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JUSTICE, RECONCILIATION AND REPARATION AFTER GENOCIDE AND CRIMES AGAINST HUMANITY: THE PROPOSED ESTABLISHMENT OF POPULAR GACACA TRIBUNALS IN RWANDA.

I. INTRODUCTION

On 17 October 1998, on the occasion of one of the weekly consultation meetings between Rwandan President Pasteur Bizimungu and some political leaders and civil society representatives, it was decided to establish a Commission to look into mechanisms that might increase popular involvement in the ongoing judicial proceedings against suspected perpetrators of the genocide and other crimes against humanity committed in Rwanda between 1 October 1990 and 31 December 1994. The commission was composed of 15 members, chaired by the Minister of Justice and included a number of members of parliament and several senior civil servants of the Ministry of Justice. On 8 June 1999, an official document[1] was published with a fairly detailed proposal in view of the establishment of Gacaca[2] tribunals. The proposal outlines the jurisdiction of these "popular" tribunals, their composition and functioning as well as the necessary pre-conditions for their establishment and their relation with the existing laws and institutions (see below, section III.3.4.).

This paper will present these proposals, which will be the subject of a debate at the level of the National Assembly and attempt at making a first evaluation of the major advantages, risks and limitations of the proposed use of these gacaca tribunals, which find some degree of inspiration in the traditional, indigenous dispute settlement and reconciliation mechanism.

Before doing so, reference will first be made to the context in which these gacaca tribunals will be operating. The proposed use of gacaca tribunals can indeed not be seen in isolation. In fact, between 1990 and today, Rwanda has been struggling with a process of political transition, has been involved in an internal armed conflict (which has now become a regional armed conflict) and has been the scene of a massive number of human rights violations, amounting to genocide and crimes against humanity.

II. RWANDA 1990 - 1999: ARMED CONFLICT, POLITICAL TRANSITION, GENOCIDE AND OTHER MASSIVE HUMAN RIGHTS VIOLATIONS

This paper will start by briefly summarizing developments over the last 10 years in these three different but interlinked areas: armed conflict, political transition and genocide and other crimes against humanity. The context in which the proposed Gacaca tribunals will need to operate is, in fact, not "neutral". It is not a situation in which justice needs to be done

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

[2] "Gacaca" is kinyarwanda for "lawn" or "lawn-justice", named after the place where, traditionally, the local community gathered to settle disputes opposing members of a family or different families or inhabitants of the same hill, etcetera. For a more detailed presentation of the gacaca, see section xxx below.

for an isolated or a number of isolated criminal offences, for which a given society had developed its appropriate statal or non-statal, indigenous response. The impact of genocide, war and failed political transition has led to a context in which society itself has been the victim, i.e. where the social tissue which underpins the usual indigenous response has broken down, and where the state has been an instrument of oppression rather than an instrument of protection of fundamental rights of its citizens.

Expectations towards the judicial response to genocide and other crimes against humanity have been very high. And the judicial approach - at international or national level, through formal state laws and institutions or through non-state mechanisms - is of extreme importance in itself. Nevertheless, in order to attain more long term objectives of peace, reconciliation and a contect conducive to sustainable human development, to which the judicial response is rightly expected to contribute, an appropriate and integrated answer will also need to be found for the two other challenges.

II.1. The armed conflict: from internal to regional

The invasion by the Rwandan Patriotic Front (RPF) in Northern Rwanda on 1 October 1990, was the start of an internal armed conflict between the nearly exclusively Hutu regime and army and a Tutsi dominated armed rebellion, predominantly made up of members of the exiled Tutsi "old case-load" refugee community in Uganda. Throughout the civil war, the war front remained situated in the northern part of the country. But in Kigali and elsewhere, Tutsi civilians, perceived as allies and spies of the rebel forces, as well as other political opponents of the one-party regime were victims of arbitrary arrests and other serious human rights violations[3]. A cease-fire[4] was signed on 12 July 1992 and a negotiations process started in Arusha, Tanzania. The Arusha Peace Accord was signed on 4 August 1993 and included protocols on the integration of the armed forces, the repatriation of refugees and the resettlement of displaced persons. The internal armed conflict had seemingly come to an end.

The implementation of the Arusha Peace Accords met with strong resistance. The shooting of the presidential airplane and the assassination of President Habyarimana on 6 April 1994 was not only the start for the genocide and a massive number of other human rights violations, but also for the resumption of the war. The parallel chronology of both events (the start of the genocide and the resumption of the war) may have seriously mislead international observers in the initial days and even weeks of the events: whereas the international community was hoping for an immediate cease-fire to stop the massacres (and, as a consequence, needed the interim Hutu Government as one of the negotiating parties) the reality was that the majority of massacres did not occur as a consequence of the war but as part of the implementation of a well orchestrated genocide. As far as the military aspects are concerned, the northern town of Buymba was taken by the RPF without much fighting. It would take several weeks before control over the capital town (including the airport) was firmly taken. The Eastern Kibungo Province was also soon under rebel control, which happened "*with a minimum of fighting*"[5]. The RPF continued to recruit new soldiers, including among Tutsi genocide survivors. The interim Hutu Government of Prime Minister Jean Kambanda was forced to retreat, first to Gitarama, then to Gisenyi, on the Rwando-Zairean border. The fall of Kigali, Ruhengeri and finally Gisenyi on 18 July 1994 were followed by the establishment of a new Government in Kigali on 19 July 1994. More than one

[3] For many Rwandese and a number of foreign observers, this was actually the real start of the genocide, which is generally interpreted as limited to the April-June 1994 three month period.

[4] Two earlier cease-fires, signed on 29 March 1991 in N'Sele and on 16 September 1991 in Gbadolite, has not been respected.

[5] PRUNIER, G., *The Rwanda Crisis. History of a Genocide*, Hurst and Company, London, 1995, p.268.

million people had crossed the border into Zaire; they included a large number of former Government army soldiers (the ex-FAR, or *Forces Armées Rwandaises*) and Interahamwe militia members. Again, following the military victory of the RPF rebellion, the armed conflict had seemingly come to an end.

However, cross-border raids in the northwestern part of the country continued to create insecurity, intially on a relatively reduced scale, but gradually, throughout 1995 and 1996, more intensively. The lack of willingness on behalf of the Zaire government to control these armed activities was seen by the new Government in Kigali as a long term source of internal instability. The armed invasion by the RPA (the new Government army) into Zaire, in November 1996, to dismantle the refugees camps and, as a consequence, the military bases of the new Hutu rebellion was supposed to put an end to this insecurity. Meanwhile, the creation of the AFDL rebellion under the leadership of Laurent-Désiré Kabila led to the fall of the Mobutu-regime, Zaire becoming the Democratic Republic of Congo. However, the source of the ongoing insecurity in the North-West soon turned out to have been "internalized": in June 1997, the Phases and Security Procedures of the United Nations considered one third of communes as being "*inaccessible*" to UN personnel, and another third of the communes as "*requiring a military escort*". A 1998 African Rights report[6] lists all operational leaders of the armed Hutu insurