice: Charting a Path to Reconciliation” (2002) 12 International Legal Perspectives 73
111 Rwandan Minister for Transport, (http://www.bbc.co.uk) and J Sarkin, “Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda’s Approach Using Community Based Gacaca Tribunals to Deal with the Past” IntLForum 112, 117
112 J Sarkin, “Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda’s Approach Using Community Based Gacaca Tribunals to Deal with the Past” IntLForum 112, 118
A truth commission silences revisionists but it does not reveal enough truth unless an amnesty is offered and then it does not fully quench a victim’s need for some form of punishment to negate their desire for revenge. In South Africa granting an amnesty was, according to South Africa’s former justice minister Dullah Omar, the price for allowing a relatively peaceful transition to full democracy. While neither the Geneva Convention nor the South African constitution prevented granting such an amnesty in exchange for truth, the amnesty was not well received by many survivors of murdered activists. In addition, it appears that the South African commission had a negative impact on the country. Indeed, Human Rights Watch report that a respected poll shows two thirds of South Africans believed the TRC investigations led to a deterioration in race relations.

The TRC in South Africa explicitly focused on national reconciliation and was a top-down notion of reconciliation. Nonetheless, victims and non-Governmental organisations lobbied for the TRC to meet local needs and “the TRC was thus constantly pulled in both directions, setting up expectations that it could not ultimately fulfill.” The South African TRC left many victims unsatisfied. Less than ten percent of victims who made statements had the opportunity to testify in public and the TRC decided which cases to hear, independently of community input.

In a country like Rwanda which has many rural communities, a bottom-up approach is more useful. Victims of apartheid in South Africa wanted a detailed history of the atrocities in their community more than a broad picture of different forms of suffering in order to remove suspicions they still held about informers and other perpetrators. The Gacaca system is much better at providing a forum for the whole truth to be known about the genocide in a particular area.

113 For example, in former CDR leader Jean Bosco Barayagwiza’s book Le Sang HUTU est-il rouge? (1995) (ICTR Archives), he claims that the only genocide committed in 1994 in Rwanda was a genocide against the Hutu by the Tutsi RPF.
114 M Minow Between Vengeance and Forgiveness (1998) 55
115 M Minow Between Vengeance and Forgiveness (1998) 56
Ruti Teitel describes transitional justice as the pragmatic balancing of ideal justice with political realism. A state can only do what its resources allow it to do. Many states in a post-conflict situation are reaching to truth commissions to fill the judicial lacuna left after the atrocities ended. The truth commission is a pragmatic gap-filler. In South Africa, the Truth and Reconciliation Commission was the result of transitional negotiations as apartheid ended and was essentially a political compromise necessary for a peaceful transition. After much study of truth commissions in other countries, “South Africans concluded that ‘to achieve unity and morally acceptable reconciliation, it is necessary that the truth about gross violations of human rights must be: established by an official investigation unit using fair procedures; fully and unreservedly acknowledged by the perpetrators; made known to the public, together with the identify of the planners, perpetrators, and victims.” A political compromise was not necessary in Rwanda where the RPF rebel forces won an outright victory and therefore a more retributive approach was possible.

121 Explanatory Memorandum to the Parliamentary Bill quoted in M Minow Between Vengeance and Forgiveness (1998) 55
2.3.2.2 Reintegrative Shaming

The Rwandan atrocities present such a unique situation that Drumbl believes shaming is the only way to stop the cycle of genocide. He believes that because of the normalisation of brutality, many prisoners do not realise that the killing was wrong. At most, the majority believe they are prisoners of war, aggravated by the lack of prison wardens leading to the prisons being run by the more important prisoners who perpetuate this myth. There is no doubt that many accused individuals are attempting to deflect blame from themselves onto other people or the former government.

The traditional method of shaming leads to an internal acknowledgement of responsibility and brings home the reality of the atrocities to the individual prisoner which should stem the threat of recurring violence and aid reconciliation. This is particularly relevant in Rwanda where some Hutu deny the genocide and believe there is no need for collective atonement or for individual acknowledgement of culpability. Thus, a finding of guilt will play no role in the moral education and thus reintegration of the perpetrators, "shaming is needed when conscience fails".

Marshall confirms the strength of shaming when he states that “for the average member of society, in reasonable circumstances, informal pressures of shame and disrespect are quite sufficient to bring him/her into line or even to deter them from breaking the rules in the first place.” Yet génocidaires are not the average member of society. Shaming is inadequate as a means to deal with those who committed genocide. While some perpetrators did not fully believe the ideology and perhaps acted under duress, the majority knew what they were doing and it is likely that they would be immune to informal social pressures. Additionally, at the time of the genocide, killing the Tutsi was described as ‘work’, it was not regarded as reprehensible and therefore official sanctions are necessary to underline the terribleness of the crime. Despite proof that shaming techniques are

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123 P Gourevitch, We wish to inform you that tomorrow we will be killed with our families: stories from Rwanda (1999) 242
124 This is discussed more fully in the truth section.
125 Organisation of African Unity report 2000 ch. 23.64
126 Braithwaite, quoted in M Drumbl, “Punishment, postgenocide: from guilt to shame to civis in Rwanda” (2000) NYU Law Rev Vol.75 1221, 1262
successful\textsuperscript{128}, the solution required needs to do more than simply impose shame on the prisoner. It must provide a means of reconciliation, justice and reparation for the victims. It is unlikely that victims will regard reintegrative shaming as an appropriate sanction: they want justice and want, need, and deserve compensation.\textsuperscript{129}

\textsuperscript{128} Sachs, quoted in M Drumbl, “Punishment, postgenocide: from guilt to shame to civis in Rwanda” (2000) NYU Law Rev Vol.75 1221, 1263

\textsuperscript{129} Hundreds of thousands have been left destitute by the genocide.
2.3.3 The Possible Hybrid Solution: Gacaca

According to the Rwandan Government, there can be no reconciliation without justice and it is pertinent to the reconciliation process that Rwandans see and feel that justice is being done. Rwanda needs accountability to break a system of impunity which stretches back to the 1960s when people were told that the more they participated in the killings the less they would be punished. In a change of culture and mind-set, the guilty must be punished and the innocent freed but it is imperative that the truth be told and an accurate historical record of what happened in 1994 compiled. As Justice Goldstone observed, nobody can forgive what they do not know. However, it need not be a case of retributive or restorative justice. Gacaca succeeds in combining elements of both theories of justice. Gacaca literally means ‘sitting on the grass’. It consists of an open, public, participatory tribunal contextually responding to the needs of the Rwandan communitarian society. This public setting combines all the aforementioned benefits of shaming, encourages the truth to be told and retains the symbolic impact of a trial, using a method familiar to Rwandans and incorporating a compensatory element.

An in-depth review of the Rwandan situation revealed that a judicial system ensuring active community participation in the investigation and sentencing of culprits could be a viable alternative to the classical judicial system. Gacaca is a traditional form of citizen-based populist justice involving the community at every level: from the election of Gacaca judges to the opportunity to testify. Gacaca jurisdictions are based on the people of Rwanda: Rwandans judge, Rwandans are witnesses, Rwandans are judged and Rwandans receive damages.

Gacaca seeks to incorporate the truth-telling elements of a truth commission into more of a judicial system which punishes offenders. Instead of allowing impunity or even having

130 Jean de Dieu Mucyo, Rwanda’s former justice minister (http://news.bbc.co.uk/1/hi/world/africa).
132 Braithwaite defines communitarian societies as those in which, “…individuals are deeply enmeshed in interdependencies which have the special qualities of mutual help and trust”. “Crime, Shame and Reintegration” in D Nelken (ed) Contrasting Criminal Justice (2000) 215.
133 From the John Hopkins University Centre for Communication Programs survey “Perceptions about the Gacaca Law in Rwanda” in (3) Cahiers du Centre de Gestion des Conflits: Les Juridictions Gacaca et les Processus de Réconciliation Nationale National University of Rwanda 99
later trials, Gacaca seeks to do both at once. Gacaca ensures that those guilty of the crime of crimes are brought to account and that victims are acknowledged in a judicial manner.

Gacaca teaches that ethnic-based crimes will not be tolerated by the community or by the State. Gacaca provides what was lacking in the reintegrative shaming technique: it provides a means of reconciliation, justice and reparation for the victims. In Gacaca, the convicted prisoner will physically help the victim in a meaningful way through community service; shaming is thus part of Gacaca while Gacaca retains the necessary punitive and compensatory elements.

Gacaca, as a communitarian system, is above all concerned with the restoration of harmony within the community. It aims to bring together divided sections of a community to work together to establish what happened during the genocide. It aims to give the victims an opportunity to tell their story to a sympathetic audience with cathartic results. Yet, unlike some wholly communitarian systems, Gacaca is based on a written law and set of procedures. This is a great departure from Gacaca’s traditional roots and removes the flexibility of the ancient process. Nonetheless, the departure is welcomed as it will ensure uniformity across the country and should protect the tribunals from becoming controlled by local majority interests. Thus the Gacaca courts are tailored to meet the needs of the country and to encourage forgiveness, the only lasting means to reconciliation. However, while Gacaca’s strength lies in its participatory nature, its success is wholly dependant on active participation by the Rwandan public.
Chapter 3  The Background and Mechanics of Gacaca

3.1 The 1996 Genocide Law

The 1996 Genocide Law is an organic law introduced to criminalise genocide and crimes against humanity. It applies to crimes committed between 1st October 1990 and 31st December 1994. Crimes committed after 1994 are to be dealt with by the ordinary criminal law. The principal innovations of the 1996 law are the categorisation procedure and the guilty plea procedure.

3.1.1 Categorisation

The law sets out fairly vague parameters for the courts to follow in the categorisation process. Article 2 states:

“Persons accused of offences set out in Article 1 of this organic law and committed during the period between 1 October 1990 and 1994 shall, on the basis of their acts of participation, be classified into one of the following categories, as modified by the 2001 Gacaca Law:

Category I

The person whose criminal acts or criminal participation place them among the planners, organisers, inciters, supervisors of the crime of genocide or crime against humanity;

The persons who, acting in a position of authority at the national, provincial or district level, within political parties, army, religious denominations or militia, has committed these offences or encouraged others to commit them;

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134 Organic laws regulate the organisation and competence of the courts in Rwanda. While this law goes further and deals with substantive issues, it was created as an organic law to hold primacy over ordinary laws.
135 Article 38, Genocide Law 1996.
136 The 2004 Gacaca Law has further modified the categories reducing the number of categories to 3: see Postscript.
137 A list of persons convicted of Category 1 acts is published in the Official Gazette of the Republic of Rwanda twice a year, Article 51, Gacaca Law 2001.
138 The 1996 Law included Cell and Sector officials in Category One, the 2001 Gacaca Law removed them. Of course, such offenders remain in Category One if they fall under another of its headings. Sector and Cell officials now face the most severe penalty in their appropriate Category because of their position. Art.52, Gacaca Law 2001.
The well-known murderer who distinguished himself in the location where he lived or wherever he passed, because of zeal which has characterised him in the killings or excessive wickedness with which they were carried out;
The person who has committed rape or acts of torture against a person’s sexual parts.

Category 2:
The persons whose criminal acts or criminal participation place them among authors, co-authors or accomplices of deliberate homicides or serious attacks against persons which caused death.
The person who, with intention of giving death, has caused injuries or committed other serious violence, but from which the victims have not died.

Category 3:
The person who has committed criminal acts or has become accomplice of serious attacks, without the intention of causing death to victims.

Category 4:
The persons having committed offences against assets.  

All crimes committed during the genocide in Rwanda are presumed to have been committed with the requisite intention to commit genocide.

This categorisation procedure is at the heart of the genocide law. Since Rwanda is an extremely hierarchical country its people are highly susceptible to influence from those in the higher echelons of power. Thus the Government rightly concludes that the ordinary Rwandan should be distinguished from the powerful. This is also a pragmatic conclusion given the climate of fear and suspicion still prevalent in Rwanda: if Rwanda is to truly recover, people must believe that their neighbours, friends, even family, were simply susceptible to this influence and do not continue to harbour ethnic hatred.

A list is published of people accused of Category One offences to prompt those not on the list to confess and receive a sentence reduction. This list may infringe the presumption of

139 Taken directly from the English version of the 1996 Genocide Law
innocence but the Government has been careful to emphasise that inclusion on the list only indicates that a person is accused of the offence, not their guilt. Such is the seriousness of Category One crimes that the more people who come forward to plead guilty the more information will be gleaned as to the planning and organising of the genocide.

A potential benefit of the categorisation procedure is that it acts as a guide for the judges. It should therefore help to ensure uniformity across the country. But vague descriptions of crimes coupled with reliance on a *mens rea* element hard to identify several years after the crime leads to a potential lack of uniformity. For example, in the ordinary courts, from a group of equally guilty *génocidaires*, one was classed in the first category and sentenced to death while his *co-génocidaires* were placed in the second category and sentenced to life imprisonment.\(^\text{140}\) Placing the task of categorisation into the hands of the lay Gacaca judges will only exacerbate this kind of problem. Further clarification of the remit of each Category is essential to ensure that the Gacaca judges can best fulfil their task.

### 3.1.2 Confession and Guilty Plea Procedure\(^\text{141}\)

“I think I could forgive, but would like them first to say they are sorry and ask for forgiveness”.\(^\text{142}\)

In an attempt to expedite justice, eradicate revisionism and improve reintegration, a Confession and Guilty Plea procedure was introduced by the 1996 law.\(^\text{143}\) Such a procedure was previously unknown in Rwandan law. The risk of misunderstanding its purpose and of innocent parties pleading guilty was considered to be so great that a widespread public awareness programme explained the process to both prisoners and communities.

A confession can be made by any offender and must involve a guilty plea with a detailed description of the offences committed, accomplices and conspirators. Most importantly for reconciliation purposes, a full apology is also required. The law does not specify to whom


\(^\text{141}\) The law regulating this procedure is now found in Articles 54-63, 68-75 of the 2001 Gacaca Law. The 2004 amendments are discussed in the Postscript.

\(^\text{142}\) Beata Mukarubuga, genocide survivor, counsellor for reconciliation agency Solace.

\(^\text{143}\) Articles 4 – 13 of the 1996 Genocide Law, repeated and further explained in the 2001 Gacaca Law.
the apology must be made but generally the offender should apologise to the victim and/or their family. The law does not indicate what the apology should consist of and in order for the confession procedure to have the greatest chance of fostering reconciliation, this could and should be remedied. Additionally, it should be made a legal requirement that the confessor apologise directly to survivors, their families and to the community as a whole.

Confessors secure a reduction in their sentence. The reduction depends upon the timing of their confession. Originally Category One offenders were excluded from this benefit but because these offenders often hold vital information about other offences, the law was changed so that they are now be considered as Category Two offenders if they confess. The following table explains the reduction of penalties:

<table>
<thead>
<tr>
<th>Cat.</th>
<th>Found guilty by trial</th>
<th>Confessed post arrest</th>
<th>Confessed prior to arrest</th>
</tr>
</thead>
<tbody>
<tr>
<td>One</td>
<td>Life sentence or death penalty.</td>
<td>Life sentence or death penalty.</td>
<td>Classified in Category Two: 25 yrs / life sentence, no community service.</td>
</tr>
<tr>
<td>Two</td>
<td>25 years or life imprisonment.</td>
<td>12-15 yrs imprisonment: half in custody, half in community service.</td>
<td>7-12 yrs imprisonment: half in custody, half in community service.</td>
</tr>
<tr>
<td>Three</td>
<td>5-7 yrs imprisonment: half in custody, half in community service.</td>
<td>3-5 yrs imprisonment: half in custody, half in community service.</td>
<td>1-3 yrs imprisonment: half in custody, half in community service.</td>
</tr>
<tr>
<td>Four</td>
<td>Civil damages.</td>
<td>Civil damages.</td>
<td>Civil damages.</td>
</tr>
</tbody>
</table>

At the start, few prisoners took the opportunity to confess but by 31 December 2002, more than 25,000 accused had made an official confession. A confession can be made in writing to a Public Prosecutor, followed by a confirmation session at Gacaca. Alternatively, confessions can be made to the Gacaca Jurisdiction itself either orally or in writing. The Seat of the Gacaca Jurisdiction, as with the Public Prosecutor, must confirm that the confession is accurate and is entitled to refuse to accept it. All prisoners and the

144 Interview conducted by the author with Beata Mukarubuga.
145 These penalties have been changed by the 2004 Law, see Postscript.
146 LIPRODHOR, Juridictions Gacaca: Potentialités et Lacunes Révélées par les Débuts (2003) 34
community are reminded of their right to confess and its accompanying benefits at every Gacaca meeting.

As with all guilty plea procedures, there runs a risk that innocent prisoners who fear a guilty verdict will plead guilty in order to avoid a heavier sentence. There also is a real danger that confessions will be insincerely made given the huge benefits. For example, a prisoner may confess to a Category Four offence to ensure immediate release when they are in fact guilty of a greater crime. Such a confession will greatly damage the forgiveness and reconciliation process but checking the accuracy of these confessions is an extremely onerous, if not often impossible, task.

The confession procedure’s major contribution is its ability to bring previously unknown facts to light. In most countries, the law ensures public order and stability but during the 1994 genocide those in authority issued orders contravening the law thus, to some extent, decriminalising the acts encouraged. The genocide was perpetrated in broad daylight in full confidence of immunity. The people who would arrest them under normal circumstances were often those issuing the orders. Yet most of these orders were issued verbally; there is no substantial paper trail outside the propaganda network. The higher jurisdiction, the ICTR, has already dealt with many involved in Rwanda’s propaganda machines such as the radio and newspapers. A large proportion of the other crimes committed cannot be traced other than by eyewitness testimonies.

The ordinary courts tried to deal with the vast number of genocide related cases but could not cope. Laudable efforts were made to improve the criminal justice system in the face of enormous odds. Group trials were introduced and intensive training programmes were established to increase the judiciary in Rwanda. The courts, however, were overwhelmed and unable to handle the quantity of cases to the quality required.147 The prosecution rate, while outstripping the ICTR, at 9721 persons tried by the end of 2003148, only made a small dent in the overall need especially as more and more people were being arrested. Rwanda was also struggling to rebuild itself; a task made even more difficult by the large number of young Rwandan men in prison. Crucially, the Hutu regard the trials as revenge

147 Many suspects are held on insufficient evidence (it was enough to point the finger at someone for them to be incarcerated): P J Magnarella Justice in Africa: Rwanda’s Genocide, Its Courts and the United Nations Tribunal (2000) 74 and are not permitted access to their files, if they have any.
and the seemingly endless, pre-trial detentions are unsatisfactory for victims. The special genocide laws introduced in 1996 were not enough: delayed justice amounts to justice denied. By 1997 it was clear than an alternative solution was required.

149 P Harrell, Rwanda’s Gamble: Gacaca and a New Model of Transitional Justice (2003) 54: “many Hutu suspect that they are being imprisoned by a Tutsi Government as revenge – not justice – and doubt that they will ever be released”. This has contribution to the perception of victor’s justice that is discussed below.
3.2 Gacaca

In July 1997, the Rwandan Government began to look at other options to their judicial quandry. Following extensive consultations by the National Unity and Reconciliation Commission in 1999, they proposed adopting an adapted version of the traditional quasi-judicial tribal system, Gacaca. The plan to create over ten thousand Gacaca Tribunals throughout the country, composed of ordinary, lay, Rwandans became a reality in 2001.\footnote{Organic Law No. 40/2000 of January 2001.} The Gacaca Law uses the categorisation and confession and guilty-plea procedures established by the Genocide Law of 1996 and has jurisdiction over all but Category One defendants; wise given the seriousness of these crimes and the fact that they were often not localised.

Despite the West’s initial reluctance to support Gacaca, Belgium followed by the European Commission, Switzerland, the Netherlands and Rwanda’s other foreign partners, decided to back Gacaca financially, supporting the initiative with restrained criticism.\footnote{F Digneffe and J Fierens (eds), \textit{Justice et Gacaca: L’expérience rwandaise et le génocide} (2003) 78}
3.2.1 Traditional Gacaca Replaced with State Enforced Gacaca

Traditional Gacaca was employed, in the absence of state control, to resolve judicial issues between neighbouring families. It had neither a fixed seat nor a fixed trial period but responded to the needs of individual cases. Its main aim was to re-establish social harmony. Gacaca made no distinction between civil and criminal law: all disruption to society was sanctioned. The judges of these courts were the elders of the community, who generally sought not to punish or humiliate the guilty party but to reconcile the parties involved. The key to traditional Gacaca was that the elders did not follow a written law. As Alliot comments “Africans fear Judgments which end a quarrel by applying a pre-established law to the two parties involved. Justice is not a technical matter, it is, above all an expression of authority: the chief renders justice. Then, it is used to reconcile the two parties.”

According to Rwandan academics, pre-established written law risks permanently breaking ties between the parties involved.

Traditional Gacaca generally awarded fines, ordered restitution or damages as punishment. When a party was fined in beers, the judges, witnesses and the two parties would share the beers as a sign of reconciliation. There is great disagreement as to what the traditional Gacaca courts could try. Tully believes that, at most, traditional Gacaca hearings were petty civil courts dealing in bride price, inheritance and minor criminal offences such as theft and land disputes. She states that serious crimes such as murder were taken directly to the Mwami, the King. Conversely, researchers at the National University of Rwanda state they have found evidence that Gacaca courts could try more serious offences such as murder. They suggest that a common resolution in such a case was a marriage between the two families, creating an alliance. The children born from this marriage were held to replace the person killed.

154 F Digneffe and J Fierens (eds), *Justice et Gacaca: L’expérience rwandaise et le génocide* (2003) 15
156 F Digneffe and J Fierens (eds), *Justice et Gacaca: L’expérience rwandaise et le génocide* (2003) 15
But how does this traditional Gacaca compare with modern-day Gacaca used in the genocide context?

1. Decisions rendered under traditional Gacaca were not written down, nor were any rules followed. Important events were remembered orally. Modern Gacaca, however, follows written laws and the judgments are written. Traditional Gacaca’s ability to approach all issues gave it great flexibility. Uniformity, however, is crucial in Rwanda’s genocide context. If the justice delivered differs from area to area, there is a real risk that the local populations will struggle to accept the judgments pronounced. Limiting the flexibility of modern Gacaca is therefore necessary.

2. Under modern Gacaca, the adjudicator is more like a jury than a wise chief. Nevertheless, this jury is made of members of the community who are respected and elected for their honesty and wisdom within the community which, to an extent, fulfils the conditions required to be a community elder although, importantly, allows women to be elected.

3. Modern Gacaca’s judges are elected whereas under traditional Gacaca the judges were the elders of the community. This is necessary in today’s context where there is so much fear and distrust. Having a variety of judges from different backgrounds rather than just the socially high members of the community should increase the perception of fairness. Of course biased judges may be elected but there are mechanisms in the Gacaca Law to remove them from office if they, for example, show a spirit of divisionism.\textsuperscript{157}

4. Traditional Gacaca was based on collective and familial responsibility, not individual liability. Such a conceptual difference may lead to misunderstandings with respect to the responsibility of the Hutu as a whole for the genocide.

5. While traditional Gacaca does focus on reconciliation, it does not rule out revenge. A family wronged may take revenge on any member of the deviant’s family. Only the chief or King can stop this revenge. Permissible revenge is a notion in conflict with

\textsuperscript{157} As stated in the 2001 Gacaca Law. Under the 2004 Gacaca Law, this is described as “sectarianism”, Article 16.
modern Gacaca. The victim’s loss of revenge may make a decision that punishes the génocidaire instead of allowing revenge unacceptable to a victim. Conversely, however, offering community service as an alternative to imprisonment for half of the sentence seems to reinforce traditional Gacaca’s compensation element.

Despite these potential difficulties, misunderstandings and differences, reconciliation is at the heart of both traditional and modern Gacaca. The emphasis placed on reconciliation over punishment should help survivors to accept the relatively low punishments and encourage both parties to be willing to be reconciled. Additionally, naming this new initiative ‘Gacaca’ in spite of the glaring differences between traditional Gacaca and its modern re-invention will aid acceptance of the process as something familiar to Rwandans. Interestingly, the preamble to the Gacaca Law does not mention traditional Gacaca. The Rwandan Government claims that the Gacaca jurisdictions are not intended to duplicate customary Gacaca procedures.158 Yet there is no doubt that the spirit of traditional Gacaca is harnessed in modern Gacaca.

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3.2.2 Gacaca: Aims and Hopes

“Gacaca means different things to different people. Some see it as a way to ease overcrowding in jails, some as a tool of reconciliation, some as a way of establishing the facts of the genocide and some as a way of punishing the guilty.” While Gacaca may mean different things to different people, there is no reason why it cannot hope to achieve all four aims.

Gacaca is an experiment which may or may not succeed but as Paul Kagame, Rwanda’s President, comments, “we have no alternative”. Economic reform is crucial for Rwanda’s future and is only possible if the burden of the prisons on the state is reduced. Some of Rwanda’s prisons are hugely overcrowded and the country is struggling to re-build itself with much of its young potential workforce in prison. Rwanda must deal with the great numbers of genocide suspects soon: many have already died in prison and with around twenty per cent of accused being acquitted in the ordinary courts, it is crucial that the remaining detainees are tried as soon as possible.

Gacaca’s official aim is “to establish the truth, with the communities, the eye witnesses, testifying...to fight impunity by punishing genocide-related crimes...[and] to promote reconciliation by achieving reintegration into society of guilty parties.” Further, the Ministry of Justice in Rwanda has explained more fully why Rwanda needs an initiative such as Gacaca:

1. There is a need to know the truth about what happened in Rwanda: who lived in what Cell in 1994, who no longer lives there, who was killed, who killed and what was destroyed.

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161 See Appendix 1
163 These seven points are taken from F Digneffe and J Fierens (eds), Justice et Gacaca: L’expérience rwandaise et le génocide (2003) 79, 80 and various Rwandan Government documents.
Justice is only effective if the truth is established. The Government believes that suspects will be unable to conceal the truth before those who saw them committing genocide. The truth should also help to alleviate fear and suspicion. The hope is that, by compiling the facts uncovered by Gacaca, the reasons for the genocide will become clearer and can be imparted to all Rwandans in an effort to ensure ‘never again’.

2. Those who were responsible for the events of 1994 must be punished. Such punishment will help end the perceived culture of impunity in Rwanda.

As the counterweight to this aim, the survivors and other members of the community must accept the Judgments passed by the Seat and help released prisoners reintegrate into society.

3. The genocide trials must be speeded up.

There are about 11,000 Gacaca courts compared to 13 specialised ordinary genocide courts so more people can be tried in less time. Additionally, eyewitnesses should more readily participate in Gacaca than in ordinary trials given its location and structure. With the trials finished in a shorter time, people will be able to start putting the genocide behind them and concentrate their efforts on developing Rwanda.

4. The ordinary courts, inspired by Western judicial ideals, cannot solve the problems caused by the genocide. The best means to do this, Gacaca, is found in Rwandan culture itself.

This emphasises that Rwanda can solve its own problems through its own culture and is especially important after the abandonment of Rwanda by the international community in 1994. The Rwandan people will feel a sense of ownership about Gacaca and should feel a sense of responsibility to deal with their own problems.

5. To unite Rwandans.

If the truth is discovered, the hope is that the population will unite to punish the guilty. They should work together to achieve justice, reconciliation and reintegration of prisoners.
6. To allow the population to participate in the administration of justice.

Gacaca can give people a cathartic opportunity to explain what happened to them and, having participated in the justice process, the population should be more willing to accept the judgments or acquittals delivered by Gacaca.
3.2.3 The Mechanics of Gacaca

Gacaca was established by Organic Law No.40/2001 of January 26 2001: ‘Organic Law setting up “GACACA Jurisdictions” and organising prosecutions for offences constituting the crime of genocide or crimes against humanity committed between October 1, 1990 and December 31, 1994’.\(^\text{164}\) It is clear that Gacaca, unlike the ICTR, will have jurisdiction over the pre-genocide preparations such as propaganda and the distribution of weapons, however it will not extend to any crimes committed after 1994.\(^\text{165}\) This, importantly, rules out some RPF massacres that took place in 1995.

Article 1 of the Gacaca Law establishes that Gacaca has jurisdiction to try persons prosecuted for having committed acts that constitute the crime of genocide or crimes against humanity. Gacaca may also try those who committed offences in the penal code which were committed with the intention of perpetrating genocide or crimes against humanity. Additionally, the Gacaca Law very clearly states that it covers those who committed crimes against humanity without the special intent of genocide, thus covering attacks on Hutu moderates and RPF revenge attacks. Currently, the latter have been politically, albeit not legally, ruled out of Gacaca’s jurisdiction. Gacaca jurisdictions will only try those who have been placed in Categories Two, Three and Four.\(^\text{166}\)

Gacaca’s work involves three separate stages, of which the first two are the remit of the Cell Gacaca. The first phase compiles local information about the genocide in a list format, easy to understand and complete. The second involves the categorisation of the accused and the third is the judgment phase.

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165 The ICTR’s temporal jurisdiction runs from January 1 1994 to December 31 1994.
166 Articles 1 and 2, Gacaca Law 2001.
3.2.3.1 Specific Objectives of the 2001 Gacaca Law

While the primary objective is retributive justice, the preamble to the 2001 Gacaca Law sets out additional aims. The main additional goal of Gacaca is to discover the truth. The preamble states that “such offences were publicly committed before the very eyes of the population, which thus must recount the facts, disclose the truth and participate in prosecuting and trying the alleged perpetrators”. The duty to testify appears therefore to be a moral obligation.

Further, Gacaca is necessary, according to the preamble, “to achieve reconciliation and justice in Rwanda, to eradicate for good the culture of impunity and to adopt provisions enabling to ensure prosecutions and trials of perpetrators and accomplices without only aiming for simple punishment, but also for the reconstitution of the Rwandan society made decaying by bad leaders who prompted the population to exterminate one part of that society”. Correspondingly, Gacaca is necessary “to provide for penalties allowing convicted prisoners to amend themselves and to favour their reintegration into the Rwandan society without hindrance to the people’s normal life”.167

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167 These two quotes are found in the preamble to the 2001 Gacaca Law.
3.2.3.2 Gacaca’s Hierarchy: Articles 3-6, 17

The four levels of Gacaca reflect the current administrative structure in Rwanda and a hierarchy ingrained in the Rwandan culture. The lowest level is the Cell, followed by the Sector, District and Province.\textsuperscript{168} Each jurisdiction is comprised of a General Assembly, a Seat and a Co-ordinating Committee. The General Assembly of the Cell is comprised of all its residents aged eighteen years or above. They elect twenty-four judges according to restrictions set out below, nineteen of whom will form the Seat of the Cell and the remaining five are delegated to the Sector’s General Assembly.\textsuperscript{169} Five from the Sector’s jurisdiction are then delegated to the District and so forth for the Province.

In each jurisdiction, the nineteen judges then nominate five of their members to form the Co-ordinating Committee who should know how to read and write Kinyarwanda and have completed at least six years of primary education. Since the most educated judges tend to be delegated to the higher Gacaca jurisdictions, the Cell courts are often left with few people who can read or write.\textsuperscript{170} Cell jurisdictions have a key role to play in the categorisation process and deliberations during categorisation rely on notes taken during the proceedings. This is too important a task to be dealt with at Cell level where many judges are illiterate.

The Cell courts have primary jurisdiction over Category Four cases and categorise the defendants. Sector courts have primary jurisdiction over Category Three cases and District courts over Category Two cases. District courts also have appellate jurisdiction over Category Three cases and Provincial courts have appellate jurisdiction over Category Two cases. There is no appeal provision from a Category Four decision: a pragmatic rule discussed below to ensure the smooth running of the Gacaca courts in the more insignificant property cases. There is also no appeal provision for those who used the guilty plea procedure unless their confession was rejected. Lastly, there is no interaction with the ordinary courts which retain sole jurisdiction over Category One defendants. This may indicate a lack of trust of the Gacaca courts and therefore harm their perception. It can be questioned why the law would choose to retain the Category One defendants within the

\begin{footnotesize}
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\begin{itemize}
\item[168] There are 8,987 Cells, 1,531 Sectors, 154 Districts and 12 Provinces (including Kigali Town) in Rwanda. The 2004 law restricts Gacaca to Cell and Sector level only. These province areas have recently changed.
\item[169] The 2004 Law reduces the number of judges at each level to nine. See Postscript.
\end{itemize}
\end{footnotesize}
remit of professional jurists if it is not because they cannot be guaranteed a fair trial in the Gacaca.
3.2.3.3 Electing the Judges: Articles 6-16

As a prime example of participatory, community-based justice, the vast majority of Rwandan citizens appointed around 250,000 judges, the *Inyangamugayo*, those who act with integrity, in an election between October 4 and 7 2001.\footnote{Between 65% and 95% of eligible Rwandans voted in these peaceful elections. One criticism is the fear that the survivors hold of génocidaires being elected as judges. LIPRODHOR, *Juridictions Gacaca: Potentialités et Lacunes Révélées par les Débuts* (2003) 16, 17.} Any ‘honest’ Rwandan was entitled to be elected without discrimination on the basis of sex, origin, religion, opinion or social position. However, there were some restrictions. The following restrictions relate to character. The judges must:

1. be trustworthy;
2. have good behaviour and morals;
3. always tell the truth;
4. have a spirit of sharing speech; and
5. be free from sectarian and discriminatory beliefs.

All judges must also be at least 21 years of age. Crucially, they must never have been sentenced to more than six months in prison and they must be above suspicion of involvement in the genocide. Often judges were not elected on extraneous moral grounds such as alcoholism\footnote{F Digneffe and J Fierens (eds), *Justice et Gacaca: L’expérience rwandaise et le génocide* (2003) 110} which, although not a legal stipulation, is important if the population is to put their trust in these ‘people of integrity’. Traditionally, the judges of these courts were the elders of the community, who were respected for their wisdom and the up-dated version of Gacaca has tried to instil this fundamental aspect to aid its acceptance by the communities and to ensure that Gacaca does not become a conventional criminal justice system under another name.

The Gacaca Law stipulates those in charge of Government administrations, those who exercise a political activity, current soldiers, policemen, policewomen, career magistrates, members of leading organs of political parties, and leaders of a religious confession or a non-Governmental organisation cannot be judges without resigning from their post. This is to ensure the independence of the *inyangamugayo*. The last two restrictions are clearly...
necessary to ensure that members of a particular religion or organisation cannot be unduly influenced.

A Gacaca Judge will be replaced following three unjustified successive absences, if they are imprisoned for at least six months or if they exhibit a culture of divisionism. Importantly, a judge will be replaced if he or she commits any act which is incompatible with the quality of an honest person. The Seat decides whether to dismiss a judge after consultations with the General Assembly.173 This provision is extremely important to ensure that the judges are committed to the task and to ensure that they show a spirit of cooperation and unity to encourage reconciliation within the community. Worryingly these provisions are not explained in any more detail and the lay judges are left to subjectively decide what constitutes a culture of divisionism or an act incompatible with the quality of an honest person.

In consideration of the real risk of partiality in a community who have always lived together, an inyangamugayo may not sit where the defendant is related to him up to the 2nd degree174, where there is a serious enmity or a deep friendship between the inyangamugayo and the defendant and where the inyangamugayo was guardian for the defendant. On assuming office, every member of the Seat must take an oath swearing that he or she will “honestly fulfil the mission entrusted to me by complying with the law, to be always guided by the spirit of impartiality and search for the trust, and to make justice triumph”.

173 Article 16 2004 Gacaca Law
174 The 2004 Law increases this to include cousins and half brothers and sisters and includes all of the judge’s spouse’s relatives to the same degree.
3.2.3.4 Training the Judges

Around 780 people became Gacaca trainers, receiving ten days training on the Gacaca Law and how to teach it. These trainers often had a background in law and included district court judges, university graduates and students from the two main universities in Rwanda. The judges received more limited training. Each group of between fifty and eighty judges met twice a week over a three-week period to receive training on the Gacaca Law and on certain aspects of counselling. The aim of the training was two-fold: to teach the Gacaca Law and to preach the benefits of Gacaca. Great emphasis was put on the principles of mutual respect and harmony to ensure the smooth running of the courts.

Although the Gacaca laws were designed to be used by non-jurists, many Gacaca Seats struggle to know how it should be interpreted. In one Cell, for example, there was great debate over the meaning of genocide: a woman who had escaped from the militia hanged herself and the Cell was unclear as to whether suicide induced by fear of “being cut into pieces, being raped” should be counted as death due to genocide or whether, in fact, she had committed the crime of genocide against herself. Such confusion highlights the complex circumstances that arose during the genocide that must now be dealt with by these lay judges. The judges themselves state that their training was neither satisfactory nor sufficient and will impart low confidence in Gacaca if they have little confidence in themselves as judges. Further training would be welcomed.

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175 National University, Butare, and the Université Libre de Kigali.
176 Information from interview conducted by the author with F Ndahimana, Gacaca Judge Trainer.
177 African Rights, Gacaca Justice: A Shared Responsibility (Jan 2003) 4
178 F Digneffe and J Fierens (eds), Justice et Gacaca: L’expérience rwandaise et le génocide (2003) 112
179 G Umugwaneza, Advisor of Gacaca, Gacaca Bureau, responsible for Byumba and Kigali Ngali; judges of Kabuga Gacaca.
3.2.3.5 Gacaca’s Functioning and Remit: Articles 18, 21-25, 29, 33-36, 39-45, 64-67, 86, 95

The Cell courts first categorise an accused then the relevant jurisdiction tries him or her and imposes an appropriate sentence if found guilty. The Gacaca courts can also award damages to victims.

The General Assemblies of the 9,500 Cell Gacaca Courts are burdened by a very great task: they must denounce authors of genocide and identify victims. They are required to help in the preparation of lists detailing those who lived in the Cell before the genocide, a list of victims of the genocide and a list of accused. Lists must also be compiled of persons who lived in the Cell but who were killed in other places; persons who were hunted down but their whereabouts is unknown; and persons who have moved away from the area with their corresponding new address. Members of the General Assembly may speak whenever they wish and give evidence against or in favour of an accused during the procedure.

Gacaca is based on the notion of community participation thus categorisation should happen close to the people. The categorisation and list processes, while only part of the pre-trial stage, involve the community testifying about a particular accused or victim. This is a great opportunity for them to share what they know and hear a fuller story about what happened in the area.

A quorum of one hundred members is required for the General Assembly; otherwise the Gacaca meeting is postponed.\(^{180}\) This is a fixed number, no flexibility is officially allowed. There have even been instances of local defence forces and local authorities forcing people to attend Gacaca against their will\(^{181}\), in conflict with the spirit of Gacaca. The quorum requirement is clearly one of the greatest causes of frustration with the Gacaca process. An element of flexibility would be welcomed. Cells differ greatly in population. A Cell may only have one hundred inhabitants if it is particularly rural, or may have close to one thousand. A quorum proportional to the size of the Cell’s population would be the obvious amendment. Such a quorum could be organised with respect to the recent 2003 census.

\(^{180}\) Article 23 of the 2001 Gacaca Law, Article 18 of the 2004 Gacaca Law.

\(^{181}\) Interview conducted by the author with K de Jonge of Penal Reform International and notes from other researchers’ experiences.
The Seat of the Cell jurisdiction must compile all information given and investigate the evidence. As well as the overwhelming task of categorisation, the Seat also receives any confessions and tries those in Category Four who do not confess. If a defendant is accused of crimes committed in different places, judgment is suspended until the Gacaca Bureau decides which Cell to send him to. The priority is, of course, given to the Cell where the most serious crime was committed.

A Gacaca Court must meet at least once a week. At each session, there must be at least fifteen of the nineteen judges present. The organisation of the meetings is fairly rigidly set out in the Gacaca Law and include a one minute’s silence at the start of each meeting to remember those who died. General sessions are public but may be held in camera for reasons of public order or good morals. Gacaca Courts can be assisted by judicial advisors but these advisors must play no role in deliberations and must not influence the judges in their substantive decision-making. Deliberations, including categorisation, are always secret. Decisions are preferably made by unanimity but an absolute majority is permissible if necessary.

Gacaca judgments are pronounced in public and must be reasoned. Judgments detail the offence(s) committed, the victim(s) and their loss(es) together with a summary of the evidence. The Co-ordinating Committee forwards Gacaca Judgments to the national Compensation Fund for Victims of the Genocide and Crimes Against Humanity detailing victims’ damages. All judgments except Category Four judgments can be appealed within fifteen days of pronouncement.

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182 Article 23 of the 2004 Gacaca Law lowers this to seven of nine judges.
183 Property crimes, now Category 3 following the 2004 law.
3.2.3.6 Gacaca’s Powers: Articles 32, 37

Gacaca tribunals have been granted powers similar to those enjoyed by the existing Rwandan courts and prosecutor’s offices. Each Gacaca Jurisdiction can summon witnesses, issue warrants and conduct searches.

A very important power is the right of the Gacaca Jurisdiction to prosecute any person who omits or refuses to testify, or who threatens or intimidates other members of the community. Additionally, the Gacaca Jurisdiction can prosecute anyone who makes a false denunciation. The maximum penalty for such an offence is two years imprisonment if it is a repeat offence for intimidation, one year for a false denunciation or a refusal to testify\textsuperscript{184}, half of which can be commuted to community service.\textsuperscript{185} This should serve as a real deterrent to those who wish to act out family feuds on the Gacaca field or to stay quiet when a fact is known. Similar punishments will be bestowed upon any person who exercises or attempts to exercise pressure on witnesses or members of the Seat. An indigenous NGO, LIPRODHOR\textsuperscript{186}, worries that some Gacaca courts have prosecuted individuals under these articles without fully investigating the situation. The Supreme Court delivered an Order in 2003 which better explains when this power should be used which is a welcomed improvement but earlier victims of this power have probably not been released\textsuperscript{187} and should be as soon as possible.

\textsuperscript{184} It is unclear as to whether this crime of refusing to testify extends to self-incriminating testimony and the assumption must be that it does.
\textsuperscript{185} As amended by the 2004 Gacaca Law: see Postscript.
\textsuperscript{186} League for the Protection of Human Rights in Rwanda.
\textsuperscript{187} LIPRODHOR, \textit{Juridictions Gacaca: Potentialités et Lacunes Révélées par les Débuts} (2003) 44
3.2.3.7 Gacaca’s Punishments: Articles 51-53\textsuperscript{188}

Punishments under the Gacaca regime can vary from civil damages to life imprisonment depending on the category of the offender and whether or not he/she confessed. The punishments are set out above. These punishments are relatively low given the crimes committed but Gacaca is not simply about punishing the guilty, it is also about reconstructing a society and reconciling the Rwandan people. Low punishments for the majority of Rwanda’s “simple citizens who have been manipulated and have perpetrated the crimes”\textsuperscript{189} should help them to reintegrate and trust to be rebuilt as survivors recognise the influence the génocidaires were under. Those who were not manipulated “simple citizens”, such as an offender who committed more than one offence in the same category, will be subject to the maximum penalty in that category. Likewise, the law stipulates that if the offender was in a position of authority, he should receive the maximum sentence for that category.

Following the flow of international criminal law, Rwanda has also become one of the first countries in the world to incorporate the concept of superior responsibility into its domestic law.\textsuperscript{190} The Gacaca Law stipulates that an act committed by a subordinate does not free his superior from his criminal responsibility if he knew or could know that his subordinate was preparing to commit, or had committed, such an act, and failed to prevent the act. The superior is also exposed to liability where he failed to punish a perpetrator on discovering the offence. The Gacaca Law is clearly blaming, and wanting Rwanda as a whole to blame, the few who were in positions of authority during the genocide, allowing the rest of the country a greater chance of reconciliation. But the law does not explain what is meant by a position of authority. Since the 1996 Genocide Law included local authority officials in Category One but the 2001 Gacaca Law removed them and added this requirement, it may be assumed that ‘positions of authority’ only extend to the provincial and national officials explained in the 2001 Law.

\textsuperscript{188} See Postscript for how the 2004 Gacaca Law amends these punishments.

\textsuperscript{189} Taken from a document, Overview, obtained at the Bureau des Juridictions Gacaca, Kigali.

First Category offenders lose all civil rights. All offenders are personally liable but First Category offenders are also liable for “all losses caused in the country due to the acts committed”. Second Category offenders are liable to permanent deprivation of the right to vote, to be an expert witness in court, to possess and carry firearms and to serve in the armed forces, to serve in the police, to be in the public service, to be a teacher or a medical staff in public or private sector.

The age of criminal responsibility is fourteen in Rwanda therefore children who were younger than fourteen years old at the time of the genocide cannot be prosecuted and are instead placed in rehabilitation centres. A halfway house exists for children who were between the ages of fourteen and eighteen at the time of the genocide: they receive a ten to twenty year prison sentence if they are convicted of a first category offence and receive half the normal sentence of those convicted of Category Two or Three offences.

Interestingly from a restorative justice perspective, if a victim and a Category Four offender come to an amicable agreement with respect to the property offence committed, the perpetrator cannot be prosecuted for the same facts. The case is effectively removed from the Gacaca setting.

Another restorative justice tool, community service, is employed in Gacaca. Those sentenced to a maximum of fifteen years in prison can chose to serve half their sentence in community service. Community work might include building work, gardening, repairing roads and bridges and involves at least three days a week, allowing the prisoner to earn money for the rest of the time which is crucial for rehabilitation. The Gacaca Law is careful to stipulate that community service is an option, not a requirement. This is important in a country where the Hutu were traditionally subservient to the Tutsi and any connotation of forced labour must avoided.

The public awareness campaign has

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191 The Gacaca Law does not explain what these civil rights include in further detail.
192 Article 76 2004 Gacaca Law – Second Category point 1 only. See postscript.
193 NB: the minimum age for criminal responsibility under the Statute of the ICC is 18.
195 As was mentioned above, while Hutu were subservient to Tutsi in pre-colonial Rwanda, the categories of Hutu and Tutsi were not strictly divided and did not as such amount to different ethnic groups. Propaganda from the late 1950s right up until 1994 fed the Hutu majority population with this belief so that the myth slowly turned into reality for the Hutu people.
emphasised that community service benefits perpetrators and victims and is not a disguised amnesty but not all victims are convinced.\textsuperscript{196}

\textsuperscript{196} From interviews conducted by the author at Gacaca meetings.
3.2.4 The Pre-Gacaca Process

Before Gacaca was underway, the Ministry of Justice led a widespread public awareness campaign. Representatives travelled throughout the country explaining and discussing the Gacaca initiative.\textsuperscript{197} This was followed by a series of meetings where prisoners with no record of the crimes of which they are accused were presented before the appropriate community. Members of this community were invited to share any information they had about these prisoners with the authorities. The pilot Cell jurisdictions then started their task in 2002 and the rest followed in mid 2004. Cells in twelve Sectors were initially chosen as pilot jurisdictions and they started work on 19 June 2002 but on 25 November 2002, this was extended to 106 Districts, thus 758 cells throughout the country\textsuperscript{198} with semi-positive results. Gacaca, as stated above, does not start with a trial but with several information gathering sessions.

\textsuperscript{197} Interview conducted by the author with G Umugwaneza, Gacaca Bureau.
\textsuperscript{198} Interview conducted by the author with I Bugingo, IRDP.
3.2.4.1 Public Awareness Campaigns

Public awareness campaigns were carried out using the administrative structures already in place in Rwanda. Posters, billboards and a film have been used to emphasis the importance of telling the truth. A newspaper, *Inkikio Gacaca* (Gacaca Courts), has also been established so that the news about Gacaca can reach the furthest corners of Rwanda. Most Rwandans know the aims of Gacaca but many seem to be ill-informed as to what will happen during the trial. Most Rwandans know the aims of Gacaca but many seem to be ill-informed as to what will happen during the trial. They tend not to have developed their own opinions on the system, or at least, will not openly express them. This may indicate either a population scared to contradict their Government or a population who are following like sheep but have not truly embraced Gacaca in their own hearts. Both will work against Gacaca’s aims.

Raising awareness in the prisons, however, has been fairly effective. Some prisons have even started their own pseudo-Gacaca sessions where prisoners seem happy to openly admit to what they did in 1994. This successful initiative had encouraged 25,000 confessions by the end of 2002. Stories of reprisals against prisoners, however, are widely circulated. Such revenge not only comes from other prisoners but sometimes come from the prisoner’s own family or friends in the community. One lady interviewed is convinced that her husband’s second wife poisoned his food parcel after he showed an inclination to confess. Whether this is founded on any truth is, to some extent, irrelevant, in a country fanatically fearful of poisoning and where such rumours may discourage other prisoners from confessing and encourage other families to take similar measures to deal with their ‘traitor’ brother. These are anomalies, after all the number of prisoners confessing had reached thirty per cent by November 2002 although the quality of such confessions has yet to be examined. Overall, the level of public awareness and understanding is poor. There remains great misunderstanding as to the purpose of Gacaca and the role of the population, especially in the rural areas.

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199 Informal conversations with the author and *Cahier du Centre de Gestion des Conflits No.3*, National University of Rwanda 150
200 Interview conducted by the author with D Gashagaza, Prison Fellowship Rwanda; LIPRODHOR, *Juridictions Gacaca: Potentialités et Lacunes Révélées par les Débats* (2003) 34
202 Interviews conducted by the author at Kabuga Town, Rusororo Sector, Saruduha Cell.
3.2.4.2 Presentation of Prisoners without Dossiers

After the genocide, a wave of arrests swept through Rwanda. The mass return of the 1960 refugees, combined with the return of other members of the Rwandan Diaspora and refugees from the genocide caused great upheaval in Rwanda. People often returned to find their homes destroyed or full of squatters and it became profitable to denounce these squatters in order to get their homes back, or, for the squatters to denounce the true owners on their return so as to stay in the house. It was enough to point the finger at someone for them to be incarcerated.\(^{203}\) Thus many prisoners do not even have charges laid against them and are eagerly awaiting trial to prove their innocence. In addition, a large number of prisoners on remand are guilty but may have spent eleven years in prison and may have already served the maximum sentence for the crimes they are accused of.

In order to amend this serious violation of international fair trial standards\(^{204}\), the Ministry of Justice initiated a series of meetings in 2000.\(^{205}\) Prisoners are presented to the population in public places and available evidence gathered. The aim of these meetings is to compile a dossier for prisoners whose dossiers are incomplete or non-existent. The effectiveness of this initiative is clear: after the presentation of forty prisoners to the population in Cyangugu, thirty-five were sent back to prison while five were freed due to lack of evidence against them.\(^{206}\) Amnesty International has criticised this initiative saying that it violates many due process safeguards including the presumption of innocence and lowering the burden of proof. According to Amnesty International, “defence witnesses are cross-examined in an intimidating manner that suggests they share in the victim’s guilt [obviously discouraging others from testifying].”\(^{207}\) But this initiative is a great step forward and a wonderful way to enthuse the population about Gacaca.


\(^{204}\) ICCPR Articles 9 and 14, see Chapter 4.

\(^{205}\) Two previous measures: *Commissions de Triage* and *Groupe Mobiles*, whose task it was to collect evidence for the sans dossiers were unsuccessful. The former were composed of representatives from the army, the administrative authorities and the Prosecutor’s Office and with different agendas, these commissions failed. The latter were more successful but a review of 60,000 resulted in only 1,000 suspects being released.


\(^{207}\) Amnesty International, AFR 47/008/2004 *Rwanda: The enduring legacy of the genocide and war*
3.2.4.3 The Seven Stages of Gathering Information

Before trials can begin, there is a lengthy pre-Gacaca process in the Cells. This concludes in the categorisation procedure placing the accused in the appropriate court. Pre-Gacaca is split into seven ‘meetings’ although one ‘meeting’ may take several months to complete. The time taken for this stage varies dramatically from two months to over a year depending on the level of killings in each area.\textsuperscript{208}

The first meeting is simply to organise the jurisdiction and decide on the day and place of future meetings. The judges are also sworn in at this time. Importantly, the judges should also use this, and all other meetings, to raise public awareness in respect of the benefits of Gacaca. The second meeting is usually a non-controversial thus well attended meeting. At this point a list is compiled of those who lived in Cell before the genocide. A list of those killed in the Cell is established during the third meeting. The fourth meeting requires a list to be made of those from the Cell who were killed in other Cells. The fifth meeting requires yet another list, this time of damages suffered by members of the Cell and those damages for which compensation has already been received.

Tensions rise in the sixth meeting where the list of accused is established. Firstly, as in all meetings, the president calls on members of the General Assembly to confess their guilt. He or she proceeds to read out written confessions received by the Seat, allowing the confessing accused an opportunity to speak. Then, the president reads out the names of those who were killed and asks the population to share anything they know about these deaths. This knowledge can be based on what the witness saw or heard. Prior to the seventh meeting, the Seat compiles all the information they have about the accused and this is read to the General Assembly, giving an accused, if present, the chance to explain him/herself. The Seat then meets to categorise the accused in the seventh session and the trials are set to begin. While these seven sessions do have specific functions, they are flexible and if more information comes to light at, for example, the categorisation point, then it can be shared as part of the information gathering purpose.\textsuperscript{209}

\textsuperscript{208} Interview conducted by the author with the Gacaca Coordinator, Butare Province
\textsuperscript{209} Interview conducted by the author with G Umugwaneza, Gacaca Bureau, responsible for Byumba and Kigali Ngali
At the start of the pilot sessions, the Rwandan people placed great hope in Gacaca. This was largely due to a very successful public awareness campaign. Prisoners hoped that they would be released, having spent many years on remand, and prisoners’ families were looking forward to having their loved ones home. On the other side of the community, survivors were hoping that they would finally discover the truth about what happened to their loved ones and find the process cathartic as many are still mourning and are traumatised. The expectation was that Gacaca would be a fast judicial process. While it is true that Gacaca is much speedier than its conventional counterpart, most pilot sessions were still in the pre-Gacaca stage after two years and have only just completed the categorisation process.

As a result, enthusiasm, necessary in such a participatory system, is waning. Gacaca depends upon participation. Without the community’s support, it will not function and will never achieve its complex and fundamental aims. Thankfully, as will be seen, the judges are often deeply committed to the task despite the great obstacles in their way and work hard to encourage participation.\textsuperscript{210} The need for community involvement cannot be underestimated: they are, in effect, the prosecutors and defenders in almost all genocide prosecutions in Rwanda.\textsuperscript{211} The role of active participation is not easy. The communitarian nature of Gacaca may result in an antagonistic atmosphere for a victim, survivor or fellow \textit{génocidaire} to openly accuse a neighbour of a crime. Such witnesses risk retaliation from family and friends. This is especially the case in a Rwanda which, despite a stable appearance, is full of fear, hatred, suspicion and undercurrents of insecurity. Traditional roots and tangible results should encourage participation and enable the people of Rwanda to feel ownership of a process which could do so much good if its principles are embraced.

\textsuperscript{210} From various interviews conducted by the author with Gacaca judges.

\textsuperscript{211} P Uvin, \textit{IDEA CASE STUDY The Gacaca Tribunals in Rwanda} 116 (http://www.idea.int)
International law has high but fair standards to ensure an accused receives a fair trial. Rwanda has pledged to guarantee various fair trial standards and protections in its domestic law and treaty obligations. It has incorporated the Universal Declaration of Human Rights into domestic law through the Arusha Peace Accord and has ratified the Universal Declaration of Human Rights (“UDHR”), the International Covenant on Civil and Political Rights (“ICCPR”), and the African Charter on Human and Peoples’ Rights (“African Charter”). The European Convention on Human Rights (“ECHR”) contains similar articles and its overseeing court, the European Court of Human Rights, has much useful jurisprudence in this regard which would be persuasive in interpreting the fair trial standards to which Rwanda is bound. Likewise, domestic courts have interpreted these standards and such interpretations are useful in understanding the parameters of international fair trial standards.

Rwanda is bound by the following fair trial standards under the first three treaties:

<table>
<thead>
<tr>
<th>Fair Trial Standards in the ICCPR</th>
<th>ICCPR Article</th>
<th>UDHR</th>
<th>African Charter Article</th>
<th>ECHR Article</th>
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<tbody>
<tr>
<td>No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.</td>
<td>Article 9(1)</td>
<td>Article 6</td>
<td>Article 5(1)</td>
<td></td>
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<tr>
<td>Anyone arrested must be informed of the reasons for his arrest at the time of his arrest and promptly informed of any charges against him.</td>
<td>Article 9(2)</td>
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<td>Article 5(2)</td>
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<tr>
<td>Trial within a reasonable time.</td>
<td>Article 9(3), Article 14(3)(c)</td>
<td>Article 7(1)(d)</td>
<td>Article 5(3), Article 6(1)</td>
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<td>Right to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention.</td>
<td>Article 9(4)</td>
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<td>Article 5(4)</td>
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<td>Right to compensation for victims of unlawful arrest.</td>
<td>Article 9(5)</td>
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Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Right to be presumed innocent until proved guilty.

Trial guarantees: (a) informed properly of the nature and cause of the charge against him; (b) adequate time and facilities for the preparation of his defence; (c) to be tried without undue delay; (d) legal assistance (free where interests of justice so required); (e) to examine witnesses against him; (f) free assistance of an interpreter; (g) not to be compelled to testify against himself or to confess guilt.

Right to be reviewed by a higher tribunal.

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<th>Fair Trial Standards in the ICCPR</th>
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These safeguards are imperative for Gacaca’s credibility, especially in the eyes of the international community. Indeed, many argue that Nuremberg’s potential as a deterrent against future atrocities would have been greater if the tribunal had not ignored so many legal principles itself.212 Violating these safeguards also has consequences for Rwanda. As Minow writes, “nothing puts the instruments of justice more at risk in a society struggling for political legitimacy than prosecuting widely known perpetrators of human rights violations and failing to secure convictions or securing them unfairly.”213 Whether these standards are protected in the Gacaca courts is questionable.

The ICCPR, the instrument containing the most relevant due process safeguards, contains an exemption provision in Article 4 but Rwanda has not indicated an intention to rely on this provision. The Rwandan Government argues that given the quasi-judicial nature of

Gacaca, and the fact that it is based on traditional Rwandan law, Gacaca should be exempt from these international standards.

4.1 Gacaca – a Compromise of Due Process Standards?

4.1.1 Correct Arrest Procedures and Trial Within a Reasonable Time.

Article 9(1) ICCPR states that no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. A similar right is found in Article 6 of the African Charter which states that no one may be deprived of his freedom except for reasons and conditions previously laid down by law. These international human rights standards provide a series of protective measures to ensure that individuals are not deprived of their liberty unlawfully or arbitrarily, and to establish safeguards against other forms of abuse of detainees.

The Human Rights Committee has explained that the term "arbitrary" in Article 9(1) of the ICCPR is not only to be equated with detention which is "against the law", but is to be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. Arrest, detention or imprisonment may only be carried out by people authorised for that purpose.

The Rwandan situation appears to violate this fair trial standard. There are countless examples of people being arrested on little or no evidence and being arrested not by the correct police or judicial authorities but by the military. These arbitrary arrests are a major concern to many international observers.

Article 9(2) ICCPR provides that anyone arrested must be informed of the reasons for his arrest at the time of his arrest and promptly informed of any charges against him. A key purpose of this requirement is to allow detainees to challenge the legality of their

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214 There is no similar right in the UDHR but there is in the ECHR (Article 5(1)).
217 Amnesty International, AFR 47/007/2002 *Gacaca: A question of justice*
218 There is no similar right in the UDHR or the African Charter but there is in the ECHR (Article 5(2)).
detention. Therefore the reasons given must be specific. They must include a clear explanation of the legal and factual basis for the arrest or detention. This information must be provided at the time of the arrest. The Human Rights Committee found that there was a violation of Article 9(2) of the ICCPR in a case in which a lawyer for a local human rights organisation was held for 50 hours without being informed of the reasons for his arrest.

In Rwandan law, the prosecutor compiles a dossier on each accused detailing the charges and evidence against him or her. Many prisoners have been in prison for eleven years and still do not know exactly what they are being charged with; they have no dossier. To legalise the situation, the Transitional National Assembly voted to suspend pre-trial safeguards found in the Code of Criminal Procedure. When the Constitutional Court subsequently ruled that this was incompatible with the right to be presumed innocent the Government amended the Constitution permitting abrogation. The deadline to regularise the suspect’s detention was extended twice, from the original date of December 1997 to December 2001 and has still not been met.

Articles 9(3) and 14(3)(c) ICCPR entitle an accused to a trial within a reasonable time. Article 9(3) applies to detainees and is based on the presumption of innocence and the right to personal liberty, which requires that anyone held in pre-trial detention is entitled to have their case given priority and to have the proceedings conducted with particular expedition. Article 14(3)(c) applies to everyone charged with a criminal offence, whether or not detained, and requires that all criminal trials are held without undue delay. The main purpose is to ensure that people awaiting trial on criminal charges do not suffer unduly prolonged uncertainty and that evidence is not lost or undermined.

221 Loi 9/96 du 8 septembre 1996
The African Commission found that a delay of two years without a hearing or projected trial date constituted a violation of the requirement in Article 7(1)(d) of the African Charter to be tried within a reasonable time.\footnote{Annette Pagnoulle (on behalf of Abdoulaye Mezou) v. Cameroon, (39/90), 10th Annual Report of the African Commission, 1996 -1997, ACHPR/RPT/10\textsuperscript{th} as quoted in Amnesty International Fair Trial Rights Manual: http://www.amnesty.org/ailib/intcam/fairtrial/indexftm_a.htm#1 (5 March 2006)} In another case it found that detention of a person for seven years without bringing him to trial constituted a violation of the "reasonable time" standard stipulated in the African Charter.\footnote{Alhassan Abubakar v. Ghana, (103/93),10th Annual Report of the African Commission, 1996 -1997, ACHPR/RPT/10\textsuperscript{th} as quoted in Amnesty International Fair Trial Rights Manual: http://www.amnesty.org/ailib/intcam/fairtrial/indexftm_a.htm#1 (5 March 2006)} The time considered to be reasonable to keep a person in detention pending trial may depend on how complex the case is, in terms of the nature of the offence and the number of alleged offenders.\footnote{Amnesty International Fair Trial Rights Manual: http://www.amnesty.org/ailib/intcam/fairtrial/indexftm_a.htm#1 (5 March 2006)}

The ECHR contains a similar article which requires trial within a reasonable time, Article 6(1), which has been interpreted by the European Court of Human Rights in Sorrentino Prota v Italy\footnote{(40465/98) [2004] ECHR 49 (29 January 2004) (paragraphs 62-69).}. In this persuasive case the court held that a delay in granting police assistance was justified on the grounds of the order of priorities established according to public-safety. The court considered that factors such as public order problems and practical difficulties resulted in a delay which was not unreasonably long. Likewise, in a Zimbabwean domestic and therefore persuasive Supreme Court case, In re Mlambo\footnote{1991 (2) ZLR 339 (SC) (5 March 2006)}, Gubbay CJ indicated useful factors which can be taken into account in considering whether the accused has been afforded a fair hearing within a reasonable time. These factors include the reason for the delay, the assertion of his rights by the accused person, prejudice arising from the delay and the conduct of the prosecutor and of the accused person in regard to the delay. Both cases shed light on how the ICCPR right would be interpreted.

Eleven years awaiting trial is clearly not reasonable but the context is important: Rwanda is facing far more practical difficulties than Italy was. Rwanda may therefore have an excuse for failing to comply with the reasonable time requirement. Yet, this is one of the key guarantees for an accused who has waited over eleven years for his trial. It appears from research into opinions about Gacaca, that quickening the speed of trials is one of the most...
important issues currently facing Rwanda. Suspects appear willing to forego their entitlement to other rights, such as the right to legal representation, in order to have their trial heard quickly. Fair trial standards should be prioritised with this right taking precedence.

Article 9(4) ICCPR allows the accused to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention. This right safeguards the right to liberty and provides protection against arbitrary detention. The African Commission held that the failure to allow a prominent political figure detained for 12 years without charge or trial to challenge the violation of his right to liberty before a court violated Article 7(1)(a) of the African Charter.

Lastly, Article 9(5) of the ICCPR entitles the victim of unlawful arrest to compensation. It is unlikely that anyone unlawfully arrested will receive compensation when the survivors of the genocide are still awaiting their compensation from the Government; budgetary constraints deny fundamental rights.

230 27% of Rwandans interviewed believe quickening the judicial process is the most important result of Gacaca with only community participation being higher at 40.9%. “De la Paix à la Justice: les enjeux de la réconciliation nationale” Cahier du Centre de Gestion des Conflits No.6, National University of Rwanda 52.

231 There is no similar right in the UDHR but the African Charter does contain a similar article (Article 7(1)(d)).

4.1.2 A Fair and Public Hearing by a Competent, Independent and Impartial Tribunal

Article 14(1) of the ICCPR, Article 10 of the UDHR and Article 7(1)(d) of the African Charter state that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The right to trial by an independent and impartial tribunal is so basic that the Human Rights Committee has stated that it "is an absolute right that may suffer no exception". The standards refer to "tribunals" rather than courts. The European Court of Human Rights has defined a tribunal as a body which exercises judicial functions, established by law to determine matters within its competence on the basis of rules of law and in accordance with proceedings conducted in a prescribed manner. Gacaca therefore unquestionably falls within its remit. All Gacaca hearings are essentially public although some hearings can take place in camera where there is an issue of public order or a moral reason. Such an occasion would not go against international law. The Gacaca jurisdictions were established by organic law and can thus be considered as competent tribunals established by law.

The right to an impartial tribunal requires that judges and jurors have no interest or stake in a particular case and do not have pre-formed opinions about it. The Human Rights Committee has stated that impartiality "implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties". Every Gacaca judge must be free from interference either by the state or by private individuals.

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235 Article 14(1) ICCPR states that “…The Press and the public may be excluded from all or part of a trial for reasons of morals, public order… or national security in a democratic society, or when the interest of the private lives of the parties so requires…”
In interpreting the equivalent provision of the ECHR, Article 6(1), a persuasive judgment of the European Court of Human Rights held that both a subjective and objective test must be satisfied for a tribunal to be regarded as impartial. The subjective approach involves ascertaining the personal conviction of a given judge in a given case and the objective approach tests whether he offered guarantees sufficient to exclude any legitimate doubt in this respect, “any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts must inspire in the public in a democratic society.”

Despite the free and transparent elections in October 2001 to elect the Gacaca judges, there are serious concerns as to their independence and their impartiality. With respect to a judge’s independence, Principle 10 of the UN Basic Principles on the Independence of the Judiciary states that “there shall be no discrimination [in the selection of judges]”. Gacaca judges must be representative of both Hutu and Tutsi. Principle 2 states that judges must decide matters before them impartially, without improper influence. Sarkin suggests that political and psychological pressure not only from the state but also from the community exert such an influence. Judges may feel pressurised to make a particular decision by their friends or family. They may also feel pressure from other judges sitting alongside them. A Rwandan NGO, LIPRODHOR, discovered that in one jurisdiction, the majority of the judges belonged to the same family. It would be very difficult for a non-family member to disagree in such a potentially intimidating atmosphere.

The training manual that should be given to each jurisdiction states that Gacaca jurisdictions must not be an instrument for the service of a limited number of people nor work under the umbrella of other institutions. Legal advisors from the Gacaca Bureau are present at many Gacaca meetings. It is important that these legal advisors do not influence any decision made by the judges either for personal gain or on behalf of the Government. Amnesty International claim that the judicial advisors provided by the Government to advise Gacaca judges on matters of law could influence proceedings against an accused’s interests. Although the organisation gives an example of a prosecutor who helped a Gacaca

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238 Piersack v. Belgium (1983) 5 EHRR 169
241 There was a shortage of important documents such as the training manual when Gacaca started.
jurisdiction prepare lists, there appears to be little proof that these advisors act further than this. The Gacaca training manual will help to draw attention to this important influencing factor and should help to encourage the judges to make their own decisions as a unit.

The judges’ voluntary status ensures they remain free from Government influence but in turn, it risks corruption. Many judges are required to give up two days a week for Gacaca duties: one day to meet with the other judges and one day for a Gacaca hearing. The majority of Rwandans live in rural areas and are subsistence farmers. Two days a week devoted to Gacaca means that these judges have much less time in their fields. This is especially relevant when every Rwandan has to give up usually one day a week for *Umuganda*, community work. This leaves them open to the attractive temptation of corruption. If they are genuinely short of money, they may jeopardise their integrity. The Gacaca Law does have safeguards in place to remove such a judge, if caught, any such removal will only lessen the confidence the community place in Gacaca. The best way to combat this problem is to remunerate the judges in some way, for example, by honouring the promises given by the Government with respect to health care and school fees and to release them from their obligation to take part in the weekly *Umuganda*.

The broad complicity in the genocide and the huge numbers of victims it generated mean that everyone was affected in some way. It is imperative that these experiences are not transferred to the Tribunal setting. The judges must remain impartial for justice to be done. There is currently great fear among Rwandans that those appointed are far from bias-free. As for the ethnic balance among the judges, in areas of mass slaughter, there are few Tutsi left to be elected. While Hutu judges will not necessarily be pro-Hutu, it may lead to a distrust of the Judgments by the Tutsi. Conversely, if panels are too Tutsi-heavy, they could become a means of legitimising popular retribution where defendants are presumed guilty. This must be avoided at all costs.

243 See *Clark v Kelly* [2003] UKPC D1 where the Privy Council held that the use of a legally qualified clerk to the court did not violate an accused’s ECHR Article 6 rights.
244 Interview conducted by the author with J Nyiramuruta, elected Gacaca Judge, and F Ndahimana, Gacaca Judge Trainer.
The Gacaca Tribunals will have to be closely monitored to avoid these problems. A lack of resources, however, means that the Ministry of Justice cannot ensure every Gacaca session has a representative. During the pilot sessions, the Gacaca regional bureau in Butare assigned one judicial assistant to three Gacaca jurisdictions. It is unlikely that there will be enough judicial assistants to share between the jurisdictions once Gacaca proper commences. It is also important to note that these officials are simply to advise the judges on legal matters and do not have a monitoring mandate. Additionally, since there is a risk that a Gacaca jurisdiction is being influenced by the local authorities it is better if monitoring is carried out by an outside agency. There are many NGOs currently fulfilling this task including Avocats Sans Frontières, Penal Reform International and LIPRODHOR, but they can only reach a fraction of the pilot sessions at the moment. Much greater investment is needed to ensure the independence and impartiality of the Gacaca jurisdictions; the consequences of a biased Seat are too great to risk.

The Human Rights Committee has specified that a judge’s qualifications play a role in assessing whether a hearing was fair, independent and impartial. The lack of legal training given to the Gacaca judges is a great concern to those involved in Gacaca and those observing. Without sufficient training, judges will struggle to evaluate evidence and fairly sentence those convicted. Moreover, deciding the limits of the crime of genocide is complicated even for legally trained individuals. A lack of aptitude could have a severe detrimental effect on the effectiveness and acceptance of Gacaca.

At first glance, the training seems wanting. A Gacaca Judge receives only six days training, inadequate given their power to impose a sentence of life imprisonment. The high rate of absenteeism during training compounds matters further. In fact African Rights have reported that it was rare for someone to come to all the six days for nine hours. The law states that judges must be literate to be elected to the Coordinating Committee but this requirement does not appear to have been satisfied either from ignorance or simply

246 This is no longer the case, see Postscript.
248 African Rights, Gacaca Justice: A Shared Responsibility (Jan 2003) 5,6
that there were not enough literate judges elected.\textsuperscript{249} If these highly respected individuals doubt their abilities to fulfil the task then this will filter down and reduce the respect, support and therefore, effectiveness of Gacaca.

While it is true that these issues could jeopardise Gacaca’s ultimate aim of reconciliation, it is important to note that although many Gacaca judges lack confidence due to insufficient training and are unhappy with their voluntary status, their determination to do their best gives Gacaca its greatest hope.\textsuperscript{250}

\textsuperscript{249} Only 70\% of the Rwandan population is literate: CIA World Factbook (http://www.cia.gov/cia/publications/factbook/geos/rw.html).

\textsuperscript{250} Interview conducted by the author with J Nyiramuruta, Gacaca Judge.
4.1.3 The Right to be Presumed Innocent until Proved Guilty

The right to be presumed innocent is one of the most fundamental rights found in international fair trial standards. It is found in Article 14(2) of the ICCPR, Article 11(1) of the UDHR and Article 7(1)(b) of the African Charter. The right to be presumed innocent applies not only to treatment in court and the evaluation of evidence, but also to treatment before trial. In essence, it ensures that the burden of proof is on the prosecutor throughout the trial to prove, beyond reasonable doubt, that an accused person is guilty of the crime charged.

Since the genocide, and particularly in the two years immediately following it, tens of thousands of suspects were arbitrarily arrested. These arrests were primarily carried out by soldiers but also local authorities were, according to Amnesty International, sometimes issued with blank warrants by their public prosecutor’s offices. Moreover, Amnesty and other organisations have noted instances where individuals have formed “syndicates of denunciation”. The aim of these arrests was to end the perceived culture of impunity that had existed in Rwanda since independence but this aim cannot be used, as the Rwandan Government have done, to justify such a contravention of the right to be presumed innocent.

Gacaca also violates the presumption of innocence when heavy-handed judges do not create a favourable atmosphere for defence witnesses to speak. Many people are scared that by testifying in defence of a suspect, they themselves will be arrested for genocide. Additionally, since the Prosecutor’s Office supply Gacaca with the dossiers that have been completed, it is unlikely that a Gacaca court will approach these cases in a neutral fashion. They are likely to be greatly influenced by the information contained in these dossiers and often the burden of proof will fall on the accused to prove his innocence. This is an error of

252 Although the standard of proof is not expressly specified in other international standards, the Human Rights Committee has stated “[b]y reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt.” [Human Rights Committee General Comment 13, para. 7 as quoted in Amnesty International Fair Trial Rights Manual: http://www.amnesty.org/ailib/intcam/fairtrial/indexfm_a.htm#1 (5 March 2006)]
law that can easily be rectified with further judicial training; greater explanation about the burden of proof could help to re-establish the presumption of innocence. A sign of hope, however, is that around forty per cent of the detainees brought before their communities between October 2000 and October 2001 were released.\textsuperscript{255} This shows that the communities as a whole are willing to accept that a lack of evidence will result in release, not further detention.

\textsuperscript{255} Amnesty International, AFR 47/007/2002 \textit{Gacaca: A question of justice}
4.1.4 Adequate Time and Facilities to Prepare a Defence and Consult With Counsel

The ICCPR guarantees defendants adequate time and facilities to prepare a defence and ensures that they can consult with counsel of their own choosing in Article 14(b). Article 14(3)(d) provides for the right to be assisted by counsel including the right to choose counsel or, in cases where the interests of justice require and the accused does not have the means to pay for defence counsel, to be assigned counsel, free of charge. Article 14(3)(e) grants the right to examine or have examined the witnesses against him. The UDHR simply states in Article 10(1) that every accused is entitled to all the guarantees necessary for his defence. While the African Charter ensures that every individual has the right to be defended by counsel of his choice in Article 7(1)(c), it does not extend that right to free legal representation.

The right to adequate time and facilities to prepare the defence is an important aspect of the fundamental principle of "equality of arms": the defence and the prosecution must be treated in a manner that ensures that both parties have an equal opportunity to prepare and present their case during the course of the proceedings. The right to adequate time and facilities to prepare the defence applies both to the accused and their lawyer at all stages of the proceedings, including before the trial and during any appeals. Parties must have a procedurally equal position. According to a persuasive judgment by the European Court of Human Rights, this standard’s requirements include the right to adequate time and facilities to prepare a defence, incorporating disclosure by the prosecution of material information.256 The Amnesty International Fair Trial Rights Manual comments that “[s]uch information provides the defence with an opportunity to learn about and comment on the observations filed or evidence adduced by the prosecution.”257 The Human Rights Committee has stated that the information to be given to a person charged with a criminal offence must indicate "both the law and the alleged facts on which [the charge] is based."258

Article 14(3)(a) of the ICCPR requires information to be provided promptly. In interpreting Article 14(3)(a) of the ICCPR, the Human Rights Committee has explained

256 Foucher v France 25 EHRR 234, at p.247
that the information should be given "as soon as the charge is first made by the competent
authority. In the opinion of the Committee this right must arise when in the course of an
investigation a court or a prosecuting authority decides to take procedural steps against a
person suspected of a crime or publicly names him as such."\textsuperscript{259}

The guarantee that all accused have the right to a defence is protected but qualified in the
1996 Genocide Law which provides that any person suspected of committing a crime is
entitled to be defended by the defence lawyer of their choice but not, crucially, at the
expense of the State.\textsuperscript{260} The inauguration of the Rwandan Bar and NGOs such as Avocats
Sans Frontières have greatly improved the situation in the ordinary courts. The ethics
policy of the new Rwandan Bar requires lawyers to provide assistance for those who
cannot afford it. Currently, however, there are not enough lawyers to provide this
assistance in a country where the majority of the population lives below the poverty line.\textsuperscript{261}
This leaves the non-assisted accused, however, unhappy and feeling disadvantaged. But
even the lawyers that are available are reluctant to act as defence counsel either because of
their own experience of persecution during the genocide or because of current security
fears.\textsuperscript{262}

Gacaca makes no provision for the participation of counsel. Instead, it invites the
community to speak for or against the defendant in an open trial. Investigation resources
are allocated solely to the prosecution and, importantly, defendants have no access to their
case files. It is not uncommon in judicial systems for the prosecution to carry out most of
the investigation but this must not put the defendant at such a disadvantage. The Public
Prosecutor’s Department compiles the dossiers for each suspect. Since these dossiers will
then be given to the Gacaca judges, it can easily be foreseen that an equality of arms issue
arises. The lay, inexperienced Gacaca judges are unlikely to disagree with the information
given in these documents.

The Rwandan legislature defends this violation of fundamental rights by focusing on the
traditional nature of Gacaca. Gacaca is not conventional; there is neither a defence nor a

\textsuperscript{259} Human Rights Committee General Comment 13, para.8 as quoted in Amnesty International Fair Trial
\textsuperscript{260} F Digneffe and J Fierens (eds), \textit{Justice et Gacaca: L’expérience rwandaise et le génocide} (2003) 65, 66
\textsuperscript{261} 60% (2001 est.), CIA World Factbook (http://www.cia.gov/cia/publications/factbook/geos/rw.html).
\textsuperscript{262} In January 1997 a Rwandan lawyer who had been working closely with Avocats Sans Frontières
prosecuting counsel. Gacaca falls outwith the type of tribunal to which this right is designed to apply. As the Gacaca Training Manual explains: “Gacaca Jurisdictions are jurisdictions based on justice from and done by countrymen as it is them who are judges in them and witnesses for the prosecution and/or for the defence. There shall be no counsels.”.

The ICCPR’s requirement to provide free legal representation contains two elements: firstly, the defendant must be able to show that he does not have the financial resources to pay for a defence; and secondly, that the interests of justice require that the person have free legal assistance. The determination of whether the interests of justice require appointment of counsel is based primarily on the seriousness of the offence, the issues at stake, including the potential sentence, and the complexity of the issues. It can be argued, as Tully does, that the “interests of justice” involve looking not only at the specific case but at the Rwandan context as a whole. The interests of justice probably require the low numbers of lawyers to assist those facing the death penalty.

Amnesty International has received several reports of individuals who were persecuted by the Rwandan Government for refusing to testify against genocide suspects either because they had not witnessed the crime(s) committed or because they felt the accusation untrue. Refusing to give false testimony was effectively regarded as treason. This unlawful action greatly undermines the Government’s justification for the lack of equality of arms guarantees in Gacaca.

LIPRODHOR convincingly argues that an element of the right to legal representation should be guaranteed to those who request it: both traumatised victims and an accused should have the option of having someone speak on behalf of them in Gacaca proceedings. Gacaca sessions often take place in an intimidating atmosphere during which an accused has to testify as to what he did or did not do eleven years previously. This may be difficult to do in front of friends, family and enemies not seen since the traumatic events of 1994. The accused himself may be traumatised either from what he did,

266 LIPRODHOR, Juridictions Gacaca: Potentialites et Lacunes Revelees par les Debuts (2003) 46
witnessed or suffered during the genocide. Likewise, the victim will suffer similar trauma during testifying. Having a type of spokesperson, not necessarily a jurist, would help to reduce any anxiety and fear that an accused feels. It is unlikely, however, that the human and financial resources required would be available.

The defendant’s position could be improved by better explaining Gacaca’s procedures and, above all, completing all dossiers and making the information held within these dossiers available to the accused. Currently, an accused may appear at a Gacaca court without knowing the charges against him, who made them and who will testify either for or against him. There is no specified time in the Gacaca Law for suspects to be told of the charges against them and some only find out when they appear before a Gacaca session. Additionally, there is no provision allowing the Gacaca judges to postpone a hearing if defendants have not been given sufficient time or materials to prepare their case. There is not even any indication that the judges have been taught that this is a fair trial guarantee. It must be remembered that these prisoners have not been in their communities for many years and many do not know who is trustworthy and what each person’s genocide experience was. A more in-depth awareness raising programme currently takes place in some prisons but an improved understanding is vital to achieve partial equality of arms. More training must be given to the judges so that they fully understand an accused’s fair trial rights and the reasons for these rights. Much more use should be made of the willing NGOs and Rwandans themselves.
4.1.5 Privilege Against Self-incrimination

Article 14(3)(g) of the ICCPR states that no one charged with a criminal offence may be “compelled to testify against himself or to confess guilt”. This fair trial standard is closely linked with the presumption of innocence which ensures that the burden of proof is on the prosecutor. This fundamental right is considered to be inherent in Article 6 of the European Convention, even though it is not expressly set out. A persuasive European Court of Human Rights judgment has stated that "[a]lthough not specifically mentioned in Article 6 of the [European] Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6".267

The right of an accused to remain silent during trial has been deemed to be implicit in two internationally protected rights: the right to be presumed innocent and the right not to be compelled to testify or confess guilt.268 The right of an accused to silence in respect of crimes of genocide, other crimes against humanity and war crimes, is expressly provided for in Rule 42(A)(iii) of the Yugoslavia Rules, Rule 42(A)(iii) of the Rwanda Rules and Article 55(2)(b) of the ICC Statute.

Oral testimony is at the heart of Gacaca. During a Gacaca hearing, an accused can be asked questions by any member of the General Assembly. The accused is required to answer these questions, which may include self-incriminating answers, with imprisonment as the alternative to testifying. Article 32 of the 2001 Gacaca Law states that “any person who omits or refuses to testify on what he/she has seen or on what he/she knows…risks a prison sentence from 1 to 3 years”269 This is in complete contradiction to the privilege. One of the aims of Gacaca is that the truth be discovered and in the context where the prosecuting authorities do not have the same resources to prove guilt that other criminal justice systems enjoy, this right has been pragmatically set to one side in order for the Gacaca tribunals to be as effective as possible in uncovering the truth.

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269 Reduced by the 2004 law, see Postscript for more information.
There is also the aforementioned risk that the confession procedure will encourage innocent prisoners to plead guilty in order to benefit from the reduced sentences and possibly be released. The best way to combat this is to do as the Government is doing and release all those whose dossiers contain no evidence of criminal acts. It is only those who do not yet have a dossier who are still at risk of this.
4.1.6 The Right to Review by a Higher Tribunal

The right to review by a higher tribunal is found in Article 14(5) of the ICCPR and Article 7(1) of the African Charter. The right to have a conviction and sentence reviewed by a higher tribunal is generally applicable to everyone convicted of any criminal offence, regardless of the seriousness of the offence: the Human Rights Committee has stated that "the guarantee is not confined to only the most serious offences".270

Both parties have the right to appeal under ordinary Rwandan law,271 on fact and law. This right is reduced in the genocide context where appeals are limited to law and grave errors of fact.272 This is pragmatic reduction should not violate this international norm as it still provides for an appeals process but the Gacaca Law’s appellate provision is inadequate. There is no interaction with the ordinary mechanisms of Rwandan law; all appeals remain within the Gacaca system and cannot be appealed more than once.273 Keeping appeals within the Gacaca system will help to ensure that Gacaca remains separate from the ordinary judicial system. An attempt to remove a case from Gacaca could jeopardise the purity of Gacaca and remove its communitarian participative advantages. Nonetheless, there should be a formal appeal procedure for those convicted of Category Two Crimes. A Gacaca Tribunal can sentence these defendants to life imprisonment.274 As ‘life’ means life in Rwanda, it is important that this sentencing power is not left in the hands of ill-trained lay judges. There must be appellate provision for this category of defendants allowing access to the ordinary courts.

There is no appeal from a Category Four conviction. This was simply a time and resource saving decision which can be contextually understood but is, perhaps, not the best way to save money. Provision should be made for Category Four persons to appeal their conviction in order to comply with this fair trial standard.

271 Article 99 CPP
272 Article 24 of the 1996 law
273 Article 89 of the Gacaca Law provides that “the Prosecutor General to the Supreme Court may, on his initiative or on request, within a six month’s period following the pronouncement, inform the Court of Cassation and this, within the sole interest of a law that may have been infringed”.
274 This is no longer the case, see Postscript.
4.2 Article 4 ICCPR Exemption

Art. 4(1) of the ICCPR permits many of the guarantees found in the ICCPR, including those in Articles 9 and 14, to be suspended during a time of public emergency which threatens the life of the nation. Article 4 makes certain rights non-derogable but fair trial standards (Articles 9 and 14) are not explicitly included. The Human Rights Committee has indicated that fair trial standards may be impliedly non-derogable, “a State may not reserve the right… to arbitrarily arrest and detain persons… to presume a person guilty unless he proves his innocence… and while reservations to a particular Clause of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be”.276

It is also important to note that the African Charter does not contain an emergency clause and therefore no derogation is allowed from its fair trial safeguards. The African Commission on Human and Peoples’ Rights has commented that even in an emergency situation, the Government has must continue to “secure the safety and liberty of its citizens”.277

It is questionable whether Rwanda can benefit from this ICCPR right of derogation eleven years after the genocide. Paragraph 3 of Article 4 provides that if any State Party to the Covenant wishes to derogate from the ICCPR’s provisions, it must inform the other State Parties through the Secretary-General of the United Nations at the time of the derogation and at its end. This implies that any derogation is temporary.278 Further indication that such derogation must be temporary is found in Paragraph 1 of Article 4 which states that derogation is only permitted in time of public emergency which threatens the life of the nation.

The UN Human Rights Committee commented that: “Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature.”279 The

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275 Article 6 Right to Life, Article 7 Prohibition of Torture, Article 8(1) and (2) Prohibition of Slavery and Servitude, Article 11 Prohibition of Detention for Debt, Article 15 Prohibition of Retroactive Criminal Laws, Article 16 Recognition of Legal Personality and Article 18 Freedom of Thought, Conscience, Religion and Belief.
276 UN Doc. CCPR/C/21Rev.1/Add.6(1994). Any proceedings which lead to the death penalty must comply with Article 14 at all times (UNHCR General Comment No. 29, August 2001) but while the Rwandan ordinary courts can impose a death sentence, the Gacaca courts cannot.
278 See also UN Human Rights Committee, Derogation of Rights (Art.4) 31/7/81 General Comment 5 which indicates that a state of emergency is temporary.
279 General Comment No 29 on article 4 of the ICCPR, 24 July 2001, paragraph 2
Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights\textsuperscript{280} state that a “state party may take measures derogating from its obligations under… Article 4… only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation… Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4.”. While ongoing war, genocide or natural disaster may constitute such an emergency it is hard to imagine that Rwanda is in the midst of a time of public emergency eleven years after the genocide.

As was indicated in a domestic UK House of Lord’s case of \textit{A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)}\textsuperscript{281}, any derogation from the equivalent provision in the ECHR must be proportional and reasonable and must be reviewed regularly by the Government. While not binding, this judgment would be persuasive in Rwanda. The violations of the ICCPR detailed above could not be considered a proportionate response to the potentially proclaimed emergency and therefore any use of the emergency derogation provision is again denied.

Under Article 4(1), a time of public emergency is recognised only when it is officially proclaimed. This seems to indicate that the Rwandan Government could simply officially proclaim a time of emergency to be eligible for the Article 4 exemption. This proclamation would be reviewable by Rwanda’s Constitutional Court. The case of \textit{A and others}, however, indicates that judicial bodies will defer to the executive’s analysis of the situation and will only interfere in very grave situations.\textsuperscript{282}

Whether or not Rwanda can benefit from this exemption does not seem to concern the Rwandan authorities who see the Gacaca initiative as both a pragmatic solution to the problem of prison overcrowding and a mechanism which by its very nature, is excluded from these requirements of international law.

\textsuperscript{280} (1985) 7 HRQ 3, paragraphs 39-40
\textsuperscript{281} [2005] 2 AC 68
\textsuperscript{282} See Lord Bingham of Cornhill, paragraph 29 of the Judgment.
4.3 Gacaca: a Pragmatic Response to Fair Trial Standards?

Gacaca is a hybrid system mixing custom and formal law. It contains elements more familiar to a truth commission and yet closely resembles a classic justice system. Gacaca does not fulfil many of the procedural requirements that normally hamper the speed of ordinary criminal justice systems so is it right for Gacaca to be required to meet standards designed to safeguard rights in a formal, ordinary court system? The African Commission on Human and People’s Rights stated in its Declaration of Sept 11 1999, that village courts should not be “exempt from the provisions of the African Charter on Human and People’s Rights relating to a fair trial”. 283 Gacaca is a judicial instrument which punishes those found guilty with, at times, heavy sentences and these detainees must be assured a fair trial.

Amnesty International doubts the efficacy of Gacaca if it cannot, internationally speaking, guarantee a fair trial. The organisation reasons that “any criminal justice system, no matter its form, would lose credibility without adherence to international minimum fair trial standards”. 285 According to Amnesty, the Government’s efforts to end impunity will only be effective if international standards of fairness are complied with to show their real determination to respect human rights. Amnesty closely links the necessity of international human rights standards to a positive perception of Gacaca by the Rwandan people. It is true that if witnesses perceive the trials to be conducted in a biased manner, they are much less likely to participate in a fruitful manner but this link is not necessarily as strong as Amnesty believes it to be. While it is extremely important that the panel of judges is impartial and independent, it may be less important in the context, that a suspect gets legal advice.

Notwithstanding Amnesty’s concerns, Human Rights Watch appears to take a more pragmatic and holistic attitude. HRW is cautiously supporting Gacaca. Nobody is pretending that Gacaca is a perfect solution to the justice crisis facing Rwanda and it is important to see that while Gacaca may be violating certain international safeguards, it is protecting others. In the balancing act, the right to a speedy trial can be much better upheld.

283 Dakar Declaration of September 11, 1999
284 F Masengo, Spokesperson for the Ministry of Justice understands that “in fact, the principal reason for releasing these people is not national reconciliation. It is above all a judicial process.”
285 Amnesty International Press Release, AFR 47/005/2002 Rwanda: Gacaca tribunals must conform with international fair trial standards. See also their report, AFR 47/007/2002 Gacaca: A question of justice
through Gacaca than through the ordinary system and for the majority of prisoners on remand this is the right they most care about, especially those who are innocent or who have already served the maximum sentence for the crime(s) they committed in 1994. The Government of Rwanda must prioritise rights and decide which are the most important and deserve funding. Important steps are being taken to resolve current violations such as the release of prisoners who are *sans dossiers*: those who have no files recording the charges laid against them and the relevant evidence. 286

The lack of due process guarantees is the biggest concern to the international community who wish to see Gacaca conform to international norms. A particular worry is the lack of defence counsel. The right to defence counsel is absolute, it is not conditional on there being a prosecuting counsel. Harrell sees this as desperately unfair when the Supreme Court will provide legal advisors to assist Gacaca. 287 He seems to misunderstand that these legal advisors are there to assist the judges and are not prosecutors. The Rwandan Government claims that the lack of defence counsel is matched by the lack of a prosecutor. Having defence counsel would be such a major departure from Gacaca’s roots as to make it the same as an ordinary criminal justice system and not the quasi-judicial mechanism that is seen as so important for Rwanda’s reconciliatory potential. As Harrell correctly remarks that there is “an alternative view familiar to those of us raised in a common law tradition. This is fairness through an empathetic trier of fact, commonly referred to as a ‘jury of one’s peers’. Particularly given Hutu suspicions of Government-appointed judges and support of Gacaca, it seems likely that they would prefer fairness through an empathetic trier of fact. Under this conception of fairness, Gacaca will be fairer than the Government’s genocide courts could ever be.” 288

These efforts are ensuring compliance with some due process safeguards and the rest must be prioritised. Rwanda cannot adhere to every international norm, it has neither the manpower nor the budget to do so. It is also important to remember the alternative, Rwanda’s ordinary criminal justice system, briefly discussed above is also plagued with due process violations including the lack of legal representation for many detainees and is a corrupt and slow-moving judicial institution, involving judges, prosecutors and

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286 Balancing fair trial rights with other rights has been accepted by the Privy Council and the House of Lords in the application of the ECHR under the Human Rights Act, in *Brown v Stott* 2001 SLT 59.
investigators. Perhaps it is enough that Gacaca “respects the spirit of justice, if not the letter of criminal and human rights law” through its procedures based on its open communitarian participative sessions. Though they are legally established judicial bodies, they were not created to duplicate courtroom procedure. As Judge Pillay said recently, “who are we to tell them how to do it? They understand now that there has to be sufficient proof before you convict anyone. So they are looking for evidence.” The international critics must realise that it is impossible for every fair trial right to be upheld in a less developed country, and Rwanda is among the poorest countries in the world. International safeguards cannot be ignored but must be interpreted and prioritised by reference to the Rwandan context.

289 P Uvin, IDEA CASE STUDY The Gacaca Tribunals in Rwanda 116 (http://www.idea.int) and the Rwandan Government according to Amnesty International, AFR 47/007/2002 Gacaca: A question of justice
290 Presentation of the Human Rights Award 2003 of the Friedrich-Ebert-Stiftung to the ICTR, May 20th 2003
Chapter 5 Meeting the Objectives

5.1 Introduction

Ideally, Gacaca meetings are participative communitarian dispute-resolution forums. This system should be perfect for fostering reconciliation between two suspicious parties as the truth is aired and wounds are healed through the recognition of wrongdoing and the cathartic opportunity to share genocide experiences. Its decentralised nature is ideal for encouraging community reconciliation as each side rediscovers the humanity of their neighbour. Because of its truth-telling priority, Gacaca should be much better at creating a full picture of what happened in 1994 than an ordinary trial would be, and, importantly, it will silence the genocide deniers. Thanks to its punitive character, it avoids the pitfalls of an amnesty and ensures that individual responsibility will be accorded, reducing suspicion and encouraging trust within communities.

This ideal is dependant upon active participation in a secure and open atmosphere. For the truth to be told, members of the General Assembly must feel safe. Participation must be of the participant’s own volition and must be active. As African Rights submit, all the adult citizens of Rwanda share responsibility for this process.\(^{293}\) Yet, with a lack of participation severely hampering the progress of these tribunals, it is becoming clear that the initial support indicated by various surveys\(^{294}\) of the Rwandan population is waning and that Rwandans do not accept the responsibility of participation in Gacaca.\(^{295}\) The community must understand and believe in the importance and benefit of attending Gacaca sessions.

To beat impunity, the Gacaca tribunals must deal with all crimes and criminals: they must be fair in their justice. The tribunals and the Government must also compensate and reparate those who have suffered. To speed up the trials, Gacaca must be efficient and attended. To empty the prisons, Gacaca must find a way to deal with those who are accused as a result of the tribunals’ hearings. To achieve a measure of reconciliation, Gacaca must fulfil the hopes of those who trust in it and meet the all of the aforementioned requirements. Without these necessary factors, Gacaca may produce a worse result than

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\(^{294}\) Estimates vary: between 80% and 90% of the population were behind Gacaca at the start. E Daly, “Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda” (2002) 34 *NYUJntL&Pol* 355, 374; John Hopkins University Research Report “Perceptions about the Gacaca Law in Rwanda” in *Cahier du Centre de Gestion des Conflits No.3* National University of Rwanda, 99.

\(^{295}\) Human Rights Watch World Report 2005 - Rwanda - January 2005
inaction would have produced. However, the pilot indicates that the majority of these requirements are greatly lacking.

Perceptions of Gacaca vary wildly. Some only see Gacaca as freeing prisoners to ease the financial burden on the State. Some believe that Gacaca is in fact an amnesty. Many Hutu privately view Gacaca as victor’s justice.296 Others fear that if the truth is spoken, life on the hills will no longer be possible as tensions will rise and hatred will take over. Felicité in Kabuga Province has noticed that people spoke much more of what they witnessed during the genocide immediately after it finished than they do now because they fear the reaction of other people in the community.297 Yet others question whether people will really testify against their close family and friends. Perhaps, as Amnesty International researcher Richard Haavisto believes, “the Gacaca plan was too ambitious to begin with”.298 There is no doubt that Gacaca is a political tool being used by the Rwandan Government to empty its overburdened prisons in a cost-effective manner. Nonetheless, Gacaca has the potential to meet many of its objectives and every judicial system in the world has political overtones.

Gacaca is underway therefore the question is no longer whether it can work but whether it is working. The time has come to see whether Gacaca can live up to the expectations of the Rwandan Government and the Rwandan people, and whether it can weather the criticisms of the West.

The success of Gacaca is inextricably linked to its six main objectives299:

1. establish the truth;
2. eradicate the culture of impunity;
3. expedite the genocide trials;
4. demonstrate the capacity of people of Rwanda to manage complex problems;
5. unite and reconcile Rwandans; and
6. allow the population to participate in the administration of justice.

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296 Informal conversations, no one publicly criticises Gacaca.
297 Interview conducted by the author.
299 These six points are taken from F Digneffe and J Fierens (eds), Justice et Gacaca: L’expérience rwandaise et le génocide (2003) 79, 80 and various Rwandan Government documents.
Each of these objectives will be examined in turn, first, to assess their importance to Gacaca and Rwanda and, second, to evaluate their success. Many of the objectives overlap. For example, while the confession procedure will hopefully encourage reintegration of prisoners and thus reconciliation, it will be dealt with in the truth chapter as its paramount objective is to provide testimony in matters where there are no eye-witnesses other than perpetrators.
5.2 Establish the Truth

5.2.1 Establishing the Truth Generally

One of the paramount aims of the Gacaca initiative is to be a truth-telling forum. There is a great need to know the truth about what happened in Rwanda: who lived in what Cell in 1994, who no longer lives there, who was killed, who killed and what was destroyed. Crucially, the truth is also important to dispel the myth of collective responsibility by establishing that not every Hutu was a génocidaire. The Rwandan Government believes that discovering the truth is a measure of justice in itself for the genocide survivors. Indeed, according to Forsberg, “from the legal point of view, the case can be made that the right to know the truth has achieved the status of a norm of customary international law. In this sense, it is impossible to achieve justice without truth.” The Preamble to the 2004 Gacaca Law states that “considering these crimes were committed in public…the population has a duty to recount the facts, reveal the truth and participate in the prosecution and judgment of the alleged perpetrators.” Every Rwandan has a duty to testify to what they know.

What is the truth? Or, more correctly, what kind of truth does Gacaca look for? Perhaps it does not matter if the truth is subjective. Indeed, if the sole aim was discovery of the truth, as with a truth commission, then it would not matter. Gacaca, however, is a punitive judicial instrument and it is imperative that any testimony used by the tribunal is of a sufficient evidential standard for trying an accused. There are various types of truth according to South African Justice Albie Sachs. These are legal truth, logical truth, experiential truth and dialogical truth:

“Legal truth is microscopic: tightly focused, ‘… excluding all variables except those to be measured.’ Logical truth is the ‘generalised truth of propositions, the logic inherent in certain statements… Much of the law is concerned with… setting microscopic truth in a logical framework.’ Experiential truth is ‘the understanding gained from being inside and part of a

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300 Inkiko-Gacaca website, “Overview – The Objectives” (www.inkiko-gacaca.gov.rw)
phenomenon… Such experiential truth is deep and profound. Yet it embarrasses us in courts of law, we try to exclude it, we see it as subjective, irrelevant. We claim that all we want is the objective truth, what we call ‘the facts’. Dialogical truth ‘is a truth based on inter-change between people… the process is never-ending, there is no finalised truth.’”

This last truth, dialogical truth, is the key to reconciliation and interaction in the communities but is not certain enough to be used in a criminal trial. Experiential truth is important to the individual survivor. Gacaca should operate with a dual function: allowing dialogical truth to stimulate community discussions to create a shared truth and using a more exact truth, legal truth, when determining the guilt of a detainee. Gacaca’s flexible sessions could cater for both as a quasi-judicial system and a quasi-truth and reconciliation commission.

While various different ‘truths’ can be aimed for in Gacaca, an additional complication is that the ‘truth’ in Rwanda is that which agrees with the chief, or leader of the community. Consequently, whoever opposes the chief or leader, is the enemy as they are speaking against this ‘truth’. Rwandans fear criticising those in authority. This is shown in two Rwandan sayings. The first is “kwikiriza iyo nyirurugo ateye”, “a Rwandan would choose to dance with the king to keep amongst his preferred subjects” and secondly, “ukuri wakabwiye shobuja uraguhakishwa”, “never tell a truth which would harm your superior, find the good things and talk them up”. In fact, even today there is a proverb in Rwanda that “it is good to talk but it is even better to stay silent, because a fly will never enter a closed mouth”. This kind of truth is very dangerous for Gacaca and a change of attitude through public awareness campaigns is necessary.

There are therefore two other types of truth that are important in the Rwandan context: positive truth where individuals actively offer what they know as truth and negative truth,


303 ‘mieux vaut parler, meilleur de se taire, car dans une bouche close, jamais une mouche n’entre’, interview conducted by the author with IRDP.
the cessation of lying\textsuperscript{304}, important in a country where so many truths are known but not shared. Although the genocide was largely committed in the open, the truth is still required by those who wish to know how and where their loved ones died and who is responsible for this. In Rwanda, the lack of secrecy means that many people witnessed massacres and killings. Yet, across Rwanda, the truth is being concealed by perpetrators, bystanders and survivors. In some Cells, the whole population has remained silent during session six, which invites testimonies concerning the accused.\textsuperscript{305} Fear is a great concern among the survivors. Both ‘prosecution’ and ‘defence’ witnesses are intimidated.\textsuperscript{306} There is a fear among the general population that those who testify will have their belongings seized to indemnify the victims. In one Cell, the Gacaca president mobilised the people to remain silent by saying that if they ever accused Hutu, their loved ones would risk imprisonment.\textsuperscript{307} This misunderstanding about the Gacaca process could be resolved by improving public awareness and understanding of the process.

Discovering the truth is dependent upon the active participation of eye-witnesses.\textsuperscript{308} There are few documents in which to find an objective truth in Rwanda. Where the truth relies on eye-witnesses, it will always be subjective and its accuracy in doubt, especially where the events took place over eleven years ago and left the witness traumatised. When the fear of insecurity and reprisals are entered into the equation then the resultant ‘truth’ will be far from an exact replica of what happened in 1994. Nevertheless, any form of truth, which can help to piece events together, must be advantageous. There are many different factors influencing each witness from familial bonds to traumatism. There is a danger that the truth will be elusive in Gacaca as eye-witnesses decide that it is in their personal interest to remain quiet.

There have been instances of genocide survivors being killed to stop them testifying at a Gacaca hearing. The survivors’ organisation IBUKA alleges that the attacks were carried...

\textsuperscript{305} Such as Busoro Cell, LIPRODHOR, Juridictions Gacaca: Potentialites et Lacunes Revelees par les Debuts (2003) 31. See also Amnesty International, AFR 47/008/2004 The enduring legacy of the genocide and war
\textsuperscript{306} Many acts of intimidation have been recorded by LIPRODHOR, Juridictions Gacaca: Potentialites et Lacunes Revelees par les Debuts (2003) 41, Penal Reform International, Report V: Research on the Gacaca (September 2003) and Amnesty International, AFR 47/008/2004 The enduring legacy of the genocide and war
\textsuperscript{307} African Rights, Confessing to Genocide: Responses to Rwanda’s Genocide Law (June 2000) 45
\textsuperscript{308} Participation is discussed in Ch V, 6.
out by recently released genocide suspects.\textsuperscript{309} The Government has responded well by refusing to suspend Gacaca or stop releasing prisoners who have confessed. It has also arrested a number of suspects in relation to a much publicised specific killing of seven survivors in Kadauha district, Gikongoro.\textsuperscript{310} Rwanda’s president, Paul Kagame, has insisted that the Government is committed to devising concrete measures to prevent such incidents from happening again\textsuperscript{311} but it is hard to see that anything has changed.

As a result of intimidation, fear and other influencing factors, this subjective truth becomes even less reliable in a country where the ingrained hierarchy impacts one’s understanding of truth. The hope of many of the non-governmental organisations and the Rwanda Government seems to rest in the powers of Articles 32 and 37 of the Gacaca Law. Article 32 provides that those who refuse to testify or falsely testify can be sentenced to one to three years’ imprisonment, half of which can be carried out as community service. Those who threaten witnesses or members of the Seat can also be punished according to Article 37.\textsuperscript{312} While some Gacaca Jurisdictions have followed Article 32’s requirements\textsuperscript{313}, a lack of general implementation\textsuperscript{314} indicates unwillingness on the part of the Gacaca judges to force people to testify. These judges may have conflicts of interest, may be under the same local influences as the witnesses themselves or may simply be unaware that an individual in the community is harbouring the truth.

Accusations made during hearings overwhelmingly focus on the lesser crimes of Category Four, probably for the reasons outlined above. This indicates that there are many half-truths being told and admitted to. As Rigby claims, people are unlikely to reveal the full extent of their involvement in, and knowledge of, crimes and abuses without some kind of promised immunity from punishment.\textsuperscript{315} The lack of full truth is further discussed below in the ‘confession’ section.

\textsuperscript{309} The New Times, \textit{IBUKA blames killings on ex-prisoner} (Jan 15-18 2004)
\textsuperscript{310} The East African, \textit{Kigali to Release More Suspects Despite Killings} (Jan 25-Feb 1 2004)
\textsuperscript{311} The New Times, \textit{Kagame speaks out on Gikongoro} (Jan 15-18 2004)
\textsuperscript{312} The 2004 Gacaca Law shortens the length of imprisonment imposed as a sanction in the equivalent of Articles 32 and 37: see Postscript for further details.
\textsuperscript{313} LIPRODHOR, \textit{Juridictions Gacaca: Potentialites et Lacunes Revelees par les Debuts} (2003) 33
\textsuperscript{314} LIPRODHOR, \textit{Juridictions Gacaca: Potentialites et Lacunes Revelees par les Debuts} (2003) 33
\textsuperscript{315} A Rigby, \textit{Justice and Reconciliation after the violence} (2001) 184
While it is true that many witnesses in the community are not revealing the truth that they know at Gacaca sessions, false denunciations have also been documented by observers.\textsuperscript{316} Penal Reform International note that corruption is widespread with detainees being offered payment for not denouncing their accomplices.\textsuperscript{317} One woman claims that she was beaten until she agreed to denounce a member of her community.\textsuperscript{318} Therefore even the truth offered is often not the truth at all.

The cathartic benefits of telling and hearing the truth, and having a story officially acknowledged, have been much documented\textsuperscript{319} but are becoming more controversial. The South African Truth and Reconciliation Commission’s banner of ‘Revealing is Healing’ is too simple according to Hamber. He asserts that “psychological restoration and healing can only occur through providing space for survivors of violence to be heard, and for every detail of the traumatic event to be re-experienced in a safe environment.”\textsuperscript{320} Another necessary requirement for the cathartic process is that for stories to be therapeutic, they need to be seen to be capable of changing things.\textsuperscript{321} It is important to survivors that the truth is acknowledged when it is offered. This includes acting on previously unknown information that comes to light. In some areas those who are denounced are not arrested.\textsuperscript{322} Conversely, Amnesty International report that long-term detainees who are considered as innocent by the local population are not released.\textsuperscript{323} As a result there is an increasing reluctance to testify when it seems to produce no tangible results, especially when testifying may involve great personal risk. This is incredibly damaging for Gacaca. If, in telling the truth, Gacaca cannot give survivors the ability to be acknowledged, regain dignity and see a different future then the truth-telling process may cause further harm.

Biggar submits, in relation to survivors of all atrocities where some element of the event remains unknown, that the “discovery of the truth also helps the victim to understand her

\textsuperscript{316} Penal Reform International \textit{Report III} (April – June 2002) 22
\textsuperscript{317} Penal Reform International \textit{Report III} (April – June 2002) 26
\textsuperscript{319} For example, C L Sriram, “Revolutions in Accountability: New Approaches to Past Abuses” 19 (2003) \textit{Am. U. Int’l L. Rev.} 301.
\textsuperscript{323} Amnesty International, AFR 47/008/2004 \textit{The enduring legacy of the genocide and war}
suffering, to tie down and delimit its significance – and suffering that we can somewhat comprehend is usually easier to bear.” 324 In addition, the truth frees the survivor from what Biggar calls that “excruciating limbo between lingering hope and full-blown grief.” 325 Although eleven years have past since the genocide in Rwanda and most people have accepted that a disappeared loved one is dead, the grief of uncertainty that still remains can be reduced with the truth.

A complicating factor is an inability to name all those from elsewhere who died in the Cell. These victims were not known to their killers or other by-standers. Mass graves are still being uncovered in Rwanda, graves in which most identifying features are gone and a lack of resources means that DNA testing is not an option in Rwanda. Not only were many of the witnesses to these crimes killed during their commission but many perpetrators and other witnesses fled the country and died from insecurity or disease, especially in the refugee camps in the Democratic Republic of Congo. Although the majority of people returned to their home cells after the genocide, others did move and have settled elsewhere. It is not, however, impossible to trace the flight path of someone killed in 1994. Rwanda is a small country and there are many stories of people fleeing together. Some survivors may be able to shed light on what happened to their comrades. Manu Kabahizi of the Aegis Trust comments that “nobody lives without any clue, there might be a person but very few, most people know something and Gacaca was to make this ‘something’ be something much more solid.” 326 Where and when they can contribute is one of the great problems with Gacaca which does not easily provide for a situation where someone in one Cell wants to testify about an act of genocide or a crime against humanity committed in another Cell. There are procedures in place to share information through the Gacaca Bureau but these are limited and fairly ineffective at present. A similar problem is that many areas have no witnesses left. Here the truth will never be known: there is no one to tell it and no one left to hear it.

In conclusion it appears that in parts of Rwanda there is an increasing reluctance to testify at Gacaca meetings especially when testifying involves great personal risk and seems to

324 N Biggar “Making peace and doing justice, must we choose?” in N Biggar (ed) Burying the Past: Making Peace and Doing Justice After Civil Conflict 9
325 N Biggar “Making peace and doing justice, must we choose?” in N Biggar (ed) Burying the Past: Making Peace and Doing Justice After Civil Conflict 9
326 Interview conducted by the author with M Kabahizi, Aegis Trust
produce no tangible results. It appears that in these parts of Rwanda, short term losses are overriding long term gains. When intimidated, the short term loss of security outweighs the potential long term gain of community reconciliation and mutual trust. Testimonies need to be seen as capable of changing things. With people moving around much more than ever before in Rwanda, procedures to facilitate the sharing of information are also key to Gacaca’s success and must be a priority for the Government.

As LIPRODHOR comments, to know the whole truth is an unrealistic utopia\textsuperscript{327} and expectations for Gacaca must not be unreasonable. The start of Gacaca throughout the country should help to establish more of what happened in 1994 but it is impossible to discover everything. Gacaca holds the potential for undermining the rule of law and perpetuating the culture of impunity if friends, family and neighbours refuse to hold people accountable for their crimes. Despite all the hindrances to the discovery of truth, there is a feeling of hope in Rwanda, that, in the end, the truth will be revealed. This truth is probably dialogical truth, insufficient for legal purposes but of great use in the reconciliation process, using Gacaca in its greatest flexibility as a hybrid criminal justice system and truth commission. The truth is the most fundamental aim to the success of Gacaca and where it is aired, Gacaca works.

\textsuperscript{327} LIPRODHOR, \textit{Juridictions Gacaca: Potentialites et Lacunes Revelees par les Debuts} (2003) 48
5.2.2 The Special Case of Rape

Rape has been acknowledged as a tool of the genocide by the International Criminal Tribunal for Rwanda.\(^{328}\) It has been placed in Category One in Rwanda as an acknowledgement of its seriousness but this classification has a profound negative effect: it takes the crime away from local forums where condemnation has a greater effect and due to the lack of money for transport, people are less likely to be able to testify close far from home. It has also reduced the likelihood of confession given the seriousness of the penalty. Category One punishments are severe and range from 25 years’ imprisonment to the death penalty. Penal Reform International report that very few people have confessed to rape although they estimate that there are probably rapists in every category.\(^{329}\) From their research, PRI have concluded that “the severity of the penalty seems to be less important than to hear the verdict [of guilt]” and that “the classification of rape in Category One, doesn’t make it likely that many women who were raped will hear this pronouncement as this entails a death sentence or at least a very heavy sentence… and such sentences are seldom produced due to the difficulty of producing evidence”.\(^{330}\)

AVEGA concluded that in Kigali, Butare and Kibungo Provinces, 39.3% of Tutsi women were victims of sexual violence.\(^{331}\) As many as 250,000 women were raped between 1990 and 1994 and that thirty thousand pregnancies resulted from rape.\(^{332}\) A study in 1997 discovered that more than sixty per cent of rape victims were deliberately infected by men carrying the HIV virus\(^{333}\) and thus carry a potentially fatal physical scar alongside deep psychological scarring.\(^{334}\) Yet there have been a very small number of cases prosecuted at the domestic level.\(^{335}\) Insufficient protection for rape victims and witnesses, poorly trained police and judicial officers and a vague definition of sexual violence all contribute to the


\(^{330}\) Penal Reform International *Interim Report* (July – December 2001) 39


\(^{333}\) Anti-retroviral drugs are more accessible in Rwanda now but they are still only available to a small number of those infected with HIV. See SURF (http://www.survivors-fund.org.uk/index/htm) for more details.

\(^{335}\) Human Rights Watch *Struggling To Survive Barriers to Justice for Rape Victims in Rwanda* (September 2004)
lack of rape prosecutions. In Rwanda, rape is an extremely shameful and degrading experience, lowering the worth of the woman abused. Many women, therefore, find it impossible to talk about or testify to.

Although it has been classified as a Category One case, this crime still requires testimony at a pre-Gacaca hearing for classification purposes. Trial and judgment then take place in the ordinary courts. Article 24 of the 2000 Gacaca Law allows a Gacaca meeting to take place in closed session for public order or good moral reasons. It is likely that testifying to rape would allow such a closed session but LIPRODHOR have noted that populations are generally misinformed about this option. The 2004 Gacaca Law introduces the further safeguards such as allowing a rape victim to give testimony before a sole judge, confidentially in writing, or to staff at the Prosecutor’s Office but these changes have yet to be implemented. If the testimony is given to a Gacaca judge, the judge is to secretly forward the testimony to the Public Prosecutors thereby by-passing the pre-Gacaca stage. These safeguards have the potential to greatly increase a victim’s willingness to testify yet it is unlikely that testimony will remain confidential in a close community. Penal Reform International has reported that the pressure on these women by their communities not to testify is enormous and the procedure protracted. Until these changes are implemented, for categorisation to take place, a victim must tell the probably predominantly male judges of their own community that they have been raped, by whom and under what circumstances. If the defendant is indeed charged with rape and thus placed in Category One, the woman will have to go through the frustrating process of the criminal court system. The changes brought in by the 2004 law must be implemented as a matter of urgency.

336 See Human Rights Watch Struggling To Survive Barriers to Justice for Rape Victims in Rwanda (September 2004)
337 FIDH Vies Brisées: Les violences sexuelles lors du génocide rwandais et leurs conséquences (1996) 226/4, 266/5
339 Penal Reform International Interim Report (July – December 2001) 40
5.2.3 Confession Procedure

A procedure primarily designed to encourage prisoners to contribute to the discovery of truth, the confession procedure was also created to empty the overburdened prisons. Following an extensive public awareness campaign, the number of prisoners using the procedure has greatly increased.\(^{340}\) While it is true that the procedure has unearthed much information, the hope that sincerely repentant prisoners will tell the whole truth and victims will accept them back into the community is too naïve in the context.

A confession can be made by any offender and must involve a guilty plea with a detailed description of the offences committed, accomplices and co-conspirators. The Gacaca courts decide to accept or refuse a confession and must evaluate whether or not the confession corresponds to the truth told during the public hearings. There is no longer a deadline for confessions in an attempt to encourage as many as possible.\(^{341}\) Before the prisoners are released, they are sent to a solidarity camp where they are taught the principles of reconciliation and the importance of asking for forgiveness for their crimes.

The confession procedure also has a reconciliatory function. The act of confessing should lift the burden of the crime from the perpetrator, if accompanied by repentance, and help his reintegration into society. Moreover, his victim is more likely to forgive an act for which forgiveness has been sought. Of course, much depends upon the sincerity of the confession and the state of mind of the victim.

Knowledge about what happened in 1994 is greatly needed in Rwanda. PRI have found that only 5% of the total number of confessing murderers murdered without accomplices. This highlights the intricate web of crimes that were committed in 1994 and the corresponding value of confessions in naming accomplices who are currently free.\(^{342}\) Yet knowledge depends upon the truthfulness of the confessions as is shown below.

\(^{340}\) Fewer than sixty people confessed during the first year but by late 2001, more than 15,000 confessions were made according to Human Rights Watch Report 2001.
\(^{341}\) 2004 Gacaca Law. Note that this is the only procedural change introduced by the new law in respect of the confession system.
Initially the procedure was not well accepted by either the detainees or the survivors. There was an apparent solidarity of denial among the accused; many thought they would still have a chance of release through an amnesty or of being freed by the supporters of the former regime, who were fighting an insurgency in the northwest of the country from 1997-98. There was also great intimidation within the prisons conducted by those who had nothing to gain from the confession procedure such as those accused of Category One crimes. Indeed, the confession procedure, with its truth-telling aim could only harm these génocidaires. In 1994 they were the influential ringleaders of the genocide, the planners and instigators, those who carry authority and they continued to use their authority within the prisons.

Many prisoners are frightened to testify because they fear reprisals from fellow prisoners’ families and revenge attacks from survivors. Déo Gashagaza of Prison Fellowship Rwanda explains that there are people who discourage those who want to testify, often the intellectuals who were amongst the planners, but he maintains that they are not numerous. Furthermore, detainees will often not confess to protect their friends and family as close relatives are often detained together. According to LIPRODHOR, the confession procedure has transformed some hills from neighbourly communities to places of threats and hatred. In Cyangugu, for example, after a prisoner testified, he and his family were attacked. The authorities stepped in, however, and the attackers are now in prison. If the authorities can continue to be strong then individuals will have much more confidence in testifying.

The procedure’s success is as yet unknown. PRI’s research shows that by the end of 2002, 32,429 prisoners had confessed out of 101,469, 32%. Sixty-five percent of these guilty pleas were recorded in the last six months of 2002 which coincided with the start of the larger Gacaca pilot and indicates that the number of confessions increased as their effect could be seen by other detainees. Moreover, numbers increased dramatically following the Presidential Directive of January 2003 which provided that elderly, ill, young and minor prisoners who have confessed should be conditionally released. Overall, the Government

343 African Rights, Confessing to Genocide: Responses to Rwanda’s Genocide Law (June 2000) 2
344 They can now have their classification reduced to Category Two if they confess
345 D Gashagaza, Head of Prison Fellowship Rwanda
346 LIPRODHOR, Juridictions Gacaca: Potentialites et Lacunes Revelees par les Debuts (2003) 41
provisionally released close to 25,000 detainees who confessed to perpetrating crimes during the genocide. Indeed, PRI report that three thousand new guilty pleas were recorded in the week following the Directive.\textsuperscript{348} Previously, many detainees had doubted the promise of reduced sentence and saw the confession procedure as a ploy to make prisoners confess before an amnesty would be granted to those who had not confessed.\textsuperscript{349} Regional differences indicate that where the numbers of genocide victims were highest, the percentage of confessions is above average.\textsuperscript{350} This could be because these \textit{génocidaires} are more easily confronted with the truth of the genocide.

The Directive has had other rippling consequences. It did not mention the innocent and there is a real danger that innocent detainees will confess to receive the benefits of provisional release. There is also great misunderstanding about the Directive. According to the indigenous human rights group, LIPRODHOR, communities were not well enough prepared for the provisional liberation.\textsuperscript{351} Many of the survivors do not realise that it is a provisional release: they have stopped attending Gacaca as they believe the released \textit{génocidaires} have been granted an amnesty and have lost hope in the Gacaca system.

There have also been many logistical problems in gathering confessions. The Public Prosecuting Department must copy every confession, record it on a national computer system, keep one copy and pass the original to the relevant Gacaca Jurisdiction.\textsuperscript{352} At the outset, no resources were provided to carry out this task. Computers, printers, paper and toner were not to be fully distributed until the end of March 2003, extending the time necessary to gather confessions.\textsuperscript{353} The time taken has had a negative impact on the number of prisoners wishing to confess. African Rights report that due to the complicated and time-consuming procedures, those prisoners who had confessed were unable to demonstrate the merits of their choice to their more cautious peers. In the prisons which have been more successful in bringing detainees to trial there have been many more

\textsuperscript{348} Penal Reform International, \textit{Report IV: The guilty plea procedure, cornerstone of the Rwandan justice system} (January 2003) 14
\textsuperscript{349} African Rights, \textit{Confessing to Genocide: Responses to Rwanda’s Genocide Law} (June 2000) 17
\textsuperscript{352} Interview conducted by the author with D Deprez, Coopération Technique Belge, working at The Ministry of Justice
confessions. Consequentially, expectations were raised by the commitment in the Genocide Law that the judiciary would, within a period of three months, establish the veracity of a confession and let the detainee know whether or not his confession has been accepted. This unrealistic time frame, which was not met, contributed to the general despondency felt across Rwanda which has only just been partially remedied by the official start of the Gacaca Tribunals. Avocats Sans Frontières have been involved in helping improve logistics but they found it difficult to find out exactly how many confessions have been made. Many detainees decided to confess a second time when Avocats Sans Frontières got involved through doubt that their first confession had reached its proper destination. This further confuses the statistics and makes it extremely difficult to know how many prisoners have confessed. The fact that prisoners felt the need to confess twice, this time to an international organisation, shows the lack of confidence they have in the system and in their own authorities.

The inability to check the sincerity of confessions and the limited ability to verify the truth discovered through them poses great problems for this procedure. A confession can be offered with several motivations. An innocent detainee may confess to a crime he did not commit to be released from jail through fear that he will be tried as guilty in his home Cell. LIPRODHOR have even suggested that sometimes detainees confess to stay in the security of the prison fearing they would be killed if they returned to their hill. Other frustrating ‘truths’, such as blaming someone who is dead, who no longer lives in the community, or most worryingly, who is an enemy of the detainee, are common. Many survivors and others suspect that prisoners are confessing to a Category Four property offence to legitimately escape prison while in fact, being guilty of a Category Three, Two or even One offence. It is not surprising that prisoners will only partially confess to their crimes given the lack of solid evidence and the corresponding likelihood that they will not be found guilty of them. Indeed, with respect to Nazi war criminals, Goldhagen asserts:

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354 African Rights, Confessing to Genocide: Responses to Rwanda’s Genocide Law (June 2000) 6
355 African Rights, Confessing to Genocide: Responses to Rwanda’s Genocide Law (June 2000) 2
357 LIPRODHOR, Problematique de la Preuve dans les Proces de Genocide: l’institution imminente des juridictions Gacaca constituerait-elle une panacee? (June 2000) 39
358 Penal Reform International Report IV: The guilty plea procedure, cornerstone of the Rwandan justice system (January 2003) 8
359 The impression given at the Gacaca in Samuduha cellule, Rusuroro District, Kabuga Town Secteur, Kigali Ngali Province. Attended on 09.01.2004 and interview conducted by the author with survivors’ organization IBUKA.
“They, it should not be forgotten, were giving testimony to police interrogators and other legal authorities about crimes which were considered by their own society… and by the world at large to be among the greatest in human history. Many perpetrators had spent years… prior to their testimony denying to others, whether by silence or prevarication, the degree of their involvement in the genocide. Even when they could not completely hide that they had given to it their souls, their inner will and moral assent. To do otherwise was to declare to family and friends, to their growing children, to their now disapproving society: ‘I was a mass murderer and am (or was) proud of it.’… and indeed it is easy to demonstrate that they do lie rampantly, by word and by omission, in order to minimise their physical and cognitive involvement in the mass slaughters. Because of this, the only methodological position that makes sense is to discount all self-exculpating testimony that finds no corroboration from other sources. Most criminals assert that they have been wrongly accused of the crime. They certainly neglect to volunteer information about other criminal acts that they may have engaged in, of which the authorities are ignorant.”360

According to Amnesty International, more than 5,500 of those who were provisionally released in early 2003 were subsequently re-arrested when the authorities were presented with evidence of other crimes to which they had not confessed.361 This highlights the inaccuracy of the confessions and their inability to contribute to either the procedure’s fact-finding aim or its reconciliatory aim, as confessions are clearly not sincere. The only safeguard in the whole procedure is that the General Assembly can discuss whether or not they will accept the confession with the ultimate decision resting with the Seat. Since the fear and unwillingness amongst the General Assembly to speak is one of the reasons for


Goldhagen has been criticised for adopting an approach which was “too mechanical and inadequate for dealing with the complexities of the issue, in particular since [his] stated aim is to study the complex motivational aspects of murder.” (R B Birn, “Revising the Holocaust” (1997) 40 The Historical Journal 195, 196) but this observation is valid in the Rwandan context.

361 Amnesty International AFR 47/001/2004 Rwanda: Provisional release of genocide prisoners – priority should be accorded to the “sans-dossiers”
needing the confession procedure to uncover the truth, it is unlikely that this will prove to be a very strong safeguard.

Importantly for reconciliation purposes, a full apology is required from confessing prisoners. The law does not specify what the apology should consist of or to whom the apology must be made but generally the offender apologises to the victim and/or their family. In order for the confession procedure to have the greatest chance of fostering reconciliation, it should be made a legal requirement that the confessor apologise directly to survivors, the family of those who perished and to the community as a whole. A potential problem that needs further investigation is that, according to Penal Reform International, confessing in front of the victims is considered an insult as it is considered as a show of force. The most effective and culturally sensitive way for the confessor to display repentance to the victim or the victim’s family should be sought and implemented.

In South Africa, repentance and reparation by perpetrators was not required in order to receive an amnesty under the TRC process. Although repentance is expected by the Rwandan communities, it is often not given by perpetrators. PRI report that populations are often shocked to hear confessions without the slightest sign of emotion and even with much aggression. African Rights report that prisoners often appear to share a greater sense of resentment towards the survivors than sympathy for their plight or sorrow for their losses. As a result, the population and more particularly the survivors, question the sincerity of these confessions. According to Fatuma Ndangize of the National Unity and Reconciliation Commission, “Most of the perpetrators who have confessed, when they are taken to the communities to tell what they did, they ask for forgiveness”.

362 Interview conducted by the author with B Mukarubuga.
363 Penal Reform International Report IV: The guilty plea procedure, cornerstone of the Rwandan justice system (January 2003) 3
364 N Biggar “Making peace and doing justice, must we choose?” in Burying the Past: Making Peace and Doing Justice After Civil Conflict 14
366 African Rights, Confessing to Genocide: Responses to Rwanda’s Genocide Law (June 2000) 3
367 BBC Rwanda still Searching for Justice (http://www.news.bbc.co.uk/1/hi/world/africa/3557753.stm 25.02.06)
368 BBC Rwanda still Searching for Justice (http://www.news.bbc.co.uk/1/hi/world/africa/3557753.stm 25.02.06)
their victims to ask for forgiveness, although some seem to have established new relationships.\textsuperscript{369}

One reason the perpetrators are unwilling to apologise is that many of them blame other factors for their crimes. PRI note that prisoners “tend to present the genocide as being the result of bad policy of the former Government and of the Belgian colonial regime, which put them in a difficult situation… during the Gacaca sessions and the interview of detainees in prison, those presumed guilty hardly ever spoke of the individual motivation that led them to participate in the genocide”.\textsuperscript{370} Indeed, the organisation found that the issue of why is never asked by any of the Gacaca judges during the sessions they observed.\textsuperscript{371} Perpetrators of the genocide must learn to accept their own role in the genocide to understand why an apology is necessary.

At a speech of the Vice-President and Minister of Defence in 1999, emptying the prisons was outlined as another Government objective for Gacaca to reduce the economic drain on Rwanda and release the economic potential of the detainees.\textsuperscript{372} In this regard it can be said that Gacaca, and the confession procedure in particular, has been a victim of its own success. It was expected that these confessions would help to identify innocent detainees and those who were guilty of minor offences thereby reducing the prison population. However, Amnesty International report that by the end of 2002, the Ministry of Justice had received 32,000 confessions which incriminated an additional 250,000 individuals. PRI estimate that an average of 6.6 people are incriminated per accused.\textsuperscript{373} Additionally, the Gacaca tribunals have produced evidence incriminating even more genocide suspects.

With the remaining Category One and Two prisoners, combined with those implicated in the confession procedure and the Gacaca sessions, the prisons are likely to remain overpopulated. Penal Reform International suggests that a new way must be found to deal with those who have been recently implicated. The organisation suggests finding an alternative to imprisonment of these new suspects such as Community Service or a general

\textsuperscript{369} Hirondelle \textit{Les Meurtriers et les survivants face a face} (18 fevrier 2004)
\textsuperscript{370} Penal Reform International, \textit{Report V: Research on the Gacaca} (September 2003) 9
\textsuperscript{373} Penal Reform International, \textit{Report IV: The guilty plea procedure, cornerstone of the Rwandan justice system} (January 2003) 9
amnesty although it does not favour the latter.374 Rwanda must find a solution to this problem but the punishments must match those served on existing detainees. It would be grossly unfair to suggest otherwise.

In conclusion, the lack of eyewitnesses who are not themselves perpetrators indicates that the confession procedure is key to Gacaca’s success in uncovering the truth. But the truth offered by confessing prisoners does not always appear to be the whole truth and sometimes tries to deflect blame from the perpetrator either onto other génocidaires, who are often dead, or the former government through the attempted defence of duress and sometimes even a misunderstood self defence justification. Overall, the confession procedure’s potential contribution to the reconciliation process is greatly marred by the unwillingness of confessors to ask for forgiveness from survivors, to express regret for their actions or to even recognise their personal responsibility for their crimes. It is important to remember that some communities are enjoying a very different experience of Gacaca where the truth is aired by community and perpetrator alike. Gacaca will result in much more truth being made known than would ever be discovered otherwise. The confession procedure is undoubtedly the best and only mechanism for gleaning more of the truth about what happened in 1994 in spite of the criticism against it. There are occasions where prisoners are confessing to serious crimes such as murder and in turn implicate others in the way the system was designed to work. As African Rights have reported, and as would be expected, the truths that the confession procedure elicit are uniquely credible to the communities because they come from the mouths of perpetrators.375

The confession procedure’s major legal drawback is the difficulty of ensuring innocent detainees do not simply confess to be released from prison and of ensuring that confessing detainees admit the full extent of their crimes. It is too difficult to find a solution to this problem and it is probably inevitable in a country where prisoners have been on remand for eleven years. The commencement of the Gacaca system will improve the situation provided it is speedy, which is unlikely, innocent detainees could be released shortly. Increased communication would also help; both sides must accept and understand the procedure’s benefits for it to be a success. The required apology, if sincere, has an incredible potential to foster reconciliation between perpetrators and victims but where

perpetrators blame other factors for their crimes, the impact and power of their apology will be reduced. Yet there is no doubt that there was great pressure on génocidaires to kill. By focusing the blame on those in authority, the confessors are acknowledging the genocidal nature of the killings and the great guilt of the influential. This could have a powerful effect on reconciliation if the survivors no longer fear individual perpetrators but those who led the genocide who are now generally in exile or in prison as a Category One génocidaires or at the ICTR.
5.3 End the Culture of Impunity

One of the Government’s primary aims in passing the Genocide Law was to end a culture of impunity that had plagued Rwanda since independence. It is important to note that the Government’s assertion is accurate in perception only, not in reality. According to researchers at Rwanda’s National University, the long-believed myth that Rwanda had enjoyed a culture of impunity dating back to the first massacres in the 1950s is false. In fact, 1,240 people of all ethnicities were arrested and judged for the 1959 atrocities. 94 were acquitted but the rest were punished with sentences ranging from less than one year to more than ten years, with two sentenced to death.376

An amnesty, however, was given to those with sentences of less than five years. The amnesty was accorded by the Belgian Government, at the request of the United Nations.377 The Rwandan population was not informed as to the difference between an amnesty and impunity; they only saw the result. An amnesty was subsequently granted annually, on the anniversary of independence, for all political offences except murder and other exceptionally serious crimes described by the United Nations as being exempt from an amnesty. This gave the impression of a continual impunity for most political crimes committed in the post-colonial period.378 Many other obstacles stood in the way of prosecution, for example, Rwanda’s former Prosecutor-General, François-Xavier Nsanzeruwa met with political opposition many times with respect to certain prosecutions.379

Impunity has many characteristics and all must be dealt with in Rwanda. The most obvious is the punishment of génocidaires. The perceived impunity outlined above no doubt increased participation in the genocide. In fact, reports even suggest that some people were rewarded with promotion after committing earlier ethnic based crimes.380 In this context punishment is essential to deter future crimes. LIPRODHOR remarks in its 2003 report that having all elements of the Gacaca procedure, especially the investigative stage, in the

376 F Digneffe and J Fierens (eds), Justice et Gacaca: L’expérience rwandaise et le génocide (2003) 35
378 This information was taken from F Digneffe and J Fierens (eds), Justice et Gacaca: L’expérience rwandaise et le génocide (2003) 38.
379 For example, in attempting to arrest members of Rwanda’s propaganda machine in 1993. Interview conducted by the author and informal discussions with F-X Nsanzeruwa.
community will help to publicise that no one will remain unpunished this time. While it may be impossible to satisfactorily punish the génocidaires to the extent normally required in genocide trials the symbolic action of calling criminals to account and imposing a punishment on them is extremely important in acknowledging the suffering of victims and ending the cycle of violence experienced in Rwanda. In addition to the deterrent effect of punishment, Emile Durkheim and others assert that punishment represents societal condemnation of certain behaviour. Punishment could therefore act as a form of reconciliation between villagers and survivors, uniting each community as it displays its values. The Royal Commission on Capital Punishment quotes Lord Denning in its report stating that, “The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else… The ultimate justification for any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime…”.

In addition to the recognised need to punish the génocidaires, there are two other aspects of impunity that must be addressed. Firstly, many RPF soldiers committed war crimes and crimes against humanity during and after the genocide and have not been brought to trial. As Mattarollo explains, “impunity occurs when the State fails to meet its obligations to investigate violations and to take appropriate measures against those responsible”. The crimes committed by RPF soldiers are ignored by those in power; the majority of whom are former RPF soldiers themselves. RPF soldiers committed revenge killings in which they killed suspected génocidaires. The soldiers hunted for “real or imaginary Interahamwe”. According to Prunier, these killings represented one to two per cent of all casualties in Rwanda. Although the killings were not widespread, they have left their mark on survivors.

Another aspect of impunity is the lack of compensation for genocide survivors. In a report studying the question of impunity, Special Rapporteur Joinet proposes fifty principles

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381 F M Lawrence, “Memory, Hate and Bias Violence, in Breaking the Cycles of Hatred” in M Minow (ed) Memory, Law, and Repair (2002) 146
382 The Royal Commission on Capital Punishment, Cmd 8932, 1953, paragraph 52
which he groups into three categories: the right to know, the right to justice and the right to reparation.\textsuperscript{386}

The right to know goes beyond an individual victim’s right to know; it is also the collective right of a society, using history to prevent violations recurring and thus includes a right to remember.\textsuperscript{387} Santayana’s famous quote that “those who cannot remember the past are condemned to repeat it”\textsuperscript{388} insists on the importance of compiling an accurate historical record of what happened in Rwanda in 1994. The ICTR is attempting to do this through its jurisprudence and trial proceedings. Yet while the ICTR does look at the whole context of the genocide, its jurisprudence is focused on the areas where its accused were allegedly active. Gacaca provides the ideal opportunity to see the whole picture of what took place. In addition, an accurate national record of Gacaca proceedings could help individuals to trace loved ones.

All Rwandans do not have a common understanding of the genocide. Some maintain that it started as far back as 1959, others say it only took place in 1994, while others simply deny it happened.\textsuperscript{389} An accurate record of what happened in 1994 will silence the revisionists, acknowledge the survivors and be a useful tool to educate the future generations about Rwanda’s history. Indeed, Timothy Garton Ash argues that there are three ways of dealing with past atrocities: trials, purges, and history lessons. “I personally believe a third path, that of history lessons, is the most promising,” he writes.\textsuperscript{390} As it stands, notes should be taken at each Gacaca session under the current law\textsuperscript{391} which are then sent to Kigali\textsuperscript{392} but these notes must be compiled into a country-wide, accessible record of what happened in Rwanda’s genocide. The Ministry of Youth, Sports and Culture has been given the task of


\textsuperscript{387} This will be discussed in 5. Unite and Reconcile Rwandans

\textsuperscript{388} G Santayana, Life of Reason or The Phases of Human Progress (1936) I: 284.

\textsuperscript{389} Former Rwandan Minister for Justice, Dr. F Nteziryayo, NURC Report (2000) 59


\textsuperscript{391} The Secretary of the Co-ordination Committee should record everything that happens in a Gacaca session.

\textsuperscript{392} Interview conducted by the author with Bukuru, Regional Gacaca Co-ordinator for Butare.
archiving these records working alongside the Aegis Trust but there is no plan to use them to form an historical record. This data could create an excellent historical record.

Joinet’s second category, the right to justice is what is commonly understood as the converse of impunity and particularly impacts on the RPF crimes as set out below. The third category, the right to reparation, is examined below.

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393 Interview conducted by the author with M Kabahizi of Aegis Trust
5.3.1 Impunity and RPF Crimes

In an interview President Mitterrand referred to two genocides, inferring that the RPF killings were revenge genocide, a ‘second genocide’. This goes too far. Although there was no second genocide, many apolitical Hutu did die and the perpetrators were often RPF soldiers. Prunier notes that the, “attitude of the Government (or rather the RPF) towards [RPF soldiers accused of these killings] was ambiguous. There was much talk of their being arrested and tried for their misdeeds and some were to satisfy public opinion. The RPF itself acted with a mixture of sincere leniency (‘these are our boys, they are good boys’) and calculated tolerance of crime designed to keep the Hutu refugee mass scared. It is doubtful whether General Paul Kagame really agreed with this policy but either he was not sufficiently opposed to it to think it worth a major political fight or he no longer had full control of the RPF.”

Prunier describes three periods in the RPF killings. The first was when the genocide started in April 1994 and lasted until mid-1995. This was a period of frequent and widespread killing which Prunier believe was the RPF letting its men “clear a lot of ‘suspects’ in a process of rough retribution”. The second period was one of semi-respect of human rights between mid-1995 and early 1996. And a third period of renewed killings seems to have started around March 1996 when RPA troops were fighting a counter-insurgency war with the exiled Interahamwe.

The UNHCR commissioned a report into these killings, commonly referred to as the Gersony Report, but its findings were never published. According to Prunier, “this report apparently stated that the RPF murdered 30,000 Hutu in revenge killings between July and September 1994 and it was rumoured to present those killings as the RPF’s deliberate policy”.

394 Note that after the genocide ended the RPF (Rwandan Patriotic Front) became the RPA (Rwandan Patriotic Army): Rwanda’s national army and was no longer, therefore, ethnic based.
395 G Prunier, The Rwandan Crisis: History of a Genocide (2002) 339, “When asked by a journalist about the genocide, President Mitterand answered, ‘the genocide or the genocides? I don’t know what one should say!’”
new RPF Government but Gersony’s collaborators confirmed that their estimates were probably on the low side. 399

The RPF is widely recognised as having been a highly disciplined army but, during the genocide, control was not always centralised and many new recruits, survivors from genocidal massacres, joined the RPF ranks without the same training as original RPF soldiers. 400 The Government blame these later recruits for the revenge killings and indicate that they were sporadic and emotion-driven. Evidence, however, shows that during and after the genocide, massacres were carried out by members of the RPA on a systematic basis against a number of Hutu. The victims included men, women and children and the majority do not appear to have been suspected of participation in the genocide. 401 Human Rights Watch have concluded that “these killings were widespread, systematic, and involved large numbers of victims and participants. They were too many and too much alike to have been unconnected crimes committed by individual soldiers or low-ranking officers. Given the disciplined nature of the RPF forces and the extent of communication up and down the hierarchy, commanders of the army must have known of and at least tolerated these practices.” 402

Deputy Prosecutor, Martin Ngoga emphasises that the harsh ‘bush justice’ delivered by the army with heavy punishments and low standards of proof is evidence that RPF soldiers who committed a crime were dealt with quickly and harshly. 403 He asserts that crimes committed by RPF soldiers fall far short of the seriousness of genocide and found it offensive that the ICTR was considering prosecuting RPF soldiers accused of crimes against humanity and war crimes. While it is true that there is a difference in scale between these two crimes, this reasoning does not free the Rwandan Government from its duty to deal with the crimes of its soldiers.

403 Interview conducted by the author with M Ngoga while he was still 1st Counsel in the Tanzanian embassy with specific mandate of ICTR. He is now Deputy Prosecutor of Rwanda.
The 1996 Genocide Law provided for the formation of military courts and two have been formed: the War Council which deals with soldier ranked from non-commissioned officer to captain, and the Military Court which has jurisdiction over the rest of the officers. Some senior leaders of the army can only be tried by the Supreme Court. Although these courts have been operating, some observers and human rights organisations report that the Government has largely turned a blind eye to war crimes committed by the RPA during its war to oust the former Government and afterwards.\(^{404}\)

The most renowned massacre carried out by the RPA was at the Kibeho refugee camp where, during a forced repatriation operation, over four thousand, perhaps even eight thousand, refugees were killed in front of foreign aid workers and the international media.\(^{405}\) The killings, with heavy weaponry, lasted several days in April 1995. The Rwandan judiciary has been more active in respect of this massacre than of other reported killings, perhaps because it was televised worldwide. Colonel Ibingira, the RPA soldier in charge of the RPA unit who carried out these killings, was indicted and put on trial on 9 December 1996. Ibingira was, however, cleared of any direct responsibility for the killings committed by junior soldiers in his brigade and was sentenced to just 18 months in prison.\(^{406}\)

In September 1994, sixty-four RPA soldiers were under arrest, some charged with killing civilians.\(^{407}\) In his November 1994 report, René Degni-Ségui noted that he had received a fax from the Rwandan Minister of Justice stating that one hundred RPA soldiers had been arrested for human rights abuses committed in 1994.\(^{408}\) Other judicial action includes the trial of Majors George Rwigamba and Goodman Ruzibiza Bagurete and 2nd Lieutenants Vincent Sano and Emmanuel Rutayisire in 1997. They were found guilty of failure to stop a criminal act by soldiers under their command during the ‘war on infiltrators’. They each received 28 months imprisonment.\(^{409}\) In January 1998, Major Sam Bigabiro was convicted by a military court of having directed the killing of thirty to forty civilians in June 1994.

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\(^{404}\) Hirondelle, *Rwanda/ Regular Courts – Confronting Genocide with Rwanda’s Regular Courts* (18.09.03)

\(^{405}\) UNAMIR initially estimated 8,000 dead.

\(^{406}\) Hirondelle, *Rwanda/ Regular Courts – Confronting Genocide with Rwanda’s Regular Courts* (18.09.03)


\(^{409}\) Hirondelle, *Rwanda/ Regular Courts – Confronting Genocide with Rwanda’s Regular Courts* (18.09.03)
and sentenced to life imprisonment but Human Rights Watch report that he appealed and was released. In the same month, two RPA soldiers were executed for killing civilians and in September 1998 three RPA soldiers were sentenced to death for killing two civilians in August of that year. While around 21 other RPA soldiers had been tried by 1999, Human Rights Watch has observed that “most Rwandans know nothing to these RPA trials or discount their importance because of the small number and light penalties involved.”

Overall, these arrests are often followed by swift release and account for a small number of the atrocities carried out by RPF soldiers. Discussion of crimes committed by the RPF is still taboo in Rwanda. In October 2003 Amnesty International was told by senior judicial officials that 1,800 members of the RPA were now serving sentences for human rights abuses of which 1,500 were for abuses committed during the 1994 genocide. However, evidence Amnesty obtained from the Auditorat militaire (Military Prosecutor’s Office) suggests that only a few dozen RPA soldiers have been prosecuted and that those found guilty served minimal sentences. Nonetheless, the Ministry of Justice continue to maintain that they have tried every person who committed a war crime or crime against humanity. Journalists and human rights observers struggle to get accurate figures from the military or judicial authorities: Avocats Sans Fontières are neither aware of any publicised trials of RPF soldiers nor of any published statistics of the total number tried and sentenced. Whether this is due to an official policy of secrecy or the fact that little was documented and filed in the immediate post-genocide period is not clear.

Article 1 of the 2001 Gacaca Law states that the Gacaca Tribunals will try those accused of genocide, crimes against humanity and war crimes but the 2004 Gacaca Law makes no reference to war crimes. Whether the Gacaca tribunals are the most suitable forum to try

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415 Amnesty International, AFR 47/008/2004 The enduring legacy of the genocide and war
416 Interview conducted by the author with E Rukangira – Avocat-Général, Ministry of Justice
417 Personal contact with Avocats Sans Frontières Belgium and interview conducted by the author with R Niyibizi, Director of LIPRODHOR
these perpetrators is a controversial question. The strength of the Gacaca tribunals lies in their ability to try local people by local people. Many of the RPF perpetrators are unknown to the communities where the crimes were committed and so it is not so important to try them there. It is important, however, that they are tried and this should be done at a national level with the trials and decisions published and broadcast across Rwanda. Without such trials, the insurgents will gather more credibility while the Government loses its.

The inaction with respect to RPF crimes has three major consequences. First, the survivors of RPF revenge and other attacks and massacres are not acknowledged as survivors and do not experience the same restoration of dignity that will hopefully be felt by genocide survivors on ‘their day in court’. Amnesty International and many other observers report that many Gacaca participants expressed dissatisfaction that RPF abuses during the genocide do not fall within the competence of the Gacaca jurisdictions. Indeed they report that this has resulted in a significant drop in attendance and participation. Many villagers highlighted this as the reason why they do not attend Gacaca sessions. These survivors are further denied acknowledgement in Rwandan terminology: ‘survivors’ are Tutsi who lost their family during the genocide whereas the Hutu who lost their family during revenge attacks or RPF massacres do not have the right to call themselves ‘survivors’. Survivors of RPF atrocities are awarded nothing; no recognition, little help and thus no dignity. The Government claim that they have not “forgotten other needy cases and mechanisms of assisting them have been set up through department of social affairs” yet little has been done for these victims.

There was not a genocide committed against these Rwandan Hutu but they are victims of crimes against humanity. Eltringham notes that, “assertions regarding the ‘victimological status’ of the ‘Hutu moderates’ make no reference to ‘crimes against humanity’, underlining the fact that contemporary Rwandan society is understood exclusively through

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419 From the author’s own research, interview conducted by the author with I Bugingo of IRDP and other interviewees who must remain anonymous for security reasons.
the interpretative lens of genocide.” These victims are never recognised, neither at commemoration ceremonies nor at a political level. The Hutu killed during the genocide by other Hutu must, like those killed in revenge attacks by Tutsi, be recognised. Notwithstanding this necessity, the Government will not acknowledge that the RPF soldiers even committed crimes against humanity; they maintain that they were fighting a war and there were civilian casualties as a result of this war. Tales of massacres disprove this.

The lack of accountability for these crimes perpetuates the view held by some Hutu that the genocide was simply a war crime. De Mildt, when studying post-war prosecution in West Germany stated that, “…almost from the beginning Nazi crimes were identified as war crimes. As war crimes are generally committed by all warring parties… many Germans came to consider the exclusive prosecution of ‘their’ criminals as a ‘political affair’…and staged for no other reason than to satisfy the appetite for ordinary vengeance of the Allied victors who were apparently unwilling to expose their own war crimes.”

Thus some Hutu in Rwanda see the génocidaire prosecutions as victor’s justice further polarising the two groups and if punishment is only to be served upon those who lost the war then it is unlikely to act as a forceful deterrent to prevent a repeat of the genocide.

An alternative to prosecution in respect of RPF crimes is an official apology and therefore official acknowledgment of the crimes. For example, President Haval publicly admitted that the ethnic Germans expelled from Czechoslovakia during World War II had suffered a great injustice. According to Elshtain, “under such circumstances, where retributive justice is entirely out of place and compensatory justice is prudentially impossible and philosophically murky (given the entire story of World War II), acceptance of the gesture of recognition Havel proffered becomes a form of forgiveness that makes possible other instances of soul-searching and recognition as time goes on.” Elshtain however then writes that this recognition did not please anyone; it was too little for the ethnic Germans who had been expelled as it allowed neither a claim to compensation nor a right to expropriated properties and it was too much in the eyes of many ordinary Czechs who had suffered

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423 D de Mildt, *In the Name of the People: perpetrators of genocide in the reflection of their post-war prosecution in West Germany* (1996) 25
under the Nazi occupation.\textsuperscript{424} A similar situation could arise following a political apology from the Rwandan Government yet an apology would be better than the current silence. Forsberg observes that an official apology of this type is perceived as a sign of weakness. To apologise is regarded as being against a state’s interests, because to admit past wrongs is to make oneself vulnerable to demands for reparation or compensation.\textsuperscript{425} While it is true that such acknowledgement of past wrongdoing will open a state up to requests for compensation, it is not a sign of weakness. Rather it is a sign of strength that the Government is willing to apologise and knows that it is strong enough to deal with the consequences of such an apology.

A proper, independent and thorough investigation of RPF crimes is also necessary to end impunity. As Eltringham comments this “entails a consistent and coherent effort to respond to all allegations of human rights abuses in a dogmatic, tenacious and transparent way. Demonstrating that allegations are untrue is as much a part of demonstrating that impunity has ended as convicting those found responsible.”\textsuperscript{426} Thus, by initiating an unbiased and transparent investigation into these crimes, the myths perpetrated by the Hutu militia as they continue with their insurgency will lose strength. In 2000, African Rights reported that there has been no attempt on the part of the Government to mount an energetic and comprehensive investigation into RPA abuses. African Rights note the irony that the “results of a thorough inquiry would almost certainly confirm that although there have been numerous incidents of human rights abuses by members of the RPA since 1990 – some of which have already been acknowledged – they have not come close in either their scale or character to the systematic slaughter of the genocide. Any hidden aspects of Rwanda’s past remain fertile ground for misinformation and propaganda.”\textsuperscript{427} An investigation is vital for unity in Rwanda. A joint UN-Government investigation team did carry out an investigation but it only visited one mass grave\textsuperscript{428} and cannot be described as either thorough or transparent. A better, more independent investigation must be carried out. In the current political climate even simple acknowledgement is not foreseeable. The consequences for reconciliation are devastating.

\textsuperscript{424} J B Elshtain, “Politics and Forgiveness” in N Biggar (ed) \textit{Burying the Past: Making Peace and Doing Justice After Civil Conflict} 54-56
\textsuperscript{426} N Eltringham, \textit{Accounting for Horror: Post-Genocide Debates in Rwanda} (2004) 147
\textsuperscript{427} African Rights \textit{Confessing to Genocide: Responses to Rwanda’s Genocide Law, 2000}, p,96
\textsuperscript{428} N Eltringham, \textit{Accounting for Horror: Post-Genocide Debates in Rwanda} (2004) 103-6
A further alternative would be to have a truth commission initiative to gather testimony about RPF atrocities. Indeed, in South Africa, more than four hundred ANC leaders and cadres submitted applications to the Truth and Reconciliation Commission, including Thabo Mbeki, the deputy president at the time. These applications, however, were only submitted when Archbishop Tutu threatened to resign from the Commission after a provincial leader of the ANC insisted that there was no need for ANC combatants to apply for amnesty because they had been fighting a just war against apartheid.\textsuperscript{429} For RPF soldiers to admit responsibility for their war crimes and other crimes against humanity, they must be taught that their actions were wrong. Like the ANC fighters, they believe that they were fighting a just war against the genocide. Those in authority must lead by example. Since the current Government are unwilling to recognise the extent of RPF crimes it is unlikely that they would be willing to sponsor such a commission.

\textsuperscript{429} A Rigby, \textit{Justice and Reconciliation after the violence} (2001) 134
5.3.2 Is Acquiescence Criminal in the Context of the 1994 Genocide?

‘QUI PEUT ET N’EMPECHE PECHE’430

The guilt of the Rwandan bystanders who did nothing to stop the genocide cannot be dealt with judicially or politically. No one knows exactly how many Hutu participated in the genocide. Prunier suggests 80-100,000431 while Lemarchand estimates that ten per cent of the Hutu population of c.6.5 million participated as organisers, killers or accomplices.432 Whatever figure is more accurate, it is clear that the majority of Hutu were bystanders and some Tutsi include these bystanders in their assessment of the guilty. A Rwandan human rights worker told Eltringham in 1998 that “the 1994 genocide involved the whole of the population”433 and to a certain degree he is correct. The genocide would not have been so destructive if so many had not acquiesced.

Refusing to help somebody in danger is illegal under Article 256 of the Penal Code. Nevertheless this law does not prescribe heroism, rather it discourages selfishness. The law is qualified in that omitting to help someone in danger is not punishable if such help would constitute a health or security risk for the accused or for a third party. Rwanda was an extremely dangerous place in 1994 and it is likely that the context will place any person accused of such refusal into this category notwithstanding the pragmatic impossibility of imprisoning any more than the worst perpetrators and the fact that such refusal is not mentioned in the 1996 Genocide Law. There are many stories of heroism but even the smallest act ran the ultimate risk: a Hutu family who could not bear the sight of the naked body of their Tutsi neighbour went to cover it with some banana leaves and were all subsequently killed by the Interahamwe.434 Additionally, an application of Cassese’s futility argument in the defence of duress to the notion of criminal omissions would rule out most potential cases as almost all intervention would have been futile.435

435 Separate and Dissenting Opinion of Judge Cassese, The Prosecutor v Dragan Erdemovic (1996) ICTY IT-96-22 where Cassese argued that where the victims’ deaths were inevitable, duress may, under certain additional circumstances, be a defence to murder.
Moreover, Article 95 of the 2001 Gacaca Law provides that ‘testimony made on offences of the crime of genocide and crimes against humanity committed between October 1, 1990 and December 31, 1994, can never serve as a basis to take proceedings against its author charging him with the offence of failure to render assistance.’\(^{436}\) This provision indicates that encouraging people to testify is the paramount consideration and appears to grant an amnesty to those accused of this crime of omission where they testify. This was misunderstood during the Gacaca sessions visited where people were subjected to long questioning on this issue and increasing public awareness and understanding on the limits of the Gacaca Law are clearly necessary to remedy this misconception.\(^{437}\)

Those in a position of power who failed to help are placed in a different category in order to acknowledge the powerful role they played in such a hierarchical country. They will be guilty of aiding and abetting the genocide, of complicity in genocide. According to Judge Pillay, now of the ICC, formerly of the ICTR, “aiding and abetting is part of the crime of genocide...someone failing to prevent genocide when that person was in a position to have done something about it would, I think, appropriately fall under complicity to commit genocide because the language there is also ‘failing to stop’ or ‘prevent’.\(^{438}\)

While the bystanders are not legally guilty of acquiescence to the genocide, they are still morally guilty of inaction. Yves Ternon distinguishes between the different levels of responsibility among perpetrators of genocide. At the top of the pyramid, there are those who plan it. In the middle are those who carry out their orders and at the bottom are the spectators. Ternon explains that the spectator’s guilt does not depend on action: their presence at the scene of the crime and their tacit agreement, their indifference or their failure to revolt are elements which determine the ‘success’ of the enterprise.\(^{439}\) Unless this moral guilt is recognised by the bystanders themselves, reconciliation will remain unachievable, as trust will be elusive.

\(^{436}\) This provision was retained in the draft 2004 Gacaca Law but seems to have been removed from the actual law.  
\(^{437}\) Particularly from the author’s observation at a Gacaca session in Saruduha Cell, Ruseroro Sector, Kabuga Town District, Kigali-Rural Province.  
\(^{438}\) Judge Pillay ‘Presentation of the Human Rights Award 2003 of the Friedrich-Ebert-Stiftung to the ICTR’. May 20\(^{th}\) 2003  
After the Second World War, the German population found it extremely difficult to accept the evil aspects of a political system they had so enthusiastically supported, especially at the start, they preferred to “succumb to the comfortable illusion of having been helpless victims themselves”\textsuperscript{440}. According to de Mildt, any open-minded and straightforward acknowledgement by German society of its co-responsibility for this evil past would have been practically impossible as the process of facing up to reality would have plunged the German community into such a profound state of collective mental depression that it would have paralysed any effort to reconstruct a self-conscious and self-respecting post-war German society for some time.\textsuperscript{441} Yet the German communities were not facing the same need for peaceful coexistence and reconciliation as Rwanda where the killers and survivors live side by side.

A useful tool to acknowledge this moral guilt was used in South Africa where white bystanders were invited to sign a book to declare their moral guilt for having done nothing to stop apartheid and having enjoyed its rewards.\textsuperscript{442} The entries provide a positive way for bystanders to acknowledge their role and for victims to see the bystanders’ genuine sorrow for what had happened. A book may not be so useful in a less developed, less literate and more decentralised country like Rwanda but something similar should be investigated. One option would be to bring the community together in an informal meeting and allow bystanders to express their regret for having done nothing. Many bystanders fear that by speaking of what they know during Gacaca sessions, they will be imprisoned. It is imperative that meetings be preceded by sufficient explanations to remove such fears. This could help build bridges within communities as each group recognises the humanity of the other and each others’ genocide experience.

The other greatest challenge facing the desire to end impunity is the lack of compensation for victims of the genocide.

\textsuperscript{440} D de Mildt, \emph{In the Name of the People: perpetrators of genocide in the reflection of their post-war prosecution in West Germany} (1996) 23
\textsuperscript{441} D de Mildt, \emph{In the Name of the People: perpetrators of genocide in the reflection of their post-war prosecution in West Germany} (1996) 24
\textsuperscript{442} M Minow, \emph{Between Vengeance and Forgiveness} (1998) 75
5.3.3 Reparation

Impunity occurs where the State fails to guarantee moral and material reparation to victims for the harm done to them or to take steps to prevent the violations from recurring. For many survivors, the truth alone does not console, punishment is necessary but does not provide true comfort, only compensation represents a form of acknowledgement and of reparation that can restore dignity to those who live with psychological and physical pain. Nonetheless, compensation will only be fully accepted when there is also truth and punishment, otherwise monetary compensation may be seen as a bribe to stay quiet.

It is a basic maxim of law that harms should be remedied. States are obliged to provide remedies for violations, both as a matter of treaty law and as part of the general rules of state responsibility. The statute of the International Criminal Court provides for individual offenders to pay reparations to victims, as well as for the creation of a trust fund to be used where awards from individuals are impracticable. Various countries have taken different approaches to providing compensation to the victims of a previous regime and some states have agreed to provide compensation directly to victims. In this way victims receive their compensation from the state, not from the perpetrator. Although this form of compensation ensures that all victims of the country are treated equally as their compensation is not dependent on a rich perpetrator, it does lose moral weight in the eyes of the victims as the perpetrator does not suffer an economic loss.

The inclusion of a compensatory element in the judicial response to genocide is not a foreign concept in Africa. In fact, the aim of the criminal justice systems of many pre-colonial African societies was to vindicate the victim and his rights. Sanctions imposed were not to punish the offender but to eliminate the consequences of the offence. They were therefore compensatory, rather than punitive, in nature. In fact, according to Nsereko, “compensation for the victim remains the single most important mechanism of

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444 F Digneffe and J Fierens (eds), Justice et Gacaca: L’expérience rwandaise et le génocide (2003) 123
448 N Nsereko, “Victims of Crime and Their Rights” (1992) UNICRI Criminology in Africa 22
ensuring that justice is done. Yet, as Roht-Arriaza notes, few reparations have actually been paid in the wake of mass atrocities.

There are essentially three forms of reparation employed in the aftermath of mass conflict: reparation as economic development, reparation as community-level acknowledgement and atonement and reparation as individual payments and preferential access. Rwanda was an extremely poor country before the genocide and one of the underlying causes of the genocide is widely recognised to be poverty. Economic development could not only contribute as reparation but if it is directed towards all Rwandans, not only survivors, then it could be a tool of reconciliation and may help to prevent further ethnic tension. Community-level acknowledgement is important in unifying communities whose bonds were destroyed in the violence and the betrayal of trust. Additionally, this type of reparation can help to unify new communities which did not exist prior to the genocide. This is especially true in urban communities where people are more transient. The danger that the Hutu will perceive individual reparation as favouritism is reduced through the use of these other programmes. Minow warns of a converse danger that once amends are made victims feel that the underlying events need not be discussed again and reparation thereby trivialises the harm sustained. The same must be said of offenders who may believe that once the reparation is paid, their guilt is gone.

Article 258 of the Rwandan Civil Code, Book III states that “everyone who has done something which has caused a loss to another is obliged, if he is in fault, to reparate the loss”. As under other legal systems, to be awarded compensation, the loss must be direct, foreseeable and there must be a causal link between the harm suffered and the perpetrator. Of course, this type of compensation is dependent upon the perpetrator having the means to pay the award which is rarely the case in post-genocide Rwanda.

More specific to the genocide context, Article 30 of the 1996 Genocide Law provides that “convicted persons whose acts place them within Category One under Article 2 shall be held jointly and severally liable for all damages caused in the country by their acts of

449 N Nsereko, “Victims of Crime and Their Rights” (1992) UNICRI Criminology in Africa 39
452 M Minow, Between Vengeance and Forgiveness (1998) 92, 93
criminal participation, regardless of where the offences were committed”. There is no requirement in Rwanda for a non-Category One confessing perpetrator to make a compensatory contribution to society unless he confesses to a Category Four offence in which case such a contribution is his only punishment.\(^{453}\) These Category Four prisoners are required to reach a compensatory agreement with the victim.\(^{454}\) This increases satisfaction felt by the victim and helps relieve the massive burden on the Rwandan criminal courts. Notwithstanding these benefits, the Category Four sanction results in a paradox where a Category Four offender is released alongside his Category Three colleague, both have confessed and both were released after having spent eight years in prison. The Category Three prisoner is now free as his maximum sentence is less than that already served but the Category Four offender, guilty of a lesser offence, is now liable to compensate his victim for the property loss sustained. This injustice must be remedied. The only workable solution would be for an alternative prison sentence to be imposed where the perpetrator did not want to pay compensation and this could be written off in the case of an offender who has been on remand for a long period of time. In such a case, the victim would ideally receive the reparation money from the State.

There is widespread agreement that where a state is complicit in the violations, or where a state fails to use due diligence to investigate and prosecute the violations, the state has a duty to provide reparations.\(^{455}\) Indeed, the principle of continuity of State power suggests that there should also be available the option of suing the State but the Rwandan legislature has ruled this out. Instead, the Kagame Government established a fund in 1998: FARGE, *Fonds des Rescapés du Génocide* (Fund to Assist the Survivors of the Genocide).\(^{456}\) Until the compensation law is passed, this is all that is available from the Rwandan state to meet survivors’ most urgent needs. The Government contributes around 5% of the state’s internal revenue to this fund although this may be increased under the new draft bill.\(^{457}\) Generally, the beneficiaries are orphans, widows and disabled survivors.\(^{458}\) The Fund is to help victims with education, health and accommodation but too few survivors benefit.


\(^{454}\) Article 14(d) 1996 Genocide Law


\(^{458}\) Article 91 of the 2001 Gacaca Law
Article 96 of the 2004 Gacaca Law states that “other forms of compensation the victims receive shall be determined by a particular law” without further explanation. A version of the compensation law for victims of the genocide was drafted and discussed by the Council of Ministers in August 2002 but was not put to the National Assembly. A new version of the bill putting in place an Indemnity Fund has been circulated but not yet passed. There are two main obstacles to this law: firstly, the Government has not reached a consensus on the definition of a victim and secondly, it does not know how to finance the fund.\textsuperscript{459} The new bill provides that each survivor should be given a fixed amount of FRW 11,500,000.\textsuperscript{460} This seems high. Few donors will be willing to fund a fixed reparation fund of this amount; a developmental approach makes much more sense in Rwanda. A previous draft had proposed a detailed scale of compensatory sums but this left complicated decision-making to Gacaca judges: a difficult task which may result in a lack of uniformity of awards across the country. The problem with a fixed sum is that it fails to recognise that some survivors suffered and continue to suffer more than others but logistically it is the simplest option by far. The Government must pass a form of compensation law as soon as possible. The inaction from the authorities has prompted many survivors to believe that the Government, who they thought would treat them as a priority and would take care of their future, does not care for them and in fact blames them for having survived.\textsuperscript{461}

During the fifth pre-Gacaca session, damages sustained by every household during the genocide are noted on Civil Party Forms. These damages are supposed to include the loss of family members, injuries and loss of property although Penal Reform International reports that some participants have been accused of overestimating their losses.\textsuperscript{462} Article 90 of the Gacaca Law states that the Gacaca Judgments are to be forwarded to the Compensation Fund for Victims of the Genocide and Crimes Against Humanity, which will then fix “the modalities for granting compensation”.\textsuperscript{463} This is a complicated process open to corruption and manipulation. The major benefit, therefore, of a fixed sum payment is that these listed damages should be more accurate as they would not be used to

\textsuperscript{459} Personal contact with Avocats Sans Frontières, Belgium.
\textsuperscript{460} around US$23,500, interview with D Deprez, Coopération Technique Belge
\textsuperscript{461} A Sibomana, \textit{Hope for Rwanda: Conversations with Laure Guilbert and Hervé Deguine} 1 (1999) 144
\textsuperscript{462} Penal Reform International, \textit{Report V: Research on the Gacaca} (September 2003) 15
\textsuperscript{463} See Postscript for information on how the 2004 Gacaca Law alters this procedure.
determine the compensation award. This data will be useful in compiling a historical record of exactly what happened in Rwanda in 1994.

The main issue facing any compensation scheme is the definition of who is a ‘victim’. As Roht-Arriaza writes, “Governments have generally balanced the limited funds available against the needs and demands of affected individuals and families with unsatisfying results. For example, in Chile the Government decided to focus solely on those killed by the security forces, leaving aside the vastly larger number of those who were tortured while in detention and survived, and those who were forced into exile. While justified as a way to spend limited funds on the worst violations, the effect was to infuriate survivors, who read this as a lack of recognition for the severity of their own suffering and an attempt to paper over the extent of the crimes.”464 In Rwanda, the new bill restricts the beneficiaries to survivors. Rombouts observes that the definition of survivor, “any person who was persecuted because of their ethnic group or because their ideas were contrary to the genocide and the massacres”, in itself does not exclude one or other ethnic group465, but accepted use of the term does.

Who should receive the compensation is a controversial issue. Survivors and close family members of the dead should be entitled to compensation as should all of those who have suffered as a result of the death or injuries received by them or by members of their family. It is clear that many people have suffered from the former regime’s policy. There are those who suffered directly from the genocide and others who suffered indirectly from the discriminatory practices at school and in the workplace, particularly the civil service. The latter must not qualify for compensation in line with the floodgates argument. Those who suffered directly, however, must be compensated. The Government must be careful to ensure that not all survivors receive this money: those who have already received compensation through the Category Four ‘compensation as punishment initiative’ should not be eligible for the fixed amount compensation. This must be carefully monitored.

Herman suggests that the US Victims of Crime Act 1984 (VOCA) model for victim compensation may be useful for nations attempting to rebuild in the aftermath of war or dictatorship. This model places accountability on criminal perpetrators as a group and thereby avoids the problem of individual accountability where individual perpetrators have no assets or cannot be found. It provides compensation to victims from a trust fund based on fines levied on convicted perpetrators. The money is not paid by the Government through taxation. Although the majority of perpetrators in Rwanda could not afford to pay anything into this trust fund, if members of the former Hutu power elite who have fled to Europe and America were caught they could make a great contribution. There is the ability under the ICTR statute for some of their assets to be requisitioned. If this international institution could work closely with the Rwandan Government then perhaps the top offenders could be made to pay into a VOCA type compensation fund. From the survivors’ perspective, it is just for the instigators to pay and not the Government. Indeed, most ‘comfort women’ in Japan refused compensation from private donors insisting that those responsible pay themselves because “money alone is meaningless as a form of restitution.” From the Government’s perspective, they will be relieved of some of the compensation burden. Although in opposition to the philosophy of the model, the Government could top up the fund if it was insufficient to cover the compensation required. Additionally, the international community should contribute to the compensation fund through their own aid budgets as the international community is morally blameworthy for not stopping the genocide and for, in some instances, encouraging it.

Any compensation is most likely to be accepted if the compensation is accompanied by an apology. Marshall has noted that victims as a whole do not have exaggerated punitive feeling: in most cases relatively minor reparations and expressions of regret may satisfy victims that justice has been done as far as they are concerned. As Minow states, “at the heart, the apology depends upon a paradox. No matter how sincere, an apology cannot undo what was done, and yet in a mysterious way and according to its own logic, this is

466 42 U.S.C. 10603b(a)
precisely what it manages to do.”\textsuperscript{470} The apology, to have this mysterious effect, must be complete and sincere with an element of repentance. Monetary compensation should always be accompanied by an apology; an apology without any financial assistance can, as Minow writes, appear cheap.\textsuperscript{471}

With the population largely subsistence farmers with little or no income, a useful alternative to monetary compensation is community service provided it has a positive and direct impact on the victim. The work may take different forms depending on the needs of the particular community but it should contribute to, among other things, rebuilding infrastructure damaged in the genocide. Elsewhere, a community service punishment is given to a low-risk offender but in Rwanda, certain Category Two perpetrators will be eligible to carry out half of their sentence as community service. Importantly, they will carry out the other half of their sentence in prison which should reduce the misconception that the community service option is a soft, almost amnesty style punishment. Nonetheless, there is still a great danger of this perception being held by survivors and other community members. In fact, PRI report that the Tutsi population, both survivors and returnees, were generally shocked by the option of community service.\textsuperscript{472} A survey carried out by the National Commission for Unity and Reconciliation indicates that 90% of prisoners and of the population in general, and 75% of the survivors think that community service will favour reconciliation. This figure does seem high and care should be taken in relying on the results of a Government survey but even if slightly exaggerated, the increase is positive. Increased public understanding of gacaca through public awareness campaigns should remedy any remaining doubts ensuring that the Rwandan population as a whole understands that community service makes a positive contribution to community life.

PRI and Dignité en Détention, conclude that the success of Gacaca depends on the success of Community Service.\textsuperscript{473} It should be a top priority for the Government and yet the community service programme is progressing very slowly and the level of misinformation about both the community service programme and the guilty plea provision is still low. Other national events such as the 2003 elections have taken priority. However, PRI now

\textsuperscript{470} M Minow, \textit{Between Vengeance and Forgiveness} (1998) 114
\textsuperscript{472} Penal Reform International \textit{Interim Report} (July-December 2001) 9,10
\textsuperscript{473} Penal Reform International, \textit{Report V: Research on the Gacaca} (September 2003) 16
notes that some highly qualified persons were appointed as members of the Executive
Secretariat of the National Committee of Community Service and their office has been
opened. The provincial Community Service committees are in place, as well as those of the
pilot districts and sectors. The Ministry of Justice has even started training members of
these Community Service communities.\footnote{Penal Reform International, Report V: Research on the Gacaca (September 2003) 16}

Except in the case of property crimes, it is impossible to fulfil the ultimate aim of
reparation: to return the victim to the position he or she would have been in had the
violations not occurred. Nonetheless, the law sets out guidelines on how to reparate losses.
Principle 10 of the Proposed Guiding Principles for Combating Impunity for International
Crimes states that compensation includes the restoration of liberty, legal rights, social
status, family life, and citizenship, return to one’s place of residence, and restoration of
employment and return of property.\footnote{Proposed Guiding Principles for Combating Impunity for International Crimes, many contributors in M C Bassiouni (ed) Post-Conflict Justice (2002) 266-8}
Reparation should also include a guarantee that the harmful even will not reoccur. Compensation therefore includes material reparation such as monetary compensation, medical help and restoration of property as well as moral
reparation. Moral reparation offers the victim an opportunity to tell their story before an
acknowledging community and to see the perpetrator brought to justice. More basic moral
reparation includes the identification and exhumation of the bodies of victims, assistance in
reburials and culturally appropriate mourning ceremonies, as well as collective memorials
and days of remembrance.\footnote{N Roht-Arriaza, “Reparations, Decisions and Dilemmas” (2004) 27 Hastings Int&Comp L Rev 157, 159}
Guarantees of non-repetition include the reform of education, re-writing of history texts, education in human rights and tolerance, and the reform of

The new draft compensation bill suggests that compensation may be paid in the form of
services, particularly in the field of education, health and housing, but memorials are also a
useful form of reparation. They can play an important part in honouring the dead and
providing a reminder that the country must never experience a repeat of the atrocities. They
can contribute to the grieving process as the dead are officially acknowledged. Memorials
are therefore both a grieving and an educational device; teaching the next generation of the
horrors of the past generation. If carried out correctly, an annual commemoration and other
memorials can help to properly bury the past and point to a new future. There is, however, the potential that such memorials and commemorations re-open wounds, and worse, further polarises the two ethnicities. They must be sensitively carried out and open to both sides of the community with input as to their design from both sides. It is important that all victims are remembered. The victims of RPF atrocities outlined above must be included in such memorials.

Compensation and reparation in all its forms are an important part of the reconstruction of Rwanda and of reconciliation within communities. Reparations are visible and understood by all sides as an acknowledgement of harm done and suffered. As Roht-Arriaza comments, reparations also serve as a bridge between the notions of reparatory and distributive justice, between the spheres of political and moral life and economic well being.478

In conclusion, Gacaca’s aim to rid Rwanda of its previous culture of impunity has had limited success. While it may be impossible to satisfactorily punish the génocidaires, the symbolic action of calling criminals to account and imposing a punishment on them is extremely important in acknowledging the suffering of victims and ending the cycle of violence experienced in Rwanda. But fighting impunity involves more than trying génocidaires, it requires three categories of action: providing knowledge through airing the truth, providing justice and providing reparation.

Providing justice extends to judicially dealing with RPF soldiers who committed war crimes and crimes against humanity during and after the genocide. An important consequence of the Government’s refusal to acknowledge that RPF atrocities took place on the scale that they did is that Hutu in Rwanda see the Gacaca génocidaire prosecutions as victor’s justice. If punishment is only to be served upon those who lost the war then it is unlikely to act as a forceful deterrent to prevent a repeat of the genocide. In addition, to silence insurgents who claim that RPF soldiers committed many more crimes than they actually did commit, it is important that these soldiers are tried. Without such trials, the insurgents will gather more credibility while the Government loses its.

Bystanders must be released from their moral guilt and the condemnation placed upon them by survivors. Unless this moral guilt is recognised by the bystanders themselves, reconciliation will remain unachievable, as trust will be elusive. A suitable option for Rwanda would be to bring the community together in an informal meeting and allow bystanders to express their regret for having done nothing. Many innocent bystanders fear that by speaking of what they know during Gacaca sessions, they will be imprisoned so it is imperative that meetings are preceded by sufficient explanations to remove such fears.

Providing reparation is the third element in the fight against impunity. The compensation law that has been promised for many years must be passed and preferably reassessed by the Rwandan Parliament so as to provide developmental compensation. The Rwandan Government must ensure that the negative effects of any compensation programme are minimised. Such negative effects include resentment which will occur if survivors are seen to obtain special benefits when large sectors of the population suffered displacement or if scarce resources must be drained from other social programmes to pay for reparations.479 Compensation, when provided, should include material reparation such as monetary compensation, medical help and restoration of property as well as moral reparation which offers the victim an opportunity to tell their story before an acknowledging community and to see the perpetrator brought to justice. The requirements of moral reparation are met, to an extent, by Gacaca where Gacaca is succeeding. As many génocidaires live below the poverty line, the Victims of Crime Act model suits the Rwandan situation very well by placing accountability on perpetrators as a group and providing compensation to the survivors directly from the perpetrators.

5.4 Expedite the Genocide Trials

Justice delayed is justice denied and while Gacaca is much quicker than the ordinary courts, it is not the speedy solution it was promised to be. Trials are only just getting underway in the pilot sectors and the rest of the country is only starting to gather information through the pre-Gacaca sessions. The Government originally estimated that Gacaca would take three to five years to complete its task. The indications so far are that it will probably take closer to ten years for areas which were heavily affected by the genocide. Indeed, the Government estimated that it would take four months to complete the first and second phases of Gacaca while in fact it has taken over one and half years in the pilot cells. Additionally, it is estimated that around eighty per cent of those currently on remand fall into Category Two and must therefore go before the District courts. Being at the top of the Gacaca pyramid, these courts are the fewest in number.

Public awareness campaigns started well before the pilot schemes did and the willingness of the Rwandan population to participate in Gacaca, while high at the outset, has waned as time passes. The pilot Gacaca Cells were frequently behind schedule for a number of reasons, most particularly, a lack of participation. This may be attributed to a number of factors including the agricultural seasons, local festivals and the presidential election.

The expectation of a dramatic acceleration in the pace of justice has not been fulfilled and without swift action, the hope placed on Gacaca will have been misplaced. The delay has affected participation, the perception of the tribunals and the ability of Gacaca to be viewed as an institution ending impunity and of reconciling polarised communities. Yet without taking time to adapt Gacaca once problems have arisen and to ensure that as many fair trial rights can be assured as possible Gacaca will also fail in its objectives. The key to successful Gacaca is efficiency, not haste.

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480 Interview conducted by the author with J-P Jeunet, Coopération Belge and Amnesty International, AFR 47/008/2004 The enduring legacy of the genocide and war
481 See Postscript for information on how the 2004 Gacaca Law has changed this.
482 Human Rights Watch World Report, Rwanda – January 2005
5.5 An Indigenous Method to Solve a Rwandan Problem

The Rwandan Government focuses on the ability of Gacaca to show Rwandans that they have the capacity to resolve their own problems using an indigenous method. The importance of this point cannot be underestimated in a country so recently made independent and where the atrocities were carried out by Rwandans on Rwandans.

Gacaca is susceptible to influence from local authorities but its decentralised nature should minimise the potential for Government interference. It is likely that there is great truth in Daly’s assertion that that “weakening the role of the Government may enhance the trust that people have in the process. The less control the Government has over the trials, the more credible the outcome of the trials may become.” This use of subsidiarity ensures that every Rwandan feels real ownership of the process and that justice is visible to those who suffered as well as the perpetrators, making it as relevant as possible to the local population.

483 The issues of participation and decentralisation are dealt with in other sections, namely, the participation chapter and the reconciliation chapter respectively. Whether modern Gacaca really does reflect traditional Gacaca is discussed above in ch 3, 2. a.
5.6 Unite and Reconcile Rwandans

Reconciliation is necessary throughout Rwanda, not just between perpetrators and victims but within each community. Reconciliation will heal broken lives and shattered communities as individuals are brought together and learn to trust and work with each other. In time, respect for one another will be translated into respect for the rule of law and human rights. Yet reconciliation cannot be achieved by using one specific mechanism, every individual has specific needs that must be met in order for reconciliation to be achieved. Rwanda has invested in the Gacaca process in the hope that a bottom-up, grassroots approach will meet as many of these needs as possible.

To foster and encourage reconciliation is Gacaca’s most challenging but most important long-term goal. A concern held by many human rights observers is that the punitive aspects of Gacaca have outweighed the reconciliatory aspects due to the dominance of lawyers in Gacaca’s design. The fact that Gacaca only tries crimes of genocide and not other crimes against humanity and war crimes has caused some observers to describe the process as ‘criminogenic’, stating that it prepares the way for a further cycle of oppression and conflict.

Reconciliation requires healing, justice, truth and reparation. Gacaca is actively involved in working towards the first three. It promotes healing by giving a victim the opportunity to tell his or her story, it advocates truth in its very nature and it delivers justice with its sentencing powers.

Reconciliation is an aim and a process. It is a process which should take the deeply divided Hutu and Tutsi and join them together as Rwandans. The time that reconciliation takes should not be negatively perceived; reconciliation should not and cannot be rushed. Any reconciliation process that appears to take place quickly is unlikely to be genuine. Indeed, the Jews were not expected to immediately forgive Nazi Germans for having carried out genocide. It is no different in Rwanda except that reconciliation is more urgent given the close proximity of perpetrator to survivor. In addition, a desire for reconciliation cannot be

486 J Fisher, researching NGO involvement in Rwanda, personal contact.
487 Reconciliation After Violent Conflict: A Handbook IDEA ch 2.3 (http://www.idea.int)
assumed and much work is needed to encourage a genuine change in attitude, rather than force a false reconciliation.

At the very least reconciliation means ‘peaceful co-existence’, at best it involves forgiveness and repentance on all sides with a rebuilding of trust and community in each local area. Reconciliation is often summarised by academics who work in this field as ‘closure, healing and rehabilitation’ or as a process through which the parties involved in a destructive conflict try to re-establish a relationship which is felt to be the minimum acceptable. Rwandans describe it as “living together without fear”. To achieve true, lasting reconciliation Rwanda should take effective steps to address the root causes of the genocide such as poverty and inequitable access to political, social, economic power. As Fatouma Ndangize, the Executive Secretary of the Rwandan National Unity and Reconciliation Commission observed, “states cannot reconcile people but they can adopt socio-economic and political policies that foster reconciliation among people”.

There are essentially three stages to reconciliation although they will not necessarily occur in this order. First, fear must be replaced by non-violent co-existence. Minimum physical security is fundamental and a justice system or other mechanism must remove the desire for revenge. People must be able to live in relative safety in their communities. This has not yet been met in some areas of Rwanda where the security situation changed as people began to talk about Gacaca. The Gacaca Co-ordinator for Butare said that he could easily foresee attacks following a Gacaca session with heightened emotions coupled with the inability to leave the community. A temporary increase of ethnic tension was to be expected during Gacaca hearings because survivors will relive their genocide experience which may bring hidden fears and anger to the fore. Indeed, in some communities instead of reconciling the population, Gacaca is in fact creating a gulf between the survivors and non-survivors which did not previously exist as well as a fresh upsurge of rumours relating

491 There three stages are taken from Reconciliation After Violent Conflict: Policy, IDEA (http://www.idea.int).
492 Interview conducted by the author with Bukuru, Gacaca Co-Ordinator for Butare.
to poisoning or group denunciations.\footnote{Interview conducted by the author at a Gacaca session in Kabuga Province and Penal Reform International, \textit{Report V: Research on the Gacaca} (September 2003) 5.} It is unlikely, however, that the division appeared from nowhere, it is more likely that it was expressed in the Gacaca context for the first time.

Amnesty International reports that crimes of sexual violence continue to be perpetrated by members of the current Rwandan military, the security forces and militia. In rural Rwanda, young men with minimal training are given uniforms and guns and sent to patrol the communities as part of the Local Defence Force. These young men have been accused of raping women in many local communities and are rarely prosecuted. Amnesty International report that they act with near total impunity and that local human rights organisations are not permitted to disseminate research about these abuses.\footnote{Amensty International, \textit{Rwanda: “Marked for Death”, rape survivors living with HIV/AIDS in Rwanda} (2004)} In addition, Rwanda is still involved in the violence in Eastern DRC and while instability remains in the Great Lakes region of Africa, Rwanda will not be secure. The Government claims that the war between Rwanda and Congo is not an act of aggression but a justified war resulting from the necessity of self-defence: to defend Rwanda’s sovereignty and fight against the \textit{Interahamwe} who fled to the DRC after the genocide.\footnote{The New Times, \textit{A nation in the mirror of the world} (July 28-30 2003)} Nonetheless, it still contributes to the feeling of insecurity.

Gacaca witnesses have been killed although the general feeling among the NGO community is that these are isolated incidents. Even so, the large amount of coverage they received in the media gives the Rwandan population the impression that they are widespread. These isolated incidents have even gone before Parliament and create more fear in a country that needs security to reconcile. A Rwandan court sentenced five people were sentenced to death for the killing of one genocide survivor who was due to testify in the Gacaca justice system and in another instance sentenced nine people to death and one to life imprisonment for the killing of a genocide survivor who was due to testify at Gacaca.\footnote{Addis Tribune, UN Integrated Regional Information Networks, \textit{Rwanda: Five Sentence to Death Over Killing of Genocide Survivor} (March 1 2004) and UN Integrated Regional Information Networks: http://allafrica.com/stories/printable/200403080134.html.} A strong judicial reaction to these killings should act as a deterrent to future murders but more must be done to ensure security at Gacaca sessions.
The next stage of reconciliation is where trust and confidence are rebuilt within communities. Confidence is clearly a bilateral and multilateral experience but it must also involve a personal change. Victims and perpetrators must have confidence in themselves. This is particularly important in Rwanda where the Tutsi had been strongly dehumanised through pre-genocide propaganda. This stage also includes individualising responsibility as the victims come to realise that not all Hutu are guilty. This should encourage trust to be built between individuals of both groups. Gacaca is important in this context as it helps individualise responsibility and should build trust if the bystanders are willing to testify.

The third stage is ‘towards empathy’ where both sides are willing to listen to the other sides’ genocide experience in an atmosphere of truth and sympathy. This allows each person to understand the other and by this stage the individual actors should have realised that they must find a way to interact peacefully with each other. No community will ever be free from conflict nor will victims forget what happened but empathy will create a situation where people can live and work next to each other again. Empathy, according to IDEA, does not automatically lead to forgiveness and nor should it. Nonetheless, IDEA does recognise that pardoning offenders will broaden the basis for empathy.

The cathartic action of recounting a genocide experience before a group of peers and those in authority will be one of the most positive aspects of the Gacaca process and will contribute to the towards empathy stage. Lukas Baba Sikwepere, shot and blinded by the police while being arrested, spoke of his appearance before the TRC, “I feel what… what has brought my sight back, my eyesight back to come back here and tell my story. But I feel what has been making me sick all the time is the fact that I couldn’t tell my story. But now I… it feels like I got my sight back by coming here and telling you the story.” Such a reaction, however, is contingent upon a sympathetic audience. The TRC provided such an audience but not all local communities in Rwanda will provide a suitable audience for traumatic testimony.

For survivors, psychological healing is also necessary for reconciliation. The genocide was perpetrated by Rwandans against Rwandans causing a deep rupture in society and leaving

497 A term used by Reconciliation After Violent Conflict: Policy, produced by IDEA (http://www.idea.int)
many extremely traumatised. In recognition of this, the Department of Gacaca, the Ministry of Health and various NGOs are working together to provide counselling before, during and after the trials. This is not available at every Gacaca session although it is an excellent ideal to aim for. Advocates of the Gacaca system, as a hybrid between the ordinary justice system and a truth commission, claim that it can achieve more healing than a truth commission by better vindicating the victim’s desire for revenge but also provide the same level of truth discovery. Although the therapeutic value of commissions is unknown, Tina Rosenberg finds parallels between truth commissions and the therapeutic process that helps individual victims deal with post-traumatic stress disorder. The process of truth telling and mourning helps the survivor to reconnect with their community and relieve the burden of their experiences. As Minow writes, “the goal is not exorcism but acknowledgement… therapists working with survivors of political torture have found the process of developing and revising testimony an important element of healing. Facing, rather than forgetting, the trauma is crucial if a victim hopes to avoid reproducing it in the form of emotional disturbances… by confronting the past, the traumatised individuals can learn to distinguish past, present and future.”

In terms of stability and security, local unity is far more important than national unity. As a decentralised initiative, Gacaca is a bottom-up approach which sees society more than as the sum of its parts, where a healthy society requires healthy members. The members must feel safe and happy in their communities and it is these communities which then combine to form the nation. In a country like Rwanda which has many rural communities, the bottom-up approach is particularly useful. Victims of apartheid in South Africa wanted a detailed history of the atrocities in their community more than a broad picture of different forms of suffering in order to remove suspicions they still held about informers and other perpetrators. The Gacaca system is much better at providing a forum for the whole truth to be known about the genocide in a particular area. Alongside these more personal and local

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500 For example, a widow’s association, AVEGA, brings female victims of sexual violence together before the trial to inform them of what will happen and to help them to explain publicly what happened to them during the genocide. See AVEGA and F Digneffe and J Fierens (eds), Justice et Gacaca: L’expérience rwandaise et le génocide (2003) 108 for more details.


issues, there must be an element of a top-down approach where those in charge abide by the rule of law and set an example for others to follow.  

The Government believes that reconciliation is achievable because it existed before the arrival of the colonialists. It cites examples such as all groups sharing the same language, religion and culture. The Government emphasise that there were no wars between the ethnic groups before the coming of White people and that Hutu, Tutsi and Twa were essentially social classes or castes, not ethnic groups. Yet historical experience will not lead to reconciliation and unity today. Reconciliation can only be achieved by Rwandans, as individuals. As Sylvestre Uwibajije writes, “nobody except the Rwandans themselves will be able to bring reconciliation to Rwanda. It’s a Rwandan affair, they are the only people who know the wrong they did, how much they suffer, the problems at the root of the atrocities, of their hatred, of their fears and finally of the benefits they would take from national reconciliation”. Reconciliation, therefore, does not rely on history but requires every Rwandan non-survivor to understand exactly how they contributed to the genocide, acknowledge wrongdoing.

Henri Nouwen has argued that “compassion pulls people away from the fearful clique into the large world where they can see that every human face is the face of a neighbour. Thus, the authority of compassion is the possibility of man to forgive his brother, because forgiveness is only real for him who has discovered the weakness of his friends and the sins of his enemy in his own heart.” The Tutsi in generations past have committed ethnic discrimination albeit not to the extent of genocide. An acknowledgment that the Tutsi are not guilt-free and also need forgiveness is key to reconciliation. Two-way forgiveness is required. In response to George Carey’s request to the Irish for forgiveness, Cardinal Daly of Northern Ireland asked for forgiveness from the people of Britain in Canterbury Cathedral: “The original biblical term for repentance for forgiveness, metanoia, is a strong

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504 The extent to which this is currently being achieved in Rwanda will be discussed below in the Participation section.
505 Report on Consultative Meetings held at grassroots level by the NURC Executive Secretary, 41
507 While such acknowledgement will not directly impact Gacaca, it will help non-survivors to accept the moral responsibility they have in actively participating in Gacaca.
509 See the work of Rhiannon Lloyd and African Evangelical Enterprise for more details on this method of reconciliation.
A survey which took place throughout Rwanda found that “80% of the population believe that reconciliation is possible; that Rwandans could live together again in harmony and that justice will play an important role in this reconciliation”. In another survey, 91% believed that gestures indicating community solidarity, participation in communal events and activities and providing assistance to the sick were more common than a few years ago and 91% agree that Rwanda is on the way to building a country where different ethnic groups will be able to live together in peace. Many Rwandans give the impression of being eager to embrace reconciliation naming it a likely outcome of the Gacaca process. According to Harrell, if you “mention Gacaca to even a poorly educated Rwandan…he will give a well thought-out opinion that indicates that people are aware of the process and discussing it among themselves”. But this is too naïve, many Rwandans appear frightened to indicate an opinion on Gacaca other than that publicised by the Government. When willing to speak openly, individuals are much more critical of Gacaca. It is clear therefore that the public awareness campaigns have been very effective in explaining the purposes of Gacaca but less so in describing what these purposes actually entail and in selling the idea of Gacaca to Rwandans. In 2001, Penal Reform International reported that ‘reconciliation’ remains just an often-quoted word without much substance in Rwanda.

Some feel that there can be no reconciliation while there are innocent people in prison and to this extent, Gacaca should be one stepping-stone on the path to reconciliation. While innocent Rwandans remain in prison, many have been released and the acceptance of

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511 From a speech by Madame Inyumba, Hirondelle News Agency, Role important des Gacaca dans la réconciliation. (October 12 2001). Author’s translation.
512 Evaluation of the Gacaca Promotional Campaign in Rwanda Ministry of Health, National Population Office and John Hopkins University (February 2003) ch 4, paragraph 4.2
513 P Harrell, Rwanda’s Gamble: Gacaca and a New Model of Transitional Justice (2003) 95
514 For example, a former RPF soldier interviewed openly told me his true hopes and fears about Gacaca but when asked to repeat them for recording purposes, he refused and when asked to write them down he simply listed the Government objectives of Gacaca and gave no indication of independent thought.
Gacaca in these areas has increased. Gacaca should help to remove suspicions between both sides, especially as to who did what in 1994.

In conclusion, it is clear that reconciliation requires a safe and secure environment where relationships can be rebuilt and people can learn to trust one another again, moving to a situation where their genocide experience no longer controls their lives. Insecurity in some areas of Rwanda jeopardises the reconciliation process and reduces the likelihood of the first stage of reconciliation, non-violent co-existence, being reached. But where insecurity is not an issue, the rebuilding of trust and confidence, the second stage of reconciliation, is underway as survivors rebuild self-confidence destroyed by the years of propaganda and trust and confidence is rebuilt within communities. Gacaca can then provide a forum for the third stage of reconciliation, towards empathy, to be reached. Providing an opportunity for victims to express their genocide experience in a sympathetic environment is Gacaca’s greatest contribution to the reconciliation process.

In addition, to truly contribute to reconciliation, any judicial decision rendered by the Gacaca tribunals must be accepted by the victims, perpetrators and the population as a whole. If the prosecutions are accepted by Rwandans then their most important impact will be in the establishment of the rule of law in this previously lawless state. It will show a clean break between the current Rwanda and that of the past. Justice will help prevent revenge killings and visible, participative justice may quench any desire for revenge among survivors, ascribe guilt to individuals and dispell the myth that all Hutu are to blame reducing fear, building trust and stability and creating a situation of individual rather than collective responsibility. A means of allowing victims of RPF atrocities to express their experience is equally crucial to reconciliation.

Gacaca Justice is intricately involved in the web of mechanisms to encourage reconciliation and acts alongside economic growth, with its corresponding poverty reduction, and sufficient reparation for all victims. Gacaca justice, therefore, plays a key role in encouraging and facilitating reconciliation within the numerous Rwandan communities but as has been discussed, the judicial system alone cannot achieve what is a personal and lengthy process.

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516 Butare Province Gacaca
5.7 Allow the Population to Participate in the Administration of Justice

Gacaca is a fragile mechanism and its success is wholly dependent upon the participation of the Rwandan population. A lack of participation may produce a result worse than inaction. Participation is key to the success of Gacaca, both judicially in freeing the innocent and convicting the guilty and in the reconciliation process. In one important survey, 54.8% of respondents in areas where Gacaca had started indicated that they had participated in Gacaca meetings and 83.9% of other respondents were yet to participate but indicated an intention to do in the future.\textsuperscript{517}

The very first opportunity to participate was in electing the \textit{Inyangamugayo} and the country overwhelmingly took part.\textsuperscript{518} During the pre-Gacaca gathering of information sessions participation was also healthy. Penal Reform International report that when Gacaca started at Cell level, the population turned up almost everywhere in large numbers, far above the quorum required, and in general they showed a lot of interest and curiosity.\textsuperscript{519} Problems, however, developed around the sixth session when the population was required to accuse or defend prisoners. A study by Rwanda’s Commission for National Unity indicates that 54% of the population do not wish to participate actively in Gacaca. This attitude must be changed if Gacaca is to succeed. The local population are often frightened that if they give any information they will be implicated and prosecuted\textsuperscript{520} or that they will be attacked by prisoners’ families.

Both ethnicities have reasons not to participate. The survivors make up the largest proportion of those attending Gacaca sessions but even they lack confidence that Gacaca will achieve its aims and this affects their willingness to participate. Many Tutsi doubt that the truth will be discovered because they now realise that the general population is unwilling to actively participate in Gacaca and they question the willingness of detainees

\textsuperscript{517} Evaluation of the Gacaca Promotional Campaign in Rwanda Ministry of Health, National Population Office and John Hopkins University (February 2003) ch 5, paragraph 5.2.3
\textsuperscript{518} 95.5% of Rwandans displayed an intention to participate in the elections: S Gasibirege “Résultats définitifs de l’enquête quantitatives sur les attitudes des Rwandais vis-à-vis des juridictions Gacaca” in Cahier du Centre de Gestion des Conflits No.6, National University of Rwanda (Nov 2002), and 75.9% of respondents to another survey participated in the elections: Evaluation of the Gacaca Promotional Campaign in Rwanda Ministry of Health, National Population Office and John Hopkins University (February 2003) ch 4, paragraph 4.2
\textsuperscript{519} Penal Reform International Report III (April – June 2002) 8
\textsuperscript{520} Penal Reform International, Report V: Research on the Gacaca (September 2003) 31, 33
to speak out. Some survivors have stopped going to the sessions after realising that they cannot testify at many of the pre-Gacaca sessions. This could be remedied by a suitable public awareness and understanding campaign that explains the purpose of each stage of Gacaca and how the different stages link together. Additionally, some survivors do not want to attend the Gacaca sessions because they do not want to know what happened eleven years ago; it is too traumatic. They would prefer to forget. There must be suitable psychological help available for these survivors to cope with the truth. Survivors, above all, fear revenge from prisoners and their families if they testify against a perpetrator. There is instability in areas of Rwanda and widely publicised killings of Gacaca witnesses will have made a deep impact in the willingness of all eye-witnesses to testify and survivors in particular. The Government must ensure that the Gacaca setting is safe and secure and the witnesses have real protection from intimidation.

Participation is also very low among Hutu who lost family members as a consequence of RPF atrocities. They lost interest in Gacaca when it became clear that their dead relatives would not be taken into account. A simple acknowledgement of their suffering through compensation, an apology or even punishing the offender would help them to increase their self-esteem and see the overall community benefits of Gacaca. The general population, while claiming to believe in Gacaca’s aims, are less likely to attend the sessions than survivors are. The result is that there is an ethnic imbalance at Gacaca sessions and benefits such as rebuilding of trust and reconciliation are lost.

The problem of participation varies greatly from cell to cell and depends mainly on the size of the cell. As was stated previously, it would make more sense to have the quorum as a proportion of the adults living in the cell. In addition, the struggle for daily survival threatens the participation levels of Gacaca. The fields still need tending and other work still needs to be done: these priorities are often too high for Rwandans to participate in something that provides long-term benefit but no short-term gain to the community. Additionally, Gacaca sessions are often programmed to take place in the morning which coincides with the best time to be in the fields. Many people therefore arrive late, causing

521 Penal Reform International Interim Report (July-December 2001) 15
522 See Hirondelle, Les Gacacas, Un An Après (11 juin 2003), and interview conducted by the author with K de Jonge, Penal Reform International.
523 Interview conducted by the author with Cyprien, a survivor.
524 For example, Kabuga Province Gacaca
difficulties in raising the quorum. Some arrive up to six hours after the scheduled start time. Mothers do not attend the sessions because they do not want to sit for over four hours with young children in the heat. The morning would be better for them to meet but they do not want to wait for two hours for the quorum to be achieved. The following table is from PRI’s 2003 report:

<table>
<thead>
<tr>
<th></th>
<th>Avocats Sans Frontières, July 2002 N=15 sessions</th>
<th>PRI Sept 2002 N=50 Sessions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sessions that took place</td>
<td>87% (13/15)</td>
<td>82% (41/50)</td>
</tr>
<tr>
<td>Sessions in which a quorum was not reached</td>
<td>8% (1/13)</td>
<td>10% (4/41)</td>
</tr>
<tr>
<td>Adjourned sessions</td>
<td>13% (2/15)</td>
<td>18% (9/50)</td>
</tr>
<tr>
<td>Starting 11am or later</td>
<td>69% (9/13)</td>
<td>69% (20/29)</td>
</tr>
<tr>
<td>Active participation (discussions etc.)</td>
<td>40% (6/15)</td>
<td>18% (9/50)</td>
</tr>
</tbody>
</table>

The table above indicates that a rigid, sensible timetable is required for Gacaca. Sensible timing could resolve the frustrations felt by the population and the judges as they wait for the quorum to be achieved. Such frustration hampers the acceptance of Gacaca by the population and will, in turn, encourage others to be late, exacerbating the problem.526

Poverty is a major problem in Rwanda, unless this is dealt with, participation will always be poor. A 2001 estimate places sixty per cent of the Rwandan population below the poverty line.527 As Gacaca instructor, Théogène, stated, “the judges pointed out to me that the Gacaca hearing couldn’t function well as long as the population doesn’t have anything to eat”.528

525 Interview conducted by the author with the Gacaca Coordinator, Butare Province. At the Butare Province Gacaca the session started around 1.15pm and it was scheduled to commence at 9.30pm.
526 Article 22 of the 2004 Gacaca Law provides that the day and time of Gacaca meetings is to be fixed by the General Assembly. It is therefore up to each Cell to decide when the most suitable time to meet is and should resolve these additional participation obstacles.
Some judges claim they were elected against their will\(^{529}\) where there were an insufficient number of judges standing for election. These judges will not be committed to their task. The majority of judges do attend faithfully and are committed to their office but when the needs of the field are greater, they will not attend the session as daily survival is also a struggle for these volunteer judges. For those who are employed, African Rights report that employers have not been sympathetic to the need for judges to attend Gacaca training sessions.\(^{530}\) To be given a small remuneration could greatly increase judges’ attendance as this could replace their normal salary on Gacaca days encouraging more employers to permit the judges to attend.

Fifteen out of nineteen judges is the quorum.\(^ {531}\) This is too high in small communities where illness and family issues also affect a higher proportion of people. It is not unknown for at least four judges to attend the funeral of the same person. In one Gacaca session attended, extra temporary judges were elected and sworn in on the day itself.\(^ {532}\) While this may appear to be a practical solution, these new judges had received no training and they were only elected by the members of the community who attended the Gacaca session that day, not the community as whole who elected the permanent judges.

Another problem hindering participation is the lack of interest from educated Rwandans. Rwanda is still an extremely hierarchical country which needs its leaders to embrace an idea, for the population to accept and trust it. A Penal Reform International interviewee comments, “intellectuals and local authorities don’t participate – it’s something for the peasants”.\(^ {533}\) This group of the population generally do participate when the meeting directly affects them or discusses members of their own family but tend to view their time as more important than contributing to the process as a whole.\(^ {534}\) Many Rwandans state that “if there was one session where they could go to find out what happened to their loved ones then that would be great but to go there week after week, to go for a year before I hear anything, maybe not even hear anything – that won’t be happening!”\(^ {535}\) Most educated Rwandans interviewed supported the idea of Gacaca but had yet to attend the session in


\(^{531}\) Article 23 of the 2004 Gacaca Law changes this to seven of the nine judges are required for a Gacaca meeting which leads to problems if more than two cannot attend.

\(^{532}\) Gikondo Gacaca


\(^{535}\) Interview conducted by the author with M Kabahizi of Aegis Trust
their home Cell. Interestingly, and rather surprisingly, there appears to be little difference in the participation levels between urban and rural areas. In fact, the aforementioned problem of educated Rwandans not embracing Gacaca is less noticeable in towns where they have easier access to the meetings. All politicians are required to mention the benefits of Gacaca in every speech they make which will help but the local personalities and business men must also participate to achieve the best results.

The current population in a given community is unlikely to be comprised of the same people as were there in 1994, especially in the more urban areas. People will not participate in a Gacaca to which they have no connection and they are unlikely to travel back to their home cell every week to participate in the correct Gacaca because of the time and expense involved. There are also those who have left their original cell because they felt threatened for one reason or another and are therefore even less likely to go back for the Gacaca tribunals.

There have been widespread public awareness campaigns but they have been far too shallow. The Government has been very successful in telling the Rwandan population to support Gacaca but actual knowledge about how the system works is limited despite intensive attempts by the Gacaca Bureau to explain Gacaca to the communities.\(^{536}\) In one survey, almost all respondents, 96%, had heard about Gacaca but more than four fifths of respondents incorrectly believe that the jurisdictions will try crimes of sexual violence and 96.1% did not know that Gacaca will not try the Category One masterminds of the genocide.\(^{537}\) Worryingly, it appears from various reports that increased knowledge about Gacaca is likely to make the individual more sceptical of the system’s ability to attain its aims and thus probably less likely to participate.\(^{538}\) People who know and understand Gacaca are vital in each community to explain the benefits and much work is needed to encourage these people to believe in Gacaca. Those who are influential and hold power within the community must be convinced that Gacaca could work with enough participation, physical and active, and they could then pass their enthusiasm to the rest of

\(^{536}\) Interview conducted by the author with G Umugwaneza, Advisor of Gacaca, Gacaca Bureau, responsible for Byumba and Kigali Ngali and Amnesty International, AFR 47/008/2004 \textit{The enduring legacy of the genocide and war}

\(^{537}\) Evaluation of the Gacaca Promotional Campaign in Rwanda: Ministry of Health, National Population Office and John Hopkins University (February 2003) ch 5, paragraph 5.1.1

\(^{538}\) For example, Penal Reform International, \textit{Interim Report} (July-December 2001)
the community. To some extent this role is fulfilled by those judges who are committed to their task but needs to be more widespread.

Due to insufficient attendance, the local authorities have taken to forcing people to attend and even fining those who do not attend.\(^{539}\) In such a situation, people may attend but are not there with an attitude to actively participate in the search for truth and such forced attendance goes against the spirit of Gacaca. Measures of compulsion imposed by local authorities give the impression that Gacaca is a process dominated by Government officials. If people participate in Gacaca because the law and the country requires them to do so then they are unlikely to testify and contribute to discovering the truth. They will also resent Gacaca and the survivors for requiring it and reconciliation will be greatly hampered.

The lack of participation is matched by a lack of active participation of those who do attend Gacaca. Penal Reform International has found that there is very little participation of the population, in physical terms and in terms of real participation: confessions and testimonies, either to accuse or to clear people.\(^{540}\) Many Gacaca participants have commented on how hard it is to testify at a Gacaca session.\(^{541}\) This is an extremely courageous act which may require more courage than a survivor can muster. The Gacaca session must be secure and have an atmosphere that welcomes testimony not frightens witnesses. The presence of local defence force soldiers during a Gacaca meeting is not sufficient to deal with the fear that retaliation will take place outwith the Gacaca setting. For peaceful co-existence to be a possibility, much greater security is required in the towns, and especially on the hills.

In conclusion, the participation of the General Assembly, so crucial to Gacaca’s success, is not meeting expectations. When Gacaca is attended, the participation is often not active and thus the truth remains elusive. The general population, while claiming to believe in Gacaca’s aims, are less likely to attend the sessions than survivors are. People must be gently encouraged, not forced, to attend Gacaca meetings and the example must be set by the influential people of each community. Some Rwandans are not actively participating in

\(^{539}\) Especially in the Kibuye area, interview conducted by the author with K de Jong of Penal Reform International.


\(^{541}\) Participants at Butare Province Gacaca
Gacaca because they fear personal incrimination but such fear is misplaced and is caused by a misunderstanding that Gacaca will punish bystanders. The result is that there is an ethnic imbalance at Gacaca sessions which makes reconciliation impossible in these communities. Further public awareness and understanding campaigns are crucial to remedy this misunderstanding. In addition, survivors and other eyewitnesses fear attack from perpetrators and the families of those accused of genocide. Such fear and suspicion is still widespread throughout Rwanda and Gacaca witnesses have been killed. Participation will only be active in a safe, secure environment where both sides are acknowledged and the arbitrators are impartial.
Chapter 6 Evaluation of Gacaca: a Frustrating Potential

Gacaca’s decentralised nature and use of a familiar, traditional process, ensures that every Rwandan feels ownership of the procedure and that justice is visible to those who suffered as well as to the perpetrators, making it as relevant as possible to the local population. It has the potential to achieve the best measure of justice for Rwanda but this form of justice is not recognised by critics who do not see past Gacaca’s violations of international fair trial standards.

**International Fair Trial Standards**

The arrest procedures immediately after the genocide did not meet international requirements, in particular Article 9(1) ICCPR. In addition, Article 9(2) entitles an accused to be promptly informed of the charges against them and some detainees are still awaiting information on the reasons for their arrest. The entitlement to be tried within a reasonable time is also breached although in the post-genocide context, Rwanda faces many practical difficulties and has an excuse for failing to comply with the reasonable time requirement. This is an example of how fair trial standards must be understood contextually and applied flexibly.

Another important fair trial standard is the entitlement to a fair and public hearing by a competent, independent and impartial tribunal established by law. Both the independent and impartial elements of this entitlement are in doubt in parts of Rwanda. There is a real danger of political and psychological pressure influencing Gacaca judges from state and from the community. While the judges’ voluntary status ensures they remain free from Government influence, it risks corruption. If they are genuinely short of money, they may jeopardise their integrity. Judges could be remunerated in some way and released from their obligation to take part in the weekly community work to avoid the temptation of such corruption.

The equality of arms principles are also breached by Gacaca’s procedures. Gacaca makes no provision for the participation of defence counsel. The Rwandan legislature defends this violation by focusing on the traditional nature of Gacaca. Gacaca is not conventional; there is neither a defence nor a prosecuting counsel. The strong argument that Gacaca falls outwith the type of tribunal to which this right is designed to apply is convincing. Having
defence counsel would be such a major departure from Gacaca’s roots as to make it the same as an ordinary criminal justice system and not the quasi-judicial mechanism that is seen as so important for Rwanda’s reconciliatory potential. Gacaca is a hybrid system mixing custom and formal law. Though the Gacaca courts are legally established judicial bodies, they were not created to duplicate courtroom procedure.

The international critics must realise that it is impossible for every fair trial right to be upheld in the circumstances. International safeguards cannot be ignored but must be interpreted and prioritised in reference to the Rwandan context. In the balancing act, the most important standard to those on remand is the right to a speedy trial which can be much better upheld through Gacaca than through the ordinary system. Other standards must rank below this necessity.

**Gacaca’s Aims**
Gacaca’s aims were ambitious and essential for Rwanda’s future but its many practical and logistical weaknesses mean that the practice of Gacaca is not always meeting its aims. Gacaca, when it works, should elicit the truth about what happened during the genocide in a participatory, communitarian forum acting as a catalyst for reconciliation and the rebuilding of mutual trust.

**Establish the truth**
While Gacaca holds the potential for discovering the truth, it also holds the potential to undermine the rule of law and perpetuate the culture of impunity if friends, family and neighbours refuse to hold people accountable for their crimes. In parts of Rwanda there is an increasing reluctance to testify at Gacaca meetings especially when testifying involves great personal risk and seems to produce no tangible results. It appears that in some parts of Rwanda, short term losses are overriding long term gains. When intimidated, the short term loss of security outweighs the potential long term gain of community reconciliation and mutual trust. But for individuals to have the courage to testify, their testimonies need to be seen as capable of changing things. The apparent inaction following some convincing prosecuting or defending testimonies further discourages active participation. Procedures to facilitate the sharing of information are also key to Gacaca’s success and must be a priority for the Government.
As LIPRODHOR comments, to know the whole truth is an unrealistic utopia\textsuperscript{542} and expectations for Gacaca must not be unreasonable. The start of Gacaca throughout the country should help to establish more of what happened in 1994 but it is impossible to discover everything. Despite all the hindrances to the discovery of truth, there is a feeling of hope in Rwanda, that, in the end, the truth will be revealed. This truth is probably dialogical truth, insufficient for legal purposes but of great use in the reconciliation process, using Gacaca in its greatest flexibility as a hybrid criminal justice system and truth commission. The truth is the most fundamental aim to the success of Gacaca and where it is aired, Gacaca works.

The lack of eyewitnesses who are not themselves perpetrators indicates that the confession procedure is key to Gacaca’s success in uncovering the truth. But the truth offered by confessing prisoners does not always appear to be the whole truth and sometimes tries to deflect blame from the perpetrator either onto other g\text{\`e}n\text{\`o}cidaires, who are often dead, or the former government through the attempted excuse of duress. The confession procedure’s potential contribution to the reconciliation process is greatly marred by the unwillingness of some confessors to ask for forgiveness from survivors, to express regret for their actions or to recognise their personal responsibility for their crimes.

It is important to remember that other communities are enjoying a very different experience of Gacaca where the truth is aired by community and perpetrator alike. Gacaca will result in much more truth being made known than would ever be discovered otherwise. The confession procedure is undoubtedly the best and only mechanism for gleaning more of the truth about what happened in 1994 in spite of the criticism against it. There are occasions where prisoners are confessing to serious crimes such as murder and in turn implicate others in the way the system was designed to work. As African Rights have reported, and as would be expected, the truths that the confession procedure elicit are uniquely credible to the communities because they come from the mouths of perpetrators.\textsuperscript{543}

The confession procedure’s major legal drawback is the difficulty of ensuring innocent detainees do not simply confess to be released from prison and of ensuring that confessing

\textsuperscript{542} LIPRODHOR, Juridictions Gacaca: Potentialites et Lacunes Revelees par les Debuts (2003) 48
\textsuperscript{543} African Rights, Confessing to Genocide: Responses to Rwanda’s Genocide Law (June 2000) 7
detainees admit the full extent of their crimes. This is probably inevitable in a country
where prisoners have been on remand for eleven years but the Gacaca system starting will
help and provided it is speedy, which is unlikely, innocent detainees could be released
shortly. Increased communication would also help; both sides must accept and understand
the procedure’s benefits for it to be a success. The required apology, if sincere, has an
incredible potential to foster reconciliation between perpetrators and victims but when
perpetrators blame other things for their crimes, the impact and power of their apology is
reduced. Yet there is no doubt that there was great pressure on génocidaires to kill. By
focusing the blame on those in authority, the confessors are acknowledging the genocidal
nature of the killings and the great guilt of the influential. This could have a powerful
effect on reconciliation if the survivors no longer fear individual perpetrators but those
who led the genocide who are now generally in exile, in prison as a Category One
génocidaires or at the ICTR.

End the culture of impunity
Gacaca’s aim to rid Rwanda of its previous culture of impunity has had limited success.
While it may be impossible to satisfactorily punish the génocidaires, the symbolic action
of calling criminals to account and imposing a punishment on them is extremely important
in acknowledging the suffering of victims and ending the cycle of violence experienced in
Rwanda. But fighting impunity involves more than trying génocidaires, it requires three
categories of action: providing knowledge through airing the truth, providing justice and
providing reparation.

Providing justice extends to judicially dealing with RPF soldiers who committed war
crimes and crimes against humanity during and after the genocide. An important
consequence of the Government’s refusal to acknowledge that RPF atrocities took place on
the scale that they did is that Hutu in Rwanda see the Gacaca génocidaire prosecutions as
victor’s justice. If punishment is only to be served upon those who lost the war then it is
unlikely to act as a forceful deterrent to prevent a repeat of the genocide. In addition, to
silence insurgents who claim that RPF soldiers committed many more crimes than they
actually did commit, it is important that these soldiers are tried. Without such trials, the
insurgents will gather more credibility while the Government loses its.
Bystanders must be released from their moral guilt and the condemnation placed upon them by survivors. Unless this moral guilt is recognised by the bystanders themselves, reconciliation will remain unachievable, as trust will be elusive. A suitable option for Rwanda would be to bring the community together in an informal meeting and allow bystanders to express their regret for having done nothing. Many innocent bystanders fear that by speaking of what they know during Gacaca sessions, they will be imprisoned so it is imperative that meetings are preceded by sufficient explanations to remove such fears.

