

Justice and social reconstruction in the aftermath of genocide in Rwanda: An evaluation of the possible role of the *gacaca* tribunals

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1 Introduction

Rwanda was largely devastated in 1994. Among an endless host of problems, highly complex questions and dilemmas of justice, unity, and reconciliation haunt Rwanda to this day. A basic question confronting Rwanda is how to deal with the legacy of the conflict that culminated in the genocide of the Tutsi and in the massacres of Hutu opponents of the genocide. The United Nations (UN) set up the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania.¹ Rwanda has its own courts. In both cases, the process of trying accused *genocidaires* is long, laborious, and frustrating. Only eight convictions have been handed down in Arusha after five years of work, while in Rwanda only some 3 000 cases have been disposed of. At least 120 000 detainees are in prisons around the country. The majority of these prisoners are accused of

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1 On 8 November 1994, having determined that the 'genocide and other systematic, widespread and flagrant violations of international humanitarian law . . . committed in Rwanda . . . constitute a threat to international peace and security,' the Security Council adopted Resolution 955 whereby it established the 'International tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandese citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994' UN Doc S/RES/955 (1994). For an overview of the establishment of the Rwanda Tribunal, see P Akhavan 'The International Criminal Tribunal for Rwanda: the politics and pragmatics of punishment' (1996) 90 *American Journal of International Law* 501.

participation in the genocide. At the present rate it is estimated that it will take anywhere between two and four centuries to try all those in detention. The Rwandese government has developed a new procedure called *gacaca*, lower-level tribunals that attempt to blend traditional and contemporary mechanisms to expedite the justice process in a way that promotes reconciliation. This process is expected to allow communities to establish the facts and decide the fate of the majority of those accused of lesser offences, while at the same time addressing reconciliation objectives and involving the population on a mass scale in the disposition of justice.² The impact of *gacaca* remains uncertain. It certainly needs to be evaluated. An attempt is made here to evaluate the *gacaca*'s possible contribution to the perplexing questions of justice, unity and social reconstruction in the aftermath of genocide.

The present essay deals only with criminal trials. By definition, these are focused on the perpetrators of abuses and their allies. This paper mainly aims at analysing the draft legislation on the *gacaca* jurisdictions. It makes a preliminary 'human rights impact assessment' of the implementation of the draft law establishing '*gacaca* jurisdictions'. Further, the potential role of the new institution in rebuilding Rwandese society is also discussed.³ Considering the many complex issues which still surround the process of justice in Rwanda six years after the genocide, as well as the continuing challenge to the judicial system in terms of the inadequacy of resources for dealing with such an enormous caseload, recommendations to help the process follow the analysis of the *gacaca* proposals.

The *gacaca* tribunals' proposals were formally adopted on 12 October 2000 by the Transitional National Assembly (TNA).⁴ Firstly, one should be mindful of the fact that this is an original institution. In Rwanda, as in most African countries, the body of legal prescriptions is made up of two major components. There are various indigenous norms and mechanisms, largely based on traditional values, which determine the generally accepted standards of an individual's and a community's behaviour. But

2 See Preamble, Draft Organic Law setting up '*Gacaca* Jurisdictions' and Organizing prosecutions for offences that constitute the crime of genocide or crimes against humanity committed between 1 October 1990 and 31 December 1994, Draft Organic Law (on file with author) (Draft *Gacaca* Law).

3 Although conventional wisdom holds that criminal trials promote several goals, including uncovering the truth; avoiding collective accountability by individualising guilt; breaking the cycle of impunity; deterring future war crimes; providing closure for the victims and fostering democratic institutions, little is known about the role that judicial intervention has in rebuilding societies. M Osiel *Mass atrocities, collective memory and the law* (1997) 6–10.

4 The TNA is the Rwandese parliament. The *gacaca* legislation is yet to be formally approved by the Constitutional Court Department in the Supreme Court, after which it will be promulgated by the President of the Republic and published in the Official Gazette of the Republic.

there are also the state laws largely based on the old colonial power's own legislative framework. They were introduced together with the nation-state and its general principles such as separation of powers and the rule of law.⁵ This situation is known as legal pluralism.⁶ The present aim is not to use the traditional *gacaca* process but to create a new process that shows similarities with the indigenous mechanism. In addition, this process incorporates a contemporary legislative framework with the aim of promoting social reconstruction while greatly expediting the trials of thousands of accused persons.

Secondly, it is certainly premature to make an in-depth assessment of a draft law and the merits and flaws of the legal institution it is designed to set up. As happened with the criminal trials following the adoption of the Organic Law,⁷ only gradually and over a period of time can the *gacaca* become effective and credible.⁸

Subject to these caveats, one cannot but welcome the proposals. Of course, the use of *gacaca* tribunals to deal with the genocide cases is still a controversial concept. There are those who argue that it is simply unrealistic in the current situation to introduce a concept like that for genocide trials.⁹ Others support it, as it would improve the current situation.¹⁰ Whatever the case, it is important to recognise that at least people are beginning to talk about alternatives. This contribution also

5 See also J Prendergast & D Smock Post genocidal reconciliation: building peace in Rwanda and Burundi Special Report, United States Institute of Peace (15 September 1999) also available at <<http://www.usip.org/oc/sr/sr990915/sr990915.html>> (accessed 15 September 2000).

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

7 Organisation of prosecutions for offences constituting the crime of genocide or crimes against humanity committed since 1 October 1990 (30 August 1996) Organic Law 8/96, in (1 September 1996) *Official Journal of the Republic of Rwanda* (Organic Law 8/96)

8 Further research aimed at gathering data through interviews, field observations, participant observation, study and analysis of the implementation can also illuminate experience in ways that analysis of published sources do not. A thorough and sound appraisal of this new institution must, therefore, wait some time.

9 See eg J Gakwaya 'Utilisation erronée de l'institution du Gacaca dans la recherche d'une solution au génocide rwandais' (2000) 14 *Revue de Droit Africain* 226; J Sarkin 'Preconditions and processes for establishing a Truth and Reconciliation Commission in Rwanda — the possible interim role of the *gacaca* community courts' (1999) 3 *Law, Democracy and Development* 223.

10 See eg Amnesty International Rwanda: the troubled course of justice (2000); OAU International panel of eminent personalities Rwanda: the preventable genocide (2000) OAU/IPEP/PANEL <<http://www.oau-oua.org/Document/ipep/rwanda-e/EN.htm>> (accessed 9 September 2000); (OAU Panel Report (2000)).

attempts to set out some initial and tentative comments on some of the salient traits of the future *gacaca* tribunals.

2 The Draft *Gacaca* Law: Substantive and procedural assessment

The draft legislation creating the *gacaca* jurisdictions may be considered from the viewpoint of a dispute resolution mechanism, or it may be viewed from the perspective of its contribution to the criminal justice system both substantively and procedurally.

Traditionally, *gacaca* has characterised dispute resolution. It derives its meaning from the phrase 'lawn'. This refers to members of the *gacaca* sitting on the grass, listening and considering matters before them. Defining *gacaca* is difficult, as it is an informal and non-permanent judicial or administrative institution. This meeting convenes whenever the need arises and the participants include members of one family, or different families, or all inhabitants of one hill. Traditionally, wise old men, well respected within their communities, would seek to restore social order¹¹ by leading the group discussions. The discussion generally resulted in an arrangement acceptable to all.¹² The types of conflict generally dealt with by the *gacaca* are related to land rights, cattle, marriage, inheritance rights, loans, minor attacks on personal dignity and physical integrity, damage of properties caused by one of the parties or animals, and so on.¹³

11 Previously, scholars of African justice have argued that the African concept of justice aims primarily at reconciliation of the parties. According to Hansungule, this is based on a gross misunderstanding of the African concept of law: 'Reconciliation — the restoration of social equilibrium — is of course the aim of every society and not only the African. In Africa, reconciliation of the parties becomes the main aim of the judges when the parties are in a relationship which is valuable to preserve. However, this concept does not lead to a sacrifice of legal or moral rules. Wrongdoers are upbraided and punished where they are found guilty. In other words, punishment is as much an African as it is a universal concept.' (n 6 above, 5) Contrary to the opinion of some commentators, Rwandese customary law distinguished civil and criminal matters. Thus, offences such as murder, theft, and attack on personal integrity were severely punished when established. See C Ntampaka '*Droit et croyance populaire dans la société rwandaise traditionnelle*' (1999) 211 *Dialogue* 13; Gakwaya (n 9 above) 228.

12 While it is true that in Rwanda as elsewhere in Africa, people attach the highest premium to the unity of the kinsfolk, families, and other groups, this is never done at the expense of justice. Traditional courts tend to be conciliating; they strive to effect a compromise acceptable by all parties. In other words, the main task of the judge, unlike its modern counterpart, is to try to effect a compromise. It must be stressed that this is usually when there is a relationship between the litigants which should supersede justice. However, in the end the court must pronounce its decision even if it will have undesirable consequences on the group unity. Hansungule (n 6 above) 5.

13 F Reyntjens '*Le gacaca ou la justice du gazon au Rwanda*' (1990) 40 *Politique Africaine* 31.

Considering the proposed *gacaca* process and its contribution to the criminal justice system, the draft legislation offers an original attempt to blend indigenous Rwandese culture and traditions with the European system of justice. This represents a significant departure from the traditional dichotomy between the original system of justice before colonisation and colonial law.¹⁴ The *gacaca* process is meant to handle genocide cases not falling within the first category.¹⁵ As far as criminal justice is concerned, as long as the new legislation conforms to universally accepted standards in the administration of justice, there should be no problem with judging genocide-related cases according to the *gacaca* legislation. An attempt is made to appraise in detail how the draft legislation¹⁶ creating the *gacaca* jurisdictions can provide a framework for both justice and social reconstruction in the post-genocide Rwanda.

2.1 General overview

The specialised criminal justice programme laid out in the Draft *Gacaca* Law is, in essence, quite simple. In summary, the draft law on *gacaca* proposes a system which would be loosely based on what is described as a traditional system of justice, involving ordinary citizens in trying their peers suspected of participation in the genocide.¹⁷ Local *gacaca* tribunals would be set up throughout the country, from the lowest political and administrative level of the *cellule*, to that of the *secteur*, *district* and *province*.¹⁸ Each '*gacaca* jurisdiction' includes a general assembly, a seat,

14 Following colonial rule, Rwandese customary law could apply in certain situations provided it did not supersede colonial law. See Ordonnance-loi 45 du 30 août 1924 (1924) 4 *Bulletin Officiel du Ruanda-Urundi (BORU)* (Suppl) 4–5; Gakwaya (n 9 above, 230). This situation has continued to characterise the post-colonial Rwandese Constitution. This means that even after independence, Rwandese customary law could not be invoked unless consistent with Western notions. In other words, the subordination of Rwandese customary law which started during the colonial period was perpetuated in independent Rwanda.

15 Art 2 Draft *Gacaca* Law; Organic Law 8/96.

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

17 Art 13 of the Draft *Gacaca* Law reads: 'Each Seat for "Gacaca Jurisdiction" is made up of 19 honest people. Honest people forming the seat of the Cell's "Gacaca Jurisdiction" are elected by and among the Cell's inhabitants.'

18 Art 4 Draft *Gacaca* Law. It should be remembered that one of the expected results from the '*gacaca* jurisdictions' is to make it possible to accelerate the prosecution of perpetrators of genocide since the trials shall be resolved by almost 11 000 *gacaca* jurisdictions while twelve specialised chambers used to take on this task. See Preamble, Draft *Gacaca* Law.

and a co-ordinating committee.¹⁹ The general assembly²⁰ of the cell's *gacaca* jurisdiction chooses within itself 24 honest persons, five of whom are delegated to the sector's *gacaca* jurisdiction, while the nineteen remaining persons form the seat of the cell's *gacaca* jurisdiction.²¹

All but Category One genocide cases would be tried by the *gacaca* jurisdictions.²² Individuals tried by the *gacaca* jurisdictions include those accused of homicide,²³ physical assault,²⁴ destruction of property²⁵ and other offences committed during the genocide, corresponding to Categories Two, Three and Four. The *gacaca* jurisdictions at the *cellule* level would try Category Four cases.²⁶ The *gacaca* jurisdictions at the *secteur* level would try Category Three cases,²⁷ and the *gacaca* at the *district* level would try Category Two cases.²⁸ The *province* level would hear appeals from the Category Two cases tried at the *district* level.²⁹ Category One defendants would continue to be tried by the ordinary courts.³⁰

19 Art 5 Draft *Gacaca* Law.

20 Art 6: 'The general assembly of the cell's *gacaca* jurisdiction is made up of all the cell's inhabitants aged 18 years and above'.

21 Art 9; see also discussions below on independence and impartiality.

22 Art 2. It is worth noting that the Draft *Gacaca* Law adopts a very similar classification of offenders as the Organic Law 8/96. The new legislation introduces some substantial modifications, however. For instance, persons who acted in positions of authority at lower levels (sector or cell), previously in Category One, shall be classified in the category corresponding to the offences they committed, 'but their position as leader exposes them to the severest penalty for the defendants in the same category' (art 52). Also, the formulation 'acts of sexual torture' in the Organic Law 8/96 (Category One in fine) is replaced by 'rape or act of torture against a person's sexual parts' (probably because of definitional difficulties). Interestingly, a new category of criminals is added to Category Two: 'the person who, with the intention of causing death, has inflicted injuries or committed other serious violences but from which the victims have not died' (art 51). It was probably felt that these offenders should not benefit from the same lenient treatment afforded to Category Three offenders: persons who committed serious attacks 'without the intention of causing death to victims' (last part added in the new law). It is no doubt meritorious to establish clearly the importance of the mental element (*mens rea*) for criminal responsibility to arise. Admittedly, in the case of genocide and crimes against humanity, the extreme gravity of the offence presupposes that it may only be perpetrated when intent and knowledge are present.

23 Art 51 (Category Two).

24 Category Three.

25 Category Four.

26 Art 39.

27 Art 40.

28 Art 41.

29 Art 43.

30 Art 2.

Following the pattern established by the Organic Law,³¹ the specialised criminal justice programme will rely on a system of plea agreements.³² Persons who fall within Category One are, in principle, not eligible for any reduction in penalty upon confession.³³ A pre-set, fixed reduction in the penalty is available to all perpetrators in return for an accurate and complete confession, a plea of guilty to the crimes committed, and an apology to the victims.³⁴ A greater penalty reduction is made available to perpetrators who confess and plead guilty prior to prosecution than to perpetrators who come forward only after prosecution has begun.³⁵

The sentences provided under the draft *gacaca* legislation stipulate that:³⁶ Category Two perpetrators will receive a sentence of seven to eleven years' imprisonment if they plead guilty prior to prosecution, a sentence of twelve to fifteen years' imprisonment if they plead guilty after prosecution has begun, or a sentence of twenty-five years to life imprisonment if convicted at trial.³⁷ Category Three perpetrators will receive a penalty of one to three years' imprisonment if they plead guilty before prosecution, a sentence of three to five years if they plead guilty after prosecution has begun, and five to seven years if convicted at trial.³⁸ All Category Four defendants convicted are sentenced only to civil reparations of damages caused to other people's property.³⁹

A substantial reduction in sentence is provided where a Category One, Two or Three defendant submits a guilty plea before prosecution. This leniency aims to encourage perpetrators to come forward before

31 Organic Law 8/96.

32 Despite the fact that the traditional 'plea bargain' is relatively foreign to an inquisitorial justice system, in enacting the Organic Law, the Transitional National Assembly saw the need to institute some form of procedure to encourage accused persons to confess to their criminal acts. This was done to encourage reconciliation and, equally, to attempt to speed up what was clearly going to be a lengthy if not impossible process. Chapter III, Organic Law 8/96.

33 Arts 55 and 56 Draft *Gacaca* Law. See, however, art 56, which illustrates an exception in the limited circumstance where an accused who does not appear on the published list of the first category prescribed by art 51 of the draft legislation. In such cases, persons who confess and plead guilty 'will be classified in the second category.'

34 Art 54 and art 68. This is a significant departure from the Organic Law, where Category One offenders are not entitled to any reduction in the penalty.

35 Art 55 Draft *Gacaca* Law.

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

37 Art 69 Draft *Gacaca* Law.

38 Art 70.

39 Art 71.

prosecution.⁴⁰ A perpetrator who pleads guilty prior to prosecution eliminates the need to conduct a full investigation and prepare a completed dossier for the case in question. Similarly, the penalties imposed pursuant to a guilty plea submitted after prosecution have begun but before conviction at trial are less severe than the penalties imposed pursuant to a conviction at trial. This structure intends to maintain incentives for perpetrators to plead guilty even after the initiation of prosecution.

The value of the proposed system will in the end depend on the soundness of the design itself and the quality of its implementation, which shall unfold after the promulgation of the *gacaca* law. In designing the plea agreements mechanism, consideration should be given to its failures under the Organic Law.⁴¹ In particular, questions of simplicity, credibility and confidence in the system itself and the safety of the accused should be key issues of consideration.

In addition, the Draft *Gacaca* Law introduces a significant innovation. All but Category One defendants, if convicted, will have two alternatives: either they will spend half the sentence in prison and the rest in community service or spend the entire sentence in prison.⁴²

Finally, the draft law entrusts the Supreme Court with the task of administering and developing the internal regulations of the '*gacaca* jurisdictions' in accordance with its powers. The Supreme Court is further to manage and co-ordinate the activities of courts and tribunals and to guard the independence of the magistracy.⁴³

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

40 Thus, the death penalty is excluded even for those Category Two perpetrators convicted at trial (art 69). This exclusion of the death penalty constitutes a reduction in the severity of sentence that could ordinarily be imposed under the Rwandan Penal Code, which provides capital punishment for murder. Arguably, this reduction reflects a policy decision regarding the undesirability, for the society generally and for social reconstruction and security, of undertaking the execution of literally tens of thousands of perpetrators.

41 The reasons for the failure of the procedure to thus far attract large numbers of applicants relate as much to the stringent conditions the potential applicant must satisfy, as to the reluctance on the part of the defendants to confess. Some defendants doubt that their confessions will actually lead to sentence reductions, and the failure to have a penitentiary system in place to separate those who confess from those who do not puts the potential confessors at risk for their personal safety. See also CJ Ferstman 'Domestic trials for genocide and crimes against humanity: The example of Rwanda' (1997) 9 *African Journal of International and Comparative Law* 857-869-77.

42 Arts 69, 70 and 75 Draft *Gacaca* Law.

43 Art 98. See also Preamble, Draft *Gacaca* Law.

accomplish the crucial purposes of criminal justice and contribute to reconciliation while also acknowledging resource limitations.⁴⁴

2.2 Subject matter jurisdiction

The jurisdiction of the '*gacaca* jurisdiction' roughly speaking embraces three categories of crimes. First, like the Statute of the ICTR⁴⁵ and the Organic Law,⁴⁶ the Draft *Gacaca* Law grants the courts the power to prosecute persons who have committed genocide.⁴⁷ Second, the draft law — following the example set by the ICTR Statute⁴⁸ and the Organic Law⁴⁹ — confers on the courts the power to prosecute persons who have committed crimes against humanity.⁵⁰

In the circumstances of Rwanda, the crime of genocide and crimes against humanity appear to cover most of the murders that have been committed. Some killings and other offences may, however, fall outside the specific offences of the crime of genocide and crimes against humanity because of definitional difficulties or a failure to satisfy the burden of proof.

That the scope of jurisdiction of the *gacaca* is deliberately narrowed is quite understandable. This choice is probably guided by the need to restrict the jurisdiction of the *gacaca* tribunals to crimes conceived as the most heinous for which prosecution is required. The side effect of such a decision, however, is that an implicit amnesty is granted for all the offences committed between 1 October 1990 and 31 December 1994 which do not fall under any of the three very restrictive categories of crimes.

Nevertheless, proof of systematic and deliberate planning is not a requirement for establishing the violation of common article 3 or Additional Protocol II. In this case, article 4 of the ICTR Statute, unlike the Organic Law and the Draft *Gacaca* Law, provides a safety net that is the Statute's greatest innovation.⁵¹ Under article 4, the Tribunal may prosecute persons who have committed serious violations of common article 3

44 See generally Preamble, Draft *Gacaca* Law.

45 Statute of the International Criminal Tribunal for Rwanda; UN SC Res 955 Annex (8 November 1994), (1994) 33 International Legal Materials 1602, art 2.

46 Art 1(a) ICTR Statute.

47 Art 1(a) ICTR Statute.

48 Art 3 ICTR Statute.

49 Art 1(a) ICTR Statute.

50 Art 1(a) ICTR Statute.

51 T Meron 'International criminalization of internal atrocities' (1995) 89 *American Journal of International Law* 554.

of the Geneva Conventions and of Additional Protocol II.⁵² Perhaps because it was realised that the crime of genocide and crimes against humanity might not adequately cover the field and that, for practical reasons, the safety net of common article 3 and Protocol II was needed.

The lack of a similar provision in the Organic Law or in the Draft *Gacaca* Law is unfortunate.⁵³ However, common article 3 and Protocol II are treaties binding on Rwanda. They clearly prohibit certain acts that are also prohibited by the Rwandese Penal Code, albeit in different terms.

Lastly, it should be noted that the Draft *Gacaca* Law, like the earlier Organic Law, suffers from a major defect. Unlike the provisions of the Rwandese Penal Code, where the principle of **specificity** of criminal law is prevalent, the draft legislation includes provisions that do not determine the essential elements of the crimes in detail. To this extent, the Draft *Gacaca* Law departs from the fundamental principle of specificity, which requires that a criminal rule be detailed and indicate in clear terms the various elements of crime. This principle constitutes a fundamental guarantee for the potential accused and any indicted person, because it lays down in well-defined terms the confines of the prohibited conduct,

52 Art 4 of the ICTR Statute reads: 'The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to: Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; collective punishments; taking of hostages; acts of terrorism; outrage upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any indecent assault, pillage; the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; threats to commit any of the following acts.'

53 Surprisingly, the Organic Law and the Draft *Gacaca* Law refer to the 'Geneva Convention relating to protecting civil persons in wartime' (probably referring to the fourth Geneva Convention relative to the protection of civilian persons in times of war) and its additional protocols (probably referring to Additional Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts). They do so, however, only to the extent that these instruments define genocide and crimes against humanity. See common art 1(a) of the two pieces of legislation. This is confusing since the two instruments do not cover genocide **specifically** and/or crimes against humanity. Of course, some prohibited conducts (eg grave breaches and other serious violations of international humanitarian law) overlap to some extent with genocide and crimes against humanity. However, as noted above, crimes against humanity are distinguishable from genocide. Crimes against humanity are also distinguishable from war crimes in that they do not apply only in the context of war — they apply in time of war **and** peace. See also MC Bassiouni 'Crimes against humanity' in R Gutman & D Rieff *Crimes of war: what the public should know* (1999) 108.

thus giving him notice of what he stands accused. By the same token, this principle greatly restricts the court's latitude.⁵⁴

2.3 General principles of procedural law: Applicability of fair trial rights

In a context of 'transitional justice' of the type in Rwanda, when a decision is made to prosecute, the desire to use criminal sanctions against those who committed massive human rights violations may run directly counter to the development of a democratic legal order.⁵⁵ The temptation of the victims — or rather the survivors — of the genocide to make short shrift of the criminal procedural rights of those put in the dock for the evil crime is certainly understandable. Nevertheless, this question should be viewed in the context of the new regime's commitment to the rule of law.⁵⁶ If these defendants are not all afforded the same rights granted to common defendants in a democratic order, the rule of law does not exist and the democratic foundation of the new system is arguably weakened.⁵⁷ Beyond procedural consideration, the rule of law prohibits collective punishment and discrimination on the basis of political opinion or affiliation. In establishing accountability, the burden of proof should be on the authorities or the individual making the accusation, not on the accused to prove his or her innocence.

Rwanda is required to act in consonance with international human rights law and principles. On the one hand, international standards impose a duty to prosecute the most heinous violations of human rights

54 This striking feature of the Draft *Gacaca* Law and the Organic Law — the lack of specificity — manifests itself in various ways. First, and more generally, their provisions do not prohibit a certain conduct (say murder and rape) by providing a specific detailed description of such conduct. They instead embrace a broad set of offences (genocide, crimes against humanity) without individual identification by a delineation of the prohibited behaviour. It follows that, when applying these rules, one must first of all identify the general ingredients proper to each category of crime (say, crimes against humanity) and then the specific ingredients of the sub-class one may have to deal with (say, rape, murder) by reference to the penal code. Secondly, some categories of crime are quite loose and do not specify the prohibited conduct (eg crimes against humanity). See generally D de Beer *Commentaire et Jurisprudence de la loi rwandaise du 30 Août 1996 sur l'organisation des poursuites des infractions constitutive du crime de génocide ou de crimes contre l'humanité* (1999).

55 NJ Kritz (ed) *Transitional justice: how emerging democracies reckon with former regimes* (1995) xxiv.

56 Address to the nation by HE Major General Paul Kagame on his inauguration as President of the Republic of Rwanda, 22 April 2000 (on file with author).

57 Kritz (n 55 above) xxiv.

and humanitarian law.⁵⁸ On the other hand, when prosecution is undertaken, international standards related to trials, treatment of offenders and penalties must be respected.⁵⁹ Indeed, when people are subjected to unfair trials, justice cannot be served. When innocent individuals are convicted, or when trials are manifestly unfair or perceived to be unfair, the justice system loses credibility.

An approach such as that proposed in Rwanda of using *gacaca* jurisdictions offers the benefit of expediency in handling an enormous volume of cases and may contribute to 'national healing' and 'reconciliation'.⁶⁰ Provided that fair trial standards are not compromised, the introduction of the *gacaca* might go some way towards alleviating the huge burden on the courts; it could also represent a positive development in terms of involving the local population in the process of justice.⁶¹ Holding trials at the local, grassroots level encourages people to testify to events they witnessed personally during the genocide. At the same time, however, there is reason for concern about the capacity of the proposed system to operate fairly and efficiently.⁶²

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

Clearly, one of the striking features and the main area of concern when looking at the *gacaca* proposals is the lack of legal training of members of the *gacaca* jurisdictions. The individuals who would be asked to try the cases which come before the *gacaca* jurisdictions would be elected

58 J Malamud-Goti 'Transitional governments in the breach: Why punish state criminals?' (1990) 12 *Human Rights Quarterly* 1; DF Orentlicher 'Settling account: The duty to prosecute human rights violations of a prior regime' (1991) 100 *Yale Law Journal* 2537; J Paust 'Universality and the responsibility to enforce international criminal law: No US sanctuary for alleged Nazi war criminals' (1989) *Houston Journal of International Law* 337; N Roht-Arriaza 'States responsibility to investigate and prosecute grave human rights violations in international law' (1990) 78 *California Law Review* 451.

59 Amnesty International *Fair trials manual* (1998); WA Schabas *The abolition of the death penalty in international law* (1997); M Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993); D McGoldrick *The Human Rights Committee: its role in the development of the international Covenant on Civil and Political Rights* (1994).

60 See, on the use of terminology, M Ignatieff 'Articles of faith' (1996) 5 *Index on censorship* 110.

61 N Roht-Arriaza 'Combating impunity: some thoughts on the way forward' (1996) 59 (4) *Law and Contemporary Problems* 93.

62 See also Amnesty International *Rwanda: The troubled course of justice* (2000).

into this role by the local population.⁶³ They would have no prior legal background or training, and yet would be expected to hand down judgments in extremely complex and sensitive cases, with sentences as heavy as life imprisonment.⁶⁴ They would also be responsible for determining the categorisation of the defendants, which sets the framework for sentences — including classifying defendants in Category One,⁶⁵ subject to the ordinary courts, where those found guilty may face the death penalty.⁶⁶ Even if these individuals are conscientious and striving to act in good faith, it is likely that they will be subjected to considerable pressures both from the accused and the complainants.⁶⁷ Trials which have taken place to date in the ordinary courts in Rwanda have already revealed significant difficulties and controversies; they have illustrated the absolute need for judges to be able to resist political and psychological pressures, to know how to distinguish genuine from false testimonies, and to respect at all times the equal rights of the defence and the prosecution.⁶⁸

63 Art 13 Draft *Gacaca* Law. Practically, the draft law provides that the general assembly — composed of all the cell's residents at least 18 years of age — selects within itself 24 'honest persons' including five who are delegated to the sector *gacaca* jurisdiction, while the nineteen who remain form the seat of the cell *gacaca* jurisdiction (n 17 above) art 9. The law does not, however, specifically address the procedures to be followed for these elections. This is left to the President of the Republic who 'determines by means of order, the modalities of organising elections for members of "*gacaca* jurisdiction's" organs' (n 17 above) art 9. It is unclear, for instance, if individuals will avail themselves to stand for elections or if the residents of the cell will nominate them as candidates, a pattern recently followed for the election of lower-level administrative authorities throughout the country. It is, of course, critical that the election of members to the seats of *gacaca* jurisdictions be **perceived** to be free and fair.

64 Art 69(a).

65 Arts 34(e) and 36(d). Surprisingly, the Draft *Gacaca* Law refers to the classification of offenders adopted under the Organic law as the basis for categorisation by the seat of the *gacaca* jurisdiction of the cell (art 34(e)). This is rather confusing since the *gacaca* legislation introduces some substantial modifications (n 22 above).

66 Art 68.

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

68 Amnesty International *Rwanda unfair trials: Justice denied* (1997).

Many of the judges in the ordinary courts have had only a few months' training.⁶⁹ The individuals trying the cases in the *gacaca* jurisdictions would not have benefited from any professional training, yet would presumably be expected immediately to exercise independence and impartiality. Government authorities have indicated that they would receive some 'basic' training and have appealed for international assistance for this task, but have stressed that the rules governing the *gacaca* trials must be kept simple.⁷⁰ Most international standards do not per se prohibit the establishment of specialised courts. What is required, however, is that such courts are competent, independent, and impartial, and that they afford applicable judicial guarantees so as to ensure that the proceedings are fair.⁷¹

The factors which influence the independence of the judiciary have been articulated to some extent in the Basic Principles on the Independence of the Judiciary.⁷² They include the separation of powers which

69 Although the training of magistrates was mainly organised by the Ministry of Justice, some projects were actually set up by non-governmental organisations (NGOs), such as the Brussels-based Citizens Network, which provided training courses for judicial investigators throughout the first half of 1995.

70 In fact, the government's proposal identifies the need for a massive popular education campaign, a large-scale training programme for the many people who would be involved at the various administrative levels, and an extra US\$ 32 million in the first two years. See International panel of eminent personalities (2000) Rwanda: The preventable genocide OAU/IPEP/PANEL <<http://www.oau-oua.org/Document/ipep/rwanda-e/EN.htm>> (accessed 9 September 2000), (OAU Panel Report); see also Amnesty International (n 54 above).

71 This is generally reflected in the formulation 'everyone facing a criminal trial or a suit at law has the right to trial by an independent and impartial tribunal established by law'. See art 10 of the Universal Declaration of Human Rights, UN GA Res 217 (III), 10 December 1948 (hereinafter Universal Declaration); art 14(1) of the International Covenant on Civil and Political Rights adopted 16 Dec 1966, GA Res 2200A (XXI), UN Doc A/6316 (1966), 999 UNTS 171 (entered into force March 23, 1976) (hereinafter ICCPR); arts 7(1) and 26 of the African Charter on Human and People's Rights, adopted 27 June 1981; OAU Doc CAB/LEG/67/3/Rev 5 (1981) (entered into force 21 October 1986) reprinted in (1982) 21 ILM 58 (hereinafter African Charter); arts 8(1) and 27(2) of the American Convention on Human Rights (Pact of San Jose), signed 22 November 1969, OASTS 36, Off Rec, OEA/ser L/V/II.23, doc 21, rev 6 (1979) (entered into force 18 July 1978) reprinted in (1970) 9 ILM 673 (American Convention); art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) (European Convention); see also Amnesty (n 51 above) 151. 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'. Communication 263/1987, *González del Río v Peru* (28 October 1992) UN Doc A/48/40 (1993) 20.

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

protects the judiciary from undue influence or interference,⁷³ and practical safeguards of independence such as technical competence and security of tenure for judges.⁷⁴

Also important for the purpose of this evaluation, the independence of the tribunal means that decision makers in a given case are free to decide matters before them impartially, on the basis of the facts and in accordance with the law, without any interference, pressures or improper influence from any branch of government or elsewhere.⁷⁵ It also means that the people appointed as judges are selected primarily on the basis of their integrity and ability with appropriate training or qualification in law.⁷⁶ The concept of the independence of a tribunal must also be considered in regard to the question of whether the tribunal presents an appearance of independence.⁷⁷ Appearance of independence relates to the question of whether litigants have a legitimate doubt about the tribunal's independence, thus affecting the confidence which the courts must inspire in a democratic society.⁷⁸

The selection requirements of the members of the *gacaca* tribunals are set forth in the Draft *Gacaca Law*.⁷⁹ It appears that to be eligible as a member of a seat for *gacaca* jurisdiction one needs to be an 'honest Rwandan',⁸⁰ at least 21 years of age,⁸¹ and, admittedly, a Rwandese national.⁸² The requirement that an individual should be an 'honest person' seems to be guided by an effort to ensure the integrity of the elected persons. Once these conditions are fulfilled, the draft legislation

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

74 n 73 above Principle 10.

75 Principle 2 of the Basic Principles on the Independence of the Judiciary states: 'The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.'

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

77 'Justice must not only be done, it must also be seen to be done': *Delcourt v Belgium*, ECHR (17 January 1970) Ser A 11 para 31.

78 *Sramek v Autriche*, ECHR (22 October 1984) Ser A 84.

79 Arts 13, 10 and 11.

80 Art 10 of the draft law states that: '... is honest, any Rwandan meeting the following conditions: to have a good behaviour and morals; to always say the truth; to be trustworthy; to be characterised by a spirit of sharing speech; not to have been sentenced by a trial emanating from a tried case to a penalty of at least 6 months' imprisonment; not to have participated in perpetrating offences constituting the crime of genocide or crimes against humanity; to be free from the spirit of sectarianism and discrimination' [sic].

81 Art 10.

82 Arts 6–10.

further prohibits any other discrimination notably of sex, origin, religion, opinion, or social position.⁸³

Thus, in the proposed *gacaca* process the ability of the elected persons — as lawyers or any general level of education — does not enter into consideration in the selection procedure. More problematic, however, career magistrates are explicitly excluded from election as members of the bench *gacaca* jurisdictions at the sector, district, and province levels.⁸⁴ It is difficult to understand the intention of the drafters in this regard. One explanation could be the fear of the moral and technical influence that experienced magistrates would exert on other members of the *gacaca* jurisdictions. In addition, the presence of legal professionals in such a popular tribunal could be problematic and defeat the purpose of the speedy disposal of cases and simplicity. Surprisingly, though, the draft law further provides for advice to those sitting on the *gacaca* jurisdictions in the form of assistance by *conseillers juridiques* (legal advisers) designated by a special *gacaca* department in the Supreme Court.⁸⁵ No further information is provided on the criteria for appointing these legal advisers, nor are there any guarantees of their independence. Yet, in cases where they do advise on specific trials, they may be able to exert considerable influence, as the lay judges in the *gacaca* jurisdictions would find it difficult to challenge or reject guidance from advisers in the Supreme Court who have a legal professional background. It is submitted, however, that the legal advisers could play a critical role especially in the classification of defendants.

Furthermore, at least on this point, it is clear that the draft *gacaca* legislation is in violation of its own rules. In addition to the career magistrates, 'persons in charge of centralised or decentralised Government administrations; persons exercising political activity; soldiers who are in active service; members of the national police and local defence force who are in active service; members of political parties' leading organs, religious confessions or non-government organisations cannot be elected as members of the seat for the cell's *gacaca* jurisdictions or of the general assembly of the sector, the district and the province.⁸⁶ Whatever the arguments behind these proposals, it is submitted that the listed grounds for disqualification are *prima facie* discriminatory⁸⁷ and,

83 Art 10. It is interesting to note that the listed grounds of discrimination are illustrative and not exhaustive. It should also be noted that this is a significant departure from the traditional *gacaca*, where only 'wise' old **men** acted as judges.

84 Art 11.

85 Art 29.

86 Art 11.

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

therefore, should not be approved.⁸⁸ The main concern is that there seem to be no clearly defined criteria for excluding a specific category of individuals.

'Impartiality', on the other hand, denotes absence of prejudice or bias. The principle of impartiality, which applies to each individual case, demands that each of the decision makers, whether they be professional or lay judges, be unbiased.⁸⁹ At present, challenges to the impartiality of a tribunal usually undergo two tests: a subjective one, which aims at ascertaining the personal conviction of a judge in a given case, and an objective one, which has to investigate the existence of sufficient guarantees to exclude any legitimate doubt as to impartiality.⁹⁰ With regard to the first test, impartiality must be presumed until there is proof to the contrary. In the case of an objective approach the issue of appearance becomes relevant.⁹¹ A legitimate reason to fear a lack of impartiality should prompt a judicial officer to withdraw from the case.⁹² At stake here is 'the confidence which the courts must inspire in the public in a democratic society'.⁹³

Finally, international standards refer to 'tribunals' rather than courts.⁹⁴ Some advocates of the new *gacaca* system have argued that it is not

88 See also art 2, African Charter.

89 Communication 387/1989, *Karttunen v Finland* (23 October 1992) UN Doc A/48/40 (1993) 120, relating to lay judges; and Communication 240/1987, *Collins v Jamaica* (1 November 1991) UN Doc A/47/40 (1992) 236, para 8.4, requiring jurors to be impartial. 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.' *Karttunen v Finland* para 7.2.

90 As above.

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

92 Thus, for instance, art 16 of the Draft *Gacaca* Law states that the 'honest person' who is a member of a seat for *gacaca* jurisdiction must disqualify himself if one of the listed circumstances (link with the defendant) is fulfilled.

93 *Piersack v Belgium* ECHR (1 October 1982) Ser A 53, reprinted in (1982) EHRR 169.

94 Different national legal systems and international standards define terms related to fair trials in different ways. Nevertheless, 'precisely because there are so many reasons to warrant linguistic and theoretical diversity . . . the existence of strong similarities is more convincing evidence that these rights are contained in "general principles" of law.' MC Bassiouni 'Human rights in the context of criminal justice: Identifying international protections and equivalent protections in national constitutions' (1993) 3 *Duke Journal of Comparative and International Law* 239.

appropriate to apply international standards of fair trial in this context, claiming that the *gacaca* jurisdictions are traditional methods of resolving conflicts, not a formal court system bound by international obligations. In practice, however, they would be the equivalent of criminal tribunals, but with few procedural safeguards against error or abuse. In many respects they would mirror the ordinary courts at the local level, with the principal difference that the judges would be lay people, not legal professionals. The *gacaca* tribunals would have many of the same powers as ordinary courts: the power to try defendants for crimes as serious as murder, to sentence them to lengthy prison sentences, including life imprisonment, and to compel witnesses to testify. They would also be applying criminal state legislation — all features which require them to conform to minimum international standards.⁹⁵ Furthermore, the *gacaca* proposals have been conceived and promoted — and ultimately will be enforced — by the state. They will be introduced and administered through state legislation, and a special department in the Supreme Court has been created to supervise the activities of the *gacaca* jurisdictions.⁹⁶

In any case, the description of the *gacaca* jurisdictions as a traditional system does not mean that international standards of fair trial can be set aside. Rwanda has ratified international human rights treaties which provide for the right to a fair trial.⁹⁷ Under international law, it has an obligation to adopt legislative and other measures to give effect to the rights guaranteed in these treaties.⁹⁸ According to the Human Rights Committee, the provisions of article 14 of the ICCPR apply to trials in all courts and tribunals.⁹⁹ The African Commission on Human and Peoples' Rights interpreted the provisions of article 7 of the African Charter, dealing with aspects of the right to fair trial, as applying to any institution

95 The European Court 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. See *Sramek v Autriche* (22 October 1984) 84 Ser A 17, para 36; *Le Compte, Van Leuven and De Meyere v Belgium*, ECHR (23 June 1981) Ser A 43 para 55.

96 Interestingly, the *Gacaca* Jurisdictions department in the Supreme Court has already been created, long before the adoption of the Draft *Gacaca* Law. See *Révision du 18/04/2000 de la Loi Fondamentale de la République Rwandaise* in (1/05/2000) n° 9 *Journal Officiel (JO)* 33, art 2.

97 Rwanda has been a party to the ICCPR since 1975, see Décret-loi n° 8/75 February 12, 1975 in (1975) *JO* 246.

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

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

or body that can hand down decisions which may lead to imprisonment, enabling that body to impact on the liberty and security of the person.¹⁰⁰

In addition, the declaration of the Seminar on the Right to a Fair Trial in Africa, reaffirms as follows:¹⁰¹

The right to a fair trial is a fundamental right, the non-observance of which undermines all other human rights. Therefore the right to fair trial is a non-derogable right, especially as the African Charter does not expressly allow for any derogations from the rights it enshrines.

It goes on to state: 'Traditional courts are not exempt from the provisions of the African Charter relating to a fair trial.'

b The right to defence

Unlike the Organic Law,¹⁰² the draft law on the *gacaca* jurisdictions does not make any explicit reference to the rights of the accused. In view of existing safeguards in national and international law, the accused should automatically enjoy the right to defence¹⁰³ in the *gacaca* trials. Among the minimum guarantees for a fair trial, article 14(3) of the ICCPR includes the right to defend oneself through legal counsel and to be informed of such a right, and the right to examine and call witnesses. Admittedly, nothing in the Draft *Gacaca* Law restricts the application of this right.

The right to defence includes the right to defend oneself in person or through a lawyer.¹⁰⁴ This right assures the accused of the right to participate in his or her defence, including directing and conducting his or her own defence. The Draft *Gacaca* Law suggests that the accused present at the trial will have the right to defend him or herself against the charges.¹⁰⁵ Although not explicitly mentioned, it is submitted that the accused may also decide to be assisted by a defence counsel. The further question to be determined is whether, as provided for in

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

101 Organised by the African Commission on Human and Peoples' Rights in Dakar, Senegal, on 9–11 September 1999 pursuant to art 45(1)(a) of the African Charter (on file with author).

102 Art 36 of the Organic Law holds that 'persons prosecuted under the provisions of this Organic Law enjoy the same rights of defence given to other persons subject to criminal prosecution, including the right to the defence counsel of their choice, but not at government expense.' See Organic Law 8/96.

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

104 Art 14(3)(d) ICCPR; art 7(1)(c) African Charter.

105 Art 65 (7) of the draft law states that 'the session's chairperson invites the defendant to present his defence'.

the ICCPR, the accused may have counsel assigned if the person does not have a lawyer of her choice to represent her.

Under article 14(3)(d) of the ICCPR the right to have counsel assigned is conditional upon the conclusion that the interests of justice so require it. The determination of whether the interests of justice require appointment of counsel is based primarily on the seriousness of the offence, the issue at stake, including the potential sentence, and the complexity of the issues.¹⁰⁶ The state is required to provide counsel **free of charge** to the accused under the ICCPR if two conditions are met. The first is that the interests of justice require that counsel be appointed. The second is that the accused does not have sufficient funds to pay for a lawyer.¹⁰⁷ According to the Human Rights Committee, the interests of justice require that counsel be appointed at all stages of the proceedings for people charged with crimes punishable by death, if the accused does not have the assistance of counsel of his choice.¹⁰⁸ Arguably, therefore, the right does not apply in the *gacaca* trials since they would not apply the death penalty. Nevertheless, it could also be argued that, in the interests of justice, counsel be appointed for an accused charged with crimes punishable by sentences as heavy as life imprisonment.

In Rwanda, as elsewhere in Africa, two main obstacles to the procurement of legal counsel continue to be finances and availability of counsel.¹⁰⁹ Rwanda has never had an independent defence bar and the recent promulgation of a law creating a Rwandese Bar Association¹¹⁰ is a positive step towards assuring representation, and could be utilised as a mechanism to pool local and international resources for optimal results. Although the formal establishment of a defence bar was a step forward, two primary concerns of significance for Rwanda readily come to mind: the fact that the majority are unable to hire a lawyer because of poverty, and the unpopularity of defendants — Rwandese lawyers have been unwilling to defend individuals accused of genocide. Similar concerns could be raised in the framework of the *gacaca* jurisdictions, especially as the majority are likely to have little or no formal education, and limited awareness of their rights or knowledge of how to defend themselves in a formal or semi-formal context.

106 Communication 571/1994, *Henry v Jamaica* (26 July 1996), UN Doc CCPR/C/57/D/571/1994, para 9.2.

107 Art 14(3)(d) ICCPR.

108 *Henry* (n 106 above).

109 EA Ankumah 'The right to counsel and the independence of judges against the background of the African Charter on Human and Peoples' Rights' (1991) 3 *African Journal of International Comparative Law* 573.

110 *Loi 3/97 du 19 Mars 1997 portant création du Barreau du Rwanda* in (1/04/1997) JO 1.

c Fair trial guarantees during appeal procedures

The Draft *Gacaca* Law provides a right to appeal for defendants tried by the *gacaca* jurisdictions. However, the same concern of limited guarantees of fair trial could be raised at the appeal stage. Defendants tried at the level of the **cell** can appeal to the *gacaca* jurisdiction at the **sector** level — the next level up.¹¹¹ Likewise, those tried at the **sector** level can appeal to the level of the **district**,¹¹² and those tried at the **district** level can appeal to the level of the **province**.¹¹³

An appeal must guarantee the right to an impartial and independent tribunal, utilising procedures established by law.¹¹⁴ Verdicts returned after a confession and guilty plea cannot be appealed.¹¹⁵ Notwithstanding the plea agreement, it is submitted that this provision violates the right to appeal, especially when taking into consideration the seriousness of the offences and sanctions in issue.

If the *gacaca* jurisdictions are set up as outlined in the draft law, the trials would hardly meet basic international standards for a fair trial. To be fair, many of the defects in Rwandese justice are attributable to the country's low level of economic development. Although the right to a fair trial is identified in international law as a civil and political right, the artificiality of the distinction between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, becomes apparent when the problem of justice in a poor country is considered. Realising judicial guarantees depends on resources. These rights cannot be guaranteed in the same way in a poor country as in a rich country, despite the admonition in relevant international instrument to the contrary. They are 'positive' rights, not 'negative' rights, in that they require the state to act, and not to abstain from acting.¹¹⁶ Consequently, a state such as Rwanda must make agonising choices¹¹⁷ between investing in its judicial system in order to meet the norms set out

111 Art 84 Draft *Gacaca* Law.

112 As above.

113 As above.

114 Art 14(5) ICCPR.

115 Art 86 Draft *Gacaca* Law.

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

117 See also the widely commented on South African Constitutional Court's decision in *Soobramaney v Minister of Health, Kwazulu-Natal* 1997 (12) BCLR 1696 (CC).

in the International Covenant on Civil and Political Rights, or to invest in education, health care, and housing, so as to meet the pressing needs of the poor of Rwanda and respect the claims of the International Covenant on Economic, Social and Cultural Rights,¹¹⁸ not to mention the African Charter on Human and Peoples' Rights, with its own prerogatives.

Admittedly, fair trial rights are neither subject to the 'progressive realisation', nor to 'available resources'.¹¹⁹ Clearly, however, the obligation imposed on the state does not require the state to do more than its available resources permit.¹²⁰ Thus, the stress on the immediate nature of the obligation to implement fair trial rights should be accompanied by the clear acknowledgement that there are many obstacles to the full achievement of the recognised rights. In the case of Rwanda, a number of specific challenges should be considered, including the complete devastation of the judicial structure as a result of the civil war, genocide and other crimes. The poor economic conditions and underdevelopment serve only to exacerbate an already bad situation. Rarely has a country anywhere had to face so many seemingly insuperable obstacles with so few resources.

However, there are other aspects of the trial process which are more feasibly within Rwanda's control. Given Rwanda's domestic obligations flowing from the constitution,¹²¹ the Arusha Accords¹²² and international obligations deriving from the ICCPR and the African Charter, it is clear that a number of provisions of the draft *gacaca* legislation should be amended to conform to basic international standards for fair trials.

3 Social reconstruction and reconciliation

Classical criminal law theory proposes several objectives for punishment: prevention, deterrence, retribution, protection of the public,

118 Adopted 16 December 1996, GA Res 2200A (XXI), UN Doc A/6316 (1966) (entered into force 3 January 1976) (ICESCR).

119 See art 2(1) ICESR; General Comment 3 'The nature of states parties obligations (art 2(1) of the Covenant)' (1990); Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986); Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997).

120 See art 2(2) ICCPR, whereby a state undertakes 'to take the necessary steps' to adopt such legislative or other measures to give effect to the rights recognised in the Covenant.

121 *Constitution de la République Rwandaise* (10 Juin 1991) JO 615.

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

rehabilitation, and social reconstruction in a large sense.¹²³ Some of these are echoed in the Preamble of the Draft *Gacaca* Law. For example, referring implicitly to the notion of deterrence, the Preamble to the draft law affirms the government's conviction that the legal system is 'an indispensable way to make an example of those who participated in the genocidal acts by prosecuting and convicting them so that the atrocities committed shall never be replicated'.¹²⁴

The effective prosecutions and punishment of offenders are therefore intended to deter others from committing the same crimes, and perhaps to convince those already engaged in such behaviour to stop. This argument is based on the assumption that if potential wrongdoers believe that they are likely to face punishment for their misdeeds, they may be persuaded not to initiate such activity. The punishment aspect of prosecution is therefore linked to prevention and deterrence.¹²⁵

The concept of reconciliation, on the other hand, remains elusive in countries trying to get over conflict and mass violence. A question often asked is: can there be reconciliation without justice? The majority of people do not need to read the philosophers in order to hold some basic ideas about justice. Nearly all would argue that crime deserves to be punished, whatever the nature of the offence. Further, it is contended that the punishment of the perpetrators will ultimately bring reconciliation.¹²⁶ However, the positive contribution of criminal trials to the process of reconciliation, while widely accepted, remains an empirical question: '[...]justice in itself is not a problematic objective, but whether the attainment of justice always contributes to reconciliation is anything but evident.'¹²⁷

123 MW Reisman 'Legal responses to genocide and other massive violations of human rights' (1996) 59 (4) *Law and Contemporary Problems* 75.

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

125 Bassiouni notes that the weakness in the argument is that it is after the fact, but its strength is that it has a crucial role to play in the formulation and strengthening of values and future prevention of victimisation in the society. See MC Bassiouni 'Searching for peace and achieving justice: The need for accountability' (1996) 59 *Law and Contemporary Problems* 27. But see M Minow *Between vengeance and forgiveness: Facing history after genocide and mass violence* (1998) 146. Minow refuses to use deterrence as an argument for international war crimes trials. See also J Malamud-Goti 'Transitional governments in the breach: Why punish states' criminals?' in Kritz (n 55 above) 189–96, who argues that 'the threat of a hypothetical conviction does not discourage criminal behaviour within a military body'.

126 Preamble, Draft *Gacaca* Law.

127 See Ignatieff (n 60 above) 110. Ignatieff describes the 'articles of faith' that underlie the commitment of the world community to international trials for war crimes. He asks: 'What does it mean for a nation to come to terms with its past?'

Generally, reconciliation refers to a process by which people who were formerly enemies put aside their memories of past wrongs, forgo vengeance and give up their prior group aspirations in favour of a commitment to a communitarian ideal. Reconciliation is a subject which is integral to all major religious and philosophical traditions. More specifically, the majority of traditions apparently place reconciliation above 'justice'.¹²⁸

Since 'reconciliation' has religious overtones that suggest a reliance almost on faith, I have chosen to use the term 'social reconstruction', which implies a task that individuals have to work on politically — it is something that people have to build and does not just happen. But it is easier to say how the term 'reconciliation' is flawed than it is to say why 'social reconstruction' is preferable or to specify what it means. The term merely describes the evolution of social institutions, economic development, community building and person-to-person connection that may underlie the commitment of people to live together. According to Reisman, 'social reconstructing' involves 'identifying social situations that generate or provide fertile ground for violations of public order, and introducing resources and institutions that can obviate such situations'.¹²⁹ Unfortunately, even this does not offer a very clear definition of 'social reconstruction'. For our purposes, however, what is important is not so much the ability to reach a definition of 'reconciliation' or 'social reconstruction', but rather to determine whether the *gacaca* model can be regarded as a worthwhile endeavour in the building of a peaceful society in the aftermath of genocide.¹³⁰

It is submitted that the decision to reconcile, like the power to forgive, forget, or overlook in the cases of genocide, crimes against humanity, war crimes, and torture is not that of the government but of the victims.¹³¹ Reconciliation, however, also demands a positive action from the perpetrators. Therefore, reconciliation is the result of an interaction between victim and perpetrator. Groups (whether ethnic or racial) cannot be reconciled to other groups, only individuals can be reconciled to other individuals. Nevertheless, individuals can be helped to reconcile by the process of justice and the acknowledgement of the truth.

128 See D Bronkhorst *Truth and reconciliation: Obstacles and opportunities for human rights* (1995) 38.

129 Reisman (n 123 above) 76.

130 As far as I am aware, the objective of conflict prevention/resolution strategies is not so much of suppressing conflicts within specific communities since there will always be conflicts in societies. It has even been argued that conflicts can have a positive impact in the dynamic of a society. See KJ Holsti *International politics: A framework for analysis* (1995). Efforts, therefore, should aim at mitigating the negative impact/development of conflicts — especially violence — by means of developing peaceful mechanisms of conflicts prevention/resolution.

131 Bassiouni (n 125 above) 19.

Reconstruction in a context of transitional justice is a contested notion. Social reconstruction may not occur when people are faced with judicial decisions that do not correspond to their perception about what happened, that is their 'truth'. From their perspectives, some survivor groups have expressed fears that the current proposals amount to some form of amnesty.¹³² They are concerned that a Category Two suspect (a person guilty of intentional homicide or of a serious assault causing death) might confess and, as a consequence, be released after a short prison term. Fears have also been expressed that the proposed system may be used to settle personal scores through some form of collusion between defendants and local inhabitants, especially in rural areas with few or no survivors.¹³³ Thus, although the draft *gacaca* legislation affirms that within the framework of the *gacaca* jurisdictions the population shall achieve a justice based on evidence and not on passion,¹³⁴ evidence that is sufficient to produce a verdict in a court of law may not be sufficient to override solidified interest group perspectives among the ranks of legal professionals, let alone lay judges.

It has been argued that much of the struggle for justice, and the battle against impunity is the search for truth.¹³⁵ In fact, it has further been suggested that the period which will be investigated by the *gacaca* jurisdictions (crimes committed between October 1990 and December 1994) is likely to make large segments of society consider the process illegitimate. In a similar vein, it could also be argued that the *gacaca* tribunals would not address the losses that the refugees had suffered since the onset of the civil war in 1990 and, therefore, make reconciliation difficult to contemplate. Indeed, 'recognising the losses suffered by all Rwandese promises to advance the reconciliation process by reducing levels of defensiveness among returnees'.¹³⁶

It should be kept in mind that no judicial system anywhere in the world has been designed to cope with the requirements of prosecuting crimes committed by tens of thousands, and directed against hundreds of thousands. Even a prosperous country, with a sophisticated judicial system, would be required to seek special and innovative solutions to criminal law and prosecution on such a scale. This is not to say that

132 See OAU Panel Report (2000); see also *Ligue Rwandaise pour la Promotion des Droits de l'Homme* (LIPRODHOR) *Juridictions Gacaca au Rwanda: Résultats de la recherche sur les attitudes et opinions de la population rwandaise* (2000).

133 See OAU Panel Report (2000); LIPRODHOR (n 132 above).

134 Preamble, Draft *Gacaca* Law.

135 WA Schabas 'Sentencing by international tribunals: A human rights approach' (1997) 7 *Duke Journal of Comparative and International Law* 499.

136 M Summers 'The mending of the hearts: Conflict resolution and reconciliation activities among the Rwandese refugee religious groups in Ngara district, Tanzania (A preliminary field report)' (1996) 207 Working paper in African Studies (Boston University) 14 (on file with author).

historical accountability should be neglected. Respect for the rule of law in today's Rwanda is also critical in the search for a lasting peace and social reconstruction. At the same time, in its current fragile state, the judicial system, or rather the accountability mechanism proposed, will be at best distorted and at worst crushed by the demands of investigating past and present human rights abuses in addition to prosecuting ten of thousands people for genocide. Indeed, prosecuting the perpetrators of genocide is a most urgent priority. It is essential for the restoration of Rwandese society that the wheels of justice begin to turn with respect to the crimes committed during 1994. Therefore, it seems imperative to deal with the prosecution for genocide as a problem that is separate from the equally important acknowledgement of past abuses as well the building of a human rights culture in the present Rwanda.

The idea that social reconstruction depends on shared truth presumes that shared truth about the past is possible. As Ignatieff argues, however, truth is related to identity: 'what you believe to be true depends, in some measure, on who you believe yourself to be. And who you believe yourself to be is mostly defined in terms of who you are not.'¹³⁷ This does not mean that there cannot be agreement on, for instance, a shared chronology of events, though even this would be contentious; but it is difficult and almost impossible to imagine communities with a long history of antagonisms which culminated in a violent conflict and genocide ever agreeing on how to apportion responsibility and moral blame. In other words, in the aftermath of mass violence, there may be no consensus about who were the victims and who were the perpetrators.

In dealing with crimes of mass violence, the only option is to try to establish the most objective truth by means of witness testimony and other evidence.¹³⁸ Whether it should be a 'judicial truth' or one that is reached in a different manner depends on each country's experience and choices.¹³⁹ Whatever the case, it is not realistic to expect that when 'truth' is proclaimed by an official body, it is likely to be accepted by those against whom it is directed. The point is merely that it is best to be modest about what criminal trials can accomplish. Justice can serve the interests of truth. But the truth will not necessarily be believed and hence the path from truth to reconciliation is barred. All one can say is that leaving genocide perpetrators unpunished is worse: it leaves the cycle of impunity unbroken and permits societies to indulge their fantasies of denial.¹⁴⁰

137 Ignatieff (n 60 above) 114; see also A McDonald 'A right to truth and a remedy for African victims of serious violations of international humanitarian law' (1999) 3 *Law, Democracy and Development* 139 144.

138 McDonald (n 137 above) 146.

139 As above. CD Smith 'Introduction' in Kritz (n 55 above) xvii.

140 Ignatieff (n 60 above) 118.

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

4 Conclusions and recommendations

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

It is commendable that the newly proposed system of using *gacaca* tribunals brings the justice process at the local (cell, district, province) level which is where most people, especially in the rural society of Rwanda, experienced the violence and its aftermath. In general, the involvement of local people in the process of collecting and processing information, rather than simply the involvement of professional staff, may set in motion a more sustained process for coming to terms with the past.¹⁴¹

The process of gathering the information of survivors telling their stories in local hearings, of having people taking testimonies and participating in the process as the need arises, further correspond to the African concept of justice.¹⁴² How many times have Rwandese doubted the justice they have got from the Western-style courtrooms and from an environment and language they could hardly comprehend? Since justice, like culture, is not supposed to be a static concept, it should be

141 N Roht-Arriaza 'Combating impunity: Some thoughts on the way forward' (1996) 59 (4) *Law and Contemporary Problems* 93.

142 At the hearing, any person who wants to do so may take the floor. See art 66(6) of the Draft *Gacaca* Law.

developed to be consistent with conditions and experiences in given situations.¹⁴³ Rwanda should learn from its rich past to nourish its concept of justice and ultimately human rights. Certainly, the *gacaca* process will 'prove the capacity of the Rwandan society to settle its own problems through a legal system based on Rwandan customs'.¹⁴⁴ Furthermore, for the lessons of an accountability process to be integrated into the life and culture of Rwanda, the nation should feel a sense of ownership and investment in the process.¹⁴⁵

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

Turning to the procedural criminal law aspect, it is, in principle, up to each particular nation facing the problem to decide the specific content of a policy to deal with past massive human rights abuses. However, Rwanda must also act in consonance with international human rights law and principles. In particular, international standards related to trials, treatment of offenders and punishment should be respected. The draft law on *gacaca* jurisdictions should be amended to ensure that these trials conform to international standards for fair trials. In particular, defendants should have, at least, access to legal advice. Also, measures should be taken to ensure the competence, independence and impartiality of those elected to the *gacaca* jurisdictions, at all levels. Finally, before the *gacaca* jurisdictions begin considering cases of genocide, significant resources should be devoted to ensuring training of those elected for the *gacaca* jurisdictions, including training in international standards for fair trials.

Since legal training appears to be crucial, the disqualification of career magistrates as members of the *gacaca* jurisdictions is perplexing. Measures should also be taken to ensure that legal advisers of the *gacaca* jurisdictions are independent and impartial in providing their 'advisory opinions'. In this respect, the Supreme Court, in its supervisory and monitoring function, will have a critical role to play in ensuring that the *gacaca* jurisdictions fulfil their tasks and are seen to be competent, independent and impartial.

143 See also ABS Preis 'Human rights as a cultural practice: An anthropological critique' (1996) 18 *Human Rights Quarterly* 293.

144 Preamble, Draft *Gacaca* Law.

145 NJ Kritz 'Coming to terms with atrocities: A review of accountability mechanisms for mass violations of human rights' (1996) 59 (4) *Law and Contemporary Problems* 127.

The ultimate goal of justice should be the building or rebuilding of a peaceful society.¹⁴⁶ As argued above, reconciliation results from individuals' interactions. The attainment of justice or the acknowledgement of the truth certainly serves to help the process of reconciliation. It is doubtful, however, if the process of justice necessarily leads to reconciliation. What should be achieved is not only a sense of justice but also the elimination of a sense of injustice for both the victims and the perpetrators.

The conflict in Rwanda is complex because it has multiple underlying causes.¹⁴⁷ Only when all the sources are identified can there be development of comprehensive management strategies that can result in a genuine resolution of conflict.

The dilemma of justice and social reconstruction in Rwanda is how to respond to past gross abuses in a manner that allows communities with varied experiences, needs and goals to learn to live together again. Ultimately, while justice and accountability may be significant contributors to the process of social reconstruction, criminal trials should be conceptualised as but one aspect of a larger series of possible interventions.

146 As Bassiouni notes, 'whichever mechanism or combination of mechanisms is chosen, it is chosen to achieve a particular outcome which is, in part, justice, and, whenever possible reconciliation, and ultimately, peace' (n 130 above) 23.

147 For a comprehensive overview of the various interpretations of the conflict in Rwanda, see JP Kimonyo 'Revue critique des interprétations du conflit rwandais' (2000) 1 *Cahiers Centre de Gestion des Conflits, Université Nationale du Rwanda*, 1–80.