Providing reparation is the third element in the fight against impunity. The compensation law that has been promised for many years must be passed and preferably reassessed by the Rwandan Parliament so as to provide developmental compensation. The Rwandan Government must ensure that the negative effects of any compensation programme are minimised. Such negative effects include resentment which will occur if survivors are seen to obtain special benefits when large sectors of the population suffered displacement or if scarce resources must be drained from other social programmes to pay for reparations. Compensation, when provided, should include material reparation such as monetary compensation, medical help and restoration of property as well as moral reparation which offers the victim an opportunity to tell their story before an acknowledging community and to see the perpetrator brought to justice. The requirements of moral reparation are met, to an extent, by Gacaca where Gacaca is succeeding. As many génocidaires live below the poverty line, the Victims of Crime Act model suits the Rwandan situation very well by placing accountability on perpetrators as a group and providing compensation to the survivors directly from the perpetrators.

**Expedite the genocide trials**

The expectation of a dramatic acceleration in the pace of justice has not been fulfilled and without swift action, the hope placed on Gacaca will have disappeared entirely. The delay has affected participation, the perception of the tribunals and the ability of Gacaca to be viewed as an institution ending impunity and of reconciling polarised communities. Yet without taking time to adapt Gacaca once problems have arisen and to ensure that as many fair trial rights can be assured as possible Gacaca will also fail in its objectives. The key to successful Gacaca is efficiency, not haste.

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An indigenous method to solve a Rwandan problem

The Rwandan Government focuses on the ability of Gacaca to show Rwandans that they have the capacity to resolve their own problems using an indigenous method. The importance of this point cannot be underestimated in a country so recently made independent and where the atrocities were carried out by Rwandans on Rwandans.

Gacaca is susceptible to influence from local authorities but its decentralised nature should minimise the potential for Government interference. It is likely that there is great truth in Daly’s assertion that that “weakening the role of the Government may enhance the trust that people have in the process. The less control the Government has over the trials, the more credible the outcome of the trials may become.”545 This use of subsidiarity ensures that every Rwandan feels real ownership of the process and that justice is visible to those who suffered as well as the perpetrators, making it as relevant as possible to the local population.

Unite and reconcile Rwandans

Reconciliation requires a safe and secure environment where relationships can be rebuilt and people can learn to trust one another again, moving to a situation where their genocide experience no longer controls their lives. Insecurity in some areas of Rwanda jeopardises the reconciliation process and reduces the likelihood of the first stage of reconciliation, non-violent co-existence, being reached. But where insecurity is not an issue, the rebuilding of trust and confidence, the second stage of reconciliation, is underway as survivors rebuild self-confidence destroyed by the years of propaganda and trust and confidence is rebuilt within communities. Gacaca can then provide a forum for the third stage of reconciliation, towards empathy, to be reached. Providing an opportunity for victims to express their genocide experience in a sympathetic environment is Gacaca’s greatest contribution to the reconciliation process.

In addition, to truly contribute to reconciliation, any judicial decision rendered by the Gacaca tribunals must be accepted by the victims, perpetrators and the population as a whole. If the prosecutions are accepted by Rwandans then their most important impact will

be in the establishment of the rule of law in this previously lawless state. It will show a clean break between the current Rwanda and that of the past. Justice will help prevent revenge killings and visible, participative justice may quench any desire for revenge among survivors, ascribe guilt to individuals and dispell the myth that all Hutu are to blame reducing fear, building trust and stability and creating a situation of individual rather than collective responsibility. A means of allowing victims of RPF atrocities to express their experience is equally crucial to reconciliation.

Gacaca Justice is intricately involved in the web of mechanisms to encourage reconciliation and acts alongside economic growth, with its corresponding poverty reduction, and sufficient reparation for all victims. Gacaca justice, therefore, plays a key role in encouraging and facilitating reconciliation within the numerous Rwandan communities but as has been discussed, the judicial system alone cannot achieve what is a personal and lengthy process.

**Allow the population to participate in the administration of justice**

The participation of the General Assembly, so crucial to Gacaca’s success, is not meeting expectations. When Gacaca is attended, the participation is often not active and thus the truth remains elusive. The general population, while claiming to believe in Gacaca’s aims, are less likely to attend the sessions than survivors are. People must be gently encouraged, not forced, to attend Gacaca meetings and the example must be set by the influential people of each community. Some Rwandans are not actively participating in Gacaca because they fear personal incrimination but such fear is misplaced and is caused by a misunderstanding that Gacaca will punish bystanders. The result is that there is an ethnic imbalance at Gacaca sessions which makes reconciliation impossible in these communities. Further public awareness and understanding campaigns are crucial to remedy this misunderstanding. In addition, survivors and other eyewitnesses fear attack from perpetrators and the families of those accused of genocide. Such fear and suspicion is still widespread throughout Rwanda and Gacaca witnesses have been killed. Participation will only be active in a safe, secure environment where both sides are acknowledged and the arbitrators are impartial.
Overall
The blueprint of Gacaca is an excellent one. Gacaca, contextually adapted, is an ideal model to respond to most post-atrocity situations. In the Cells where Gacaca is working, its success outstrips that which the ordinary courts could have had. Gacaca is better than the alternative of the ordinary courts as it responds to the many other needs of Rwanda’s communities, in particular, it provides a forum for the truth to be aired and a catalyst to community reconciliation. Gacaca is a clear example of where retributive and restorative models of justice meet, drawing on the benefits of each while using a system familiar to the Rwandan people.

Above all, the citizens of Rwanda must play their part. The state and the international community have put mechanisms in place to aid reconciliation but true reconciliation requires all groups involved to acknowledge their portion of the blame. Only through genuine repentance can true forgiveness take place and Hutus and Tutsis can once again live side-by-side in a climate of reintegration and reconciliation not a climate of fear, hatred, anger and suspicion.
Postscript: the 2004 Gacaca Law

In July 2004, the Rwandan Parliament passed a new Gacaca Law, repealing the 2001 Gacaca Law and the 1996 Genocide Law. The 2004 Law mainly involves procedural changes which may have a great impact on, for example, participation issues. It has only recently been implemented and there is, therefore, very little data available to assess the differences. Only assumptions can be made so far and these are outlined below. The thesis itself focuses on the 2001 Law since it has been in operation for a number of years and its effects are clear. For the purpose of this brief analysis, the 2004 Law has been grouped into the following categories:

1. Jurisdiction
2. Hierarchy
3. The Judges
4. Participation and sanction for non-participation
5. Rape and Sexual Violence
6. Compensation/Restitution
7. Categorisation
8. Confession and Guilty Plea Procedure
9. Court Etiquette
10. Punishments
11. By-standers

1. Jurisdiction
Article 1 now restricts Gacaca’s jurisdiction to Crimes Against Humanity and Genocide whereas, under the 2001 Law, Gacaca also had jurisdiction over war crimes.

This further reduces the likelihood that RPF crimes will be adjudicated.

2. Hierarchy
Article 3 provides for three tiers of Gacaca courts: at Cell and Sector level as well as a Gacaca Appeal Court at the Sector level. It removes the District and Provincial levels.

Article 4 states that the Gacaca Appeal Court has jurisdiction over Sector level Gacaca decisions only. There is still no appeal from the Cell courts for property, now Category 3,
crimes. This is a great cause for concern and the same issues arise here as arose from the 2001 Gacaca Law. The organs of the Gacaca Courts remain unchanged.

3. The Judges

Article 8 reduces the number of Gacaca judges required to form the Seat to nine (it was nineteen previously) with five deputies.

Article 10 prohibits a judge from sitting on a case in which he or she is a party or spouse, parent, grandparent, children, grandchildren or those of his or her spouse is a party, someone who is regarded as an enemy, as a close friend, someone for whom the judge is a guardian, any other relation considered incompatible with the honest person’s independence. The judge may testify for or against the prosecution in respect of that person.

Article 13 provides that the General Assembly will choose the nine judges and five deputies.

Article 23 states that the quorum for the Seat will be seven judges out of the possible nine. The deputies can be used if some of the seven judges are unable to attend. Further, if the quorum is not reached because some of the Seat members have been disqualified from sitting in a specific hearing, the deputies will take their place until the last decision or the end of the hearing. If the entire Seat is disqualified, recourse should be made to the nearest Gacaca jurisdiction (of the same level) for replacement judges. This does not prevent these neighbouring judges from continuing in their office in their own Gacaca jurisdiction.

This should greatly reduce the problem of judge absenteeism and the appointment of deputies should reduce the likelihood of having to postpone or delay a Gacaca session due to an insufficient number of judges. This could, however, increase the ability of particularly strong characters playing an overly influential role in the deliberations. Overall, a welcome improvement.

Article 103 states that the first General Assembly meeting of the Sector after the publication of this law is composed of all the judges elected at the Sector level as well as those elected to the Province and District level. At this meeting, the only business will be
the election of judges and their deputies for the Gacaca Appeal tribunal and the seat of the Sector Gacaca tribunal. The judges who are not elected return to the Cell Gacaca to count amongst those who can be elected as judges and deputies there.

4. Participation and sanction for non-participation

Article 29 places an obligation on every Rwandan to participation in Gacaca activities. Any person who does not testify or refuses to testify to something they saw or something they know about, as well as any person who makes a false or slanderous denunciation, will be prosecuted by the Gacaca jurisdiction where the offence took place. He risks a prison sentence of between three and six months. If the offence is a repeat offence, the defendant may incur a prison sentence of between six months and one year.

Article 30 provides that any person who exerts pressure, or attempts to exert pressure on witnesses or on members of the Seat of the Gacaca Jurisdiction, including blackmail, is liable to a punishment of imprisonment of between three months and one year. If the offence is a repeat offence, the defendant may incur a prison sentence of between six months and two years.

The following are regarded as exerting pressure: any actions, words or behaviour which aim to force members of the Seat to act against their will or to intimidate them indicating that if they fail to comply, some members of the Seat may face dangerous consequences. When this intimidation takes place, the provisions of the Penal Code and Criminal Procedure Code are applied in the ordinary courts.

Article 31 states that decisions taken under Articles 29 and 30 can be appealed within the Gacaca system.

Article 32 provides that detention pending trial is prohibited for persons prosecuted whose offences fall under Article 29 or Article 30. On hearing of such an alleged offence, the Seat of the Gacaca Jurisdiction where the alleged offence occurred, suspends the hearing and retires to examine the facts and if the prosecution of the offence is confirmed, the Seat fixes the date of the hearing and notifies the defendant. At the hearing, the floor is given to the General Assembly to gather further information. When the Seat takes an imprisonment
decisions, it fills out an arrest warrant which is forwarded to the nearest security organ or the representative of the Gacaca Bureau.

These Articles reduce the possible sentence for crimes of intimidation and refusal to testify to a more reasonable level. This may make it a more attractive option for a Gacaca Jurisdiction to use when faced with such an issue as previously these offences and sanctions were rarely used. Again, raising public awareness and understanding is the only way to ensure that these options are fully understood and implemented by Gacaca judges and understood and feared by the General Assemblies.

5. Rape and Sexual Violence

Article 38 provides that the victim may chose amongst the members of the Cell Gacaca’s Seat one or more than one judge to whom to submit her accusation. If there are none she trusts, she may submit it to the Office of the Judicial Police or to the Public Prosecution Department. If a Gacaca judge receives such an accusation, he/she must transfer it secretly to the Public Prosecution Department for further investigation. It is forbidden to plead guilty publicly for such an offence, nor is anyone allowed to accuse another person publicly of rape or sexual violence and all elements of this procedure take place in camera.

This is a fantastic improvement to the law and should help increase the number of women willing to testify to being raped. It is of fundamental importance, however, that this change is widely publicised and understood. Under the 2001 Law it was possible to testify in camera but the facility was rarely used as victims of rape and sexual violence were rarely aware that the option existed. Further improvements could include a nationwide fund to help these women travel to their local court once the case gets transferred.

6. Compensation

Article 39 states that the Gacaca Jurisdictions have the competence to, amongst other things, order the convicted person to pay reparation.

Article 94: “Cases relating to damaged property shall be brought before the Gacaca Court of the Cell or other courts before which the defendants appear. However, such judgments shall not be appealed against.”
Article 95: “The reparation proceeds as follows:
1. restitution of the property looted whenever possible;
2. repayment of the ransacked property or carrying out the work worth the property to be repaired.

The Court rules on the methods and periods of payment to be respected by each indebted person. In case of default by the indebted person to honour his or her commitments, the execution of judgment is carried out under the forces of law and order.”

Article 96: “Other forms of compensation the victims receive shall be determined by a particular law”. This law has still not been passed.

This is a useful option for the Gacaca tribunals. It is important to remember that few génocidaires will have the means to pay such reparation and the specific community-service type option could be extremely useful, provided the victim is willing to have the perpetrator in such close contact.

7. Categorisation

Article 41 provides that the Cell Gacaca Jurisdictions will try those in Category Three (which essentially replaces the old Category Four) and will continue to categorise defendants.

Article 42 states that the Sector Gacaca Jurisdictions will try those in Category Two and the Gacaca Appeal Court will hear appeals from the Sector Jurisdiction and appeals formed against judgments pronounced for the offences in Articles 29 and 30.

There are now only three categories. Article 2 states that Gacaca has jurisdiction over Categories Two and Three while the ordinary courts retain jurisdiction over Category One suspects. The new categories, found in Article 51, are as follows:

“First Category
1. The person whose criminal acts place them among the planners, organisers, inciters and supervisors and ringleaders of the genocide or crimes against humanity, together with his or her accomplices;
2. The person who, at that time, was in the organs of leadership, at the national level, at the level of Prefecture, Sub-prefecture, Commune, in political parties, army,
gendarme, communal police, religious denominations or in militia, has committed these offences or encouraged other people to to commit them, together with his or her accomplices;
3. The well-known murderer who distinguished himself or herself in the location where he or she lived or wherever he passed, because of the zeal which has characterized him or her in killings or excessive wickedness with which they were carried out as well as his or her accomplices;
4. The person who committed acts of torture on others, even though they did not result in death, together with his or her accomplices;
5. The person who committed acts of rape or acts of torture against sexual organs, together with his or her accomplices;
6. The person who committed dehumanising acts on the dead body together with his or her accomplices.

2nd Category
1. The person whose criminal acts or criminal participation place among killers or who committed acts of serious attack against others, causing death, together with his or her accomplices;
2. The person who injured or committed other acts of serious attacks with the intention to kill them but who did not attain his or her objective, together with his or her accomplices;
3. The person who committed or aided to commit other offences persons, without the intention to kill them, together with his or her accomplices.

3rd Category
The person who only committed offences against property.
However, if the author of the offence and the victim have agreed on their own, or before the public authority or witnesses for an amicable settlement, he or she cannot be prosecuted.”

There is very little change here except in numbering. Category 3 appears to be the old Category 4 and the 3rd section of Category 2 appears to replace the old Category 3. The purpose of this reclassification is unclear.
8. Confession and Guilty Plea Procedure

Article 54 allows any person who has committed the crime of genocide or a crime against humanity to have recourse to the confession procedure. The requirements for a confession are three-fold (as before):
1. give a detailed description of the confessed offence(s), in particular the location, the date, the witnesses, the names of the victim(s) and the damaged assets;
2. reveal accomplices and co-authors of the offence and any other useful information; and
3. offer an apology for the offence(s) committed.

It is unfortunate that the new law does not require the apology to be made directly to the victim or his family for reconciliation purposes.

Article 55 permits a génocidaire in the first category to use the confession procedure only if their name is not yet on the list and Article 56 allows a génocidaire in Category Two to use the procedure at any time. There is no change here.

Article 57 provides that if it is subsequently discovered that a person committed other offences that they did not confess to then that person can be prosecuted at any time for these offences and risks the maximum penalty provided for in the relevant category. This is a great improvement as it should discourage false confessions which were prevalent.

9. Court Etiquette

Article 71 provides that the hearing shall be conducted in quietness and that any person who takes the floor must be polite in speech and behaviour. This article allows the chairperson to warn troublemakers and to eject or detain such troublemakers for a period not exceeding forty-eight hours, according to the gravity of the offence.

This, if used, should ensure a more secure atmosphere during Gacaca sessions and encourage more timid witnesses to have the courage to testify. There is a danger, however, that the chairperson could use this procedure for personal reasons and therefore the procedure’s use must be carefully monitored.
## 10. Punishments

### Articles 72, 73

<table>
<thead>
<tr>
<th>Cat.</th>
<th>Found guilty by trial i.e. refused to confess</th>
<th>Confessed post arrest i.e. already on list of suspects</th>
<th>Confessed prior to arrest</th>
</tr>
</thead>
<tbody>
<tr>
<td>One</td>
<td>Life imprisonment or death penalty</td>
<td>Life imprisonment or death penalty</td>
<td>25-30 yrs imprisonment.</td>
</tr>
<tr>
<td>Two (1)</td>
<td>25-30 yrs imprisonment.</td>
<td>12-15 yrs imprisonment: half in custody, half in community service.</td>
<td>7-12 yrs imprisonment: half in custody, half in community service.</td>
</tr>
<tr>
<td>Two (3)</td>
<td>5-7 yrs imprisonment: half in custody, half in community service.</td>
<td>3-5 yrs imprisonment: half in custody, half in community service.</td>
<td>1-3 yrs imprisonment: half in custody, half in community service.</td>
</tr>
<tr>
<td>Three</td>
<td>Damages</td>
<td>Damages</td>
<td>Damages</td>
</tr>
</tbody>
</table>

As mentioned above, Category II(3) appears to be the same as the previous Category III and Category III appears to be the same as the old Category IV although now the Gacaca courts, when trying a Category II detainee cannot impose a life sentence. This is a welcome improvement but these courts still have the power to impose a sentence of 25-30 years which is a great responsibility.

Article 76 states that those in the first category lose their civil rights forever. Those in the second category (a) and (b) are liable to permanent deprivation of certain civil rights but they may be rehabilitated.

### 11. By-standers

A provision removing the crime of omission was retained in the draft 2004 Gacaca Law but seems to have been removed from the actual law. Such inaction, however, does not fall under any of the Gacaca categories and, in the context, is unlikely to be an office.
Appendix 1

Judgments by Jurisdiction in 2002

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Total number of people judged</th>
<th>Death Penalty %</th>
<th>Life Imprisonment %</th>
<th>Imprisonment in term of yrs %</th>
<th>Acquittal %</th>
<th>Other %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kigali</td>
<td>88</td>
<td>3</td>
<td>28</td>
<td>31.8</td>
<td>19</td>
<td>21.5</td>
</tr>
<tr>
<td>Gitarama</td>
<td>68</td>
<td>0</td>
<td>22</td>
<td>32.3</td>
<td>23</td>
<td>23.5</td>
</tr>
<tr>
<td>Butare</td>
<td>35</td>
<td>7</td>
<td>10</td>
<td>28.7</td>
<td>8</td>
<td>28.5</td>
</tr>
<tr>
<td>Gikongoro</td>
<td>77</td>
<td>2</td>
<td>35</td>
<td>45.4</td>
<td>21</td>
<td>24.6</td>
</tr>
<tr>
<td>Cyangugu</td>
<td>28</td>
<td>7</td>
<td>8</td>
<td>28.5</td>
<td>10</td>
<td>7.1</td>
</tr>
<tr>
<td>Kibuye</td>
<td>121</td>
<td>6</td>
<td>45</td>
<td>37.1</td>
<td>44</td>
<td>16.5</td>
</tr>
<tr>
<td>Gisenyi</td>
<td>112</td>
<td>4</td>
<td>37</td>
<td>33.0</td>
<td>43</td>
<td>23.2</td>
</tr>
<tr>
<td>Ruhengeri</td>
<td>129</td>
<td>14</td>
<td>35</td>
<td>27.1</td>
<td>41</td>
<td>27.9</td>
</tr>
<tr>
<td>Byumba</td>
<td>462</td>
<td>18</td>
<td>134</td>
<td>29</td>
<td>73</td>
<td>181</td>
</tr>
<tr>
<td>Kibongo</td>
<td>83</td>
<td>3</td>
<td>11</td>
<td>13.2</td>
<td>56</td>
<td>11</td>
</tr>
<tr>
<td>Nyamata</td>
<td>466</td>
<td>6</td>
<td>42</td>
<td>9.0</td>
<td>298</td>
<td>114</td>
</tr>
<tr>
<td>Rushashi</td>
<td>236</td>
<td>0</td>
<td>24</td>
<td>10.1</td>
<td>132</td>
<td>73</td>
</tr>
<tr>
<td>Military Tribunal</td>
<td>4</td>
<td>0</td>
<td>3</td>
<td>75</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>TOTAL</td>
<td>1909</td>
<td>70</td>
<td>434</td>
<td>22.6</td>
<td>787</td>
<td>528</td>
</tr>
</tbody>
</table>

Greater numbers were tried in Nyamata, Byumba, Rushashi, Ruhengeri, Kibuye and Gisenyi due, for the most part, to group trials. The number of judgments in 2002 is down on those delivered in 2001 because many judges were involved in training the gacaca judges.

Judgments delivered between 1996 and 2002

<table>
<thead>
<tr>
<th>Year</th>
<th>Total number of people tried</th>
<th>Death Penalty %</th>
<th>Life Imprisonment %</th>
<th>Imprisonment in term of years %</th>
<th>Acquittal %</th>
<th>Others %</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>379</td>
<td>117</td>
<td>123</td>
<td>32.4</td>
<td>105</td>
<td>27.7</td>
</tr>
<tr>
<td>1998</td>
<td>895</td>
<td>115</td>
<td>286</td>
<td>31.9</td>
<td>292</td>
<td>32.6</td>
</tr>
<tr>
<td>1999</td>
<td>1306</td>
<td>144</td>
<td>400</td>
<td>30.6</td>
<td>462</td>
<td>35.3</td>
</tr>
<tr>
<td>2000</td>
<td>2458</td>
<td>164</td>
<td>616</td>
<td>25</td>
<td>1130</td>
<td>46.0</td>
</tr>
<tr>
<td>2001</td>
<td>1416</td>
<td>120</td>
<td>370</td>
<td>26.1</td>
<td>577</td>
<td>40.7</td>
</tr>
<tr>
<td>2002</td>
<td>1909</td>
<td>70</td>
<td>434</td>
<td>22.7</td>
<td>787</td>
<td>41.2</td>
</tr>
<tr>
<td>TOTAL</td>
<td>8363</td>
<td>730</td>
<td>2229</td>
<td>26.6</td>
<td>3353</td>
<td>40.0</td>
</tr>
</tbody>
</table>

Note the increase in acquittals in recent years and the relatively high average.

Numbers increased recently thanks to group trials and other such initiatives.

Appendix 2 - Methodology

The aim of the study was to discover whether Gacaca in practice was meeting its many objectives and the consequent importance of these objectives for overall success in Rwanda. In undertaking this thesis I have carried out many types of research in Rwanda, Tanzania and in the UK. I have used documentary research and I collected my own data in the field through interviews within Rwanda and at the ICTR, Tanzania. Therefore a combined method was used with both primary and secondary data analysed.

The process of getting a pass to attend and observe Gacaca as a non-Rwandan is extremely bureaucratic and time-consuming. The opportunities to attend Gacaca sessions were limited, especially as I was in Rwanda when the majority of the pilot Gacaca jurisdictions had already reached the seventh pre-Gacaca meeting where the judges deliberate, in secret, the categorisation of suspects. I did try to attend some of these deliberations but I was never permitted to observe by the relevant Gacaca president. As a result I was only able to attend three Gacaca sessions in the time available. I tried to attend Gacaca in different settings and fortunately I was able to attend a session in three very different locations: rural, rural (closer to Kigali) and Kigali. I interviewed judges, officials and the general population before the meeting commenced and after these interviews I stayed to observe proceedings.

The opportunity to interview attendees at different locations as well as observe entire Gacaca sessions in rural and urban meetings gave me a greater insight into how the more educated Rwandans and those in professional or business related jobs perceive Gacaca compared with subsistence farmers.

Another great limitation to carrying out primary research was the difficulty in finding people who were willing to openly criticise Gacaca, particularly as most of the people who attend Gacaca are generally in favour of the innovation or were forced to attend by the local authorities. As a result I focused my research on the work of various NGOs in Rwanda whose remit is to regularly observe Gacaca and interview members of the general population. I was able to interview representatives from almost all of these NGOs and gathered a large number of research papers detailing their findings. In addition I interviewed Government representatives and amassed much governmental documentation regarding Gacaca and human rights in Rwanda to ensure that I retained a balance in my
research. I found both sets of people very willing to talk about their experiences of Gacaca, both on a personal level as well as on an organisational/governmental level. They were also willing to provide me with the most current information including statistical data, something that I was unable to gather myself.

In all of my interviews I asked questions which were relevant to the particular field of work of the NGO or government official, or which reflected an individual’s experience of Gacaca. The interviews did not follow a set pattern and developed along the interest and experience of the interviewee as would be expected. Nonetheless, the interviewees were always asked questions regarding their perception of Gacaca; what they thought was the perception of their community; what influenced their decision to attend/not attend Gacaca sessions; their opinions on Gacaca’s specific mechanisms such as the guilty plea procedure and community service; what they would change about Gacaca if they could change anything; their hope for Gacaca; and their hope for Rwanda through the use of Gacaca. Questions were then tailored to the individual’s experience of Gacaca.

The majority of the interviews were recorded on a mini-disk player which allowed me greater freedom when interviewing and allowed the interview to flow more freely but while most individuals were happy to be recorded, some were very uncomfortable with this and would not depart from the Government line. These were almost always members of the general population and not those involved with NGO work. In these cases, people were often much more willing to talk frankly and openly when all means of recording were put away, both microphones and paper. I was therefore dependant upon my memory when writing up the interview which is a clear limiting, but necessary, factor in an uncertain political climate. I did confirm later with my translator that what I had written accurately reflected the interview. While I could only reach a small number of Rwandans through my interviews, I felt that it was important to interview individuals from various sections of the community in order to confirm what NGO reports had concluded.

**Interviews carried out by the author**

**ICTR**
Roland K Amoussouga, Chief of External Relations, Arusha
Charles Kamuru, Press and Public Affairs
Tom Kennedy, Former Chief of Press and Public Affairs, Arusha
Stratton Musenera, Outreach Unit
Maxwell Nkole, Prosecutor, Investigation Strategy, Kigali
Paul Nzaba, Head of Witness and Victim Support Unit, Kigali
Laurent Waldon, Head of Investigation Centre, Kigali

NGO/PRESS
Irénée Bugingo, Researcher at the Institut de Recherche et de Dialogue pour la Paix (Research NGO studying obstacles to peace in Rwanda)
Mark Cumming, Trocaire (CAFOD)
Dirk Deprez, Coopération Technique Belge, working at The Ministry of Justice
Klaas de Jonge, Penal Reform International, Kigali (human rights NGO)
Gabriel Gabiro, Hirondelle correspondent (independant web based newspaper)
Manu Kabahizi, Aegis Trust (survivors’ organisation supporting the development of memorials in Rwanda)
Dieudonné Kayitare, IBUKA (survivors’ organisation)
Angela Nirere, IBUKA (survivors’ organisation)
Ruben Niyibizi, Director of LIPRODHOR: Ligue Rwandaise pour la Promotion et le Défense des Droit de l'Homme (Rwandan human rights NGO)

GOVERNMENT
Bukuru, Butare Province Gacaca Coordinator
Alphonse Ndeze, Charge Recherche, Memoire et Documentation Gacaca Bureau
Martin Ngoga, Formerly Rwanda’s Ambassador to the ICTR, currently Deputy Prosecutor-General of Rwanda
Peter Nyiramuruta, former RPF Soldier, Chief of Police in Byumba
Emmanuel Rukangira, Avocat Général, Parquet Général
Géraldine Umugwaneza, Gacaca Advisor, Gacaca Bureau, responsible for Byumba and Kigali Ngali.

OTHER
Jean Gakwandi, genocide survivor, head of reconciliation agency Solace
Déo Gashagaza, genocide survivor, head of Prison Fellowship Rwanda
Beata Mukarubuga, genocide survivor, worker for reconciliation agency Solace
Felix Ndahimana, Gacaca Judge Trainer
Edouard Nkunchiya, academic gacaca expert and lawyer

GENERAL POPULATION
Jacqueline Nyiramuruta, gacaca judge
Judges and members of the General Assembly at three Gacaca meetings
1. Butare Province, Save District, Zivu Sector, Musekera Cell;
2. Kigali-Rural Province, Kabuga Town, Rusororo Sector, Saruduha Cell; and
Members of the general population who wish to remain anonymous in Kigali and Byumba.

Many books and journal articles on international criminal law and fair trial standards were studied together with the texts of these standards, the various relevant Rwandan laws and the aforementioned NGO articles in order to assess Gacaca’s adherence to international fair trial standards. Likewise, books and journal articles were examined to achieve a greater understanding of the importance of each objective to Gacaca before the practice of Gacaca was analysed using the primary data collected by myself and the NGOs. Therefore books and journal articles were, on the whole, used to gather information about issues which are not solely issues that Gacaca faces. For example, the importance of discovering the truth in a post-conflict society is as high in Rwanda as it is in any other country seeking a mode of transitional justice. Primary data collected by myself and the work of NGOs was crucial in applying these concepts of truth, impunity, reconciliation, participation to the Gacaca context as there is a great lack of published academic material discussing the practice of Gacaca.

The internet was another research tool which was useful as it kept me in touch with changes in Rwanda although its use was greatly limited by the lack of up-to-date information on Gacaca. I found that retaining contact with people in Rwanda and with NGOs was a much better means of keeping abreast of changes. Newspapers were useful in ascertaining the current political climate in Rwanda as well as the security situation although it was always important to remember that the limited free press in Rwanda will affect what is reported.
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- Maxwell Nkole, Prosecutor, Investigation Strategy, Kigali
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- Irénée Bugingo, Researcher at the Institut de Recherche et de Dialogue pour la Paix
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- Mark Cumming, Trocaire
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- Klaas de Jonge, Penal Reform International, Kigali
- Gabriel Gabiro, Hirondelle correspondent
- Jean Gakwandi, genocide survivor, Head of reconciliation agency Solace
- Déo Gashagaza, genocide survivor, Head of Prison Fellowship Rwanda
- Manu Kabahizi, Aegis Trust
- Dieudonné Kayitare, IBUKA
- Beata Mukarubuga, genocide survivor, worker for reconciliation agency Solace
- Felix Ndahimana, Gacaca Judge Trainer
- Alphonse Ndeze, Charge Recherche, Memoire et Documentation Gacaca Bureau
- Angela Nirere, IBUKA
- Ruben Niyibizi, Director of LIPRODHOR: Ligue Rwandaise pour la Promotion et le Défense des Droit de l’Homme
- Martin Ngoga, Formerly Rwanda’s Ambassador to the ICTR, currently Deputy Prosecutor-General of Rwanda
- Edouard Nkunchiya, academic gacaca expert and lawyer
- Jacqueline Nyiramuruta, gacaca judge
- Peter Nyiramuruta, former RPF Soldier, Chief of Police in Byumba
- Emmanuel Rukangira, Avocat Général, Parquet Général
- Géraldine Umugwaneza, Advisor of Gacaca, Gacaca Bureau, responsible for Byumba and Kigali Ngali.

- Judges and members of the General Assembly at three Gacaca meetings
  - Butare Province, Save District, Zivu Sector, Musekera Cell
  - Kigali-Rural Province, Kabuga Town, Rusororo Sector, Saruduha Cell
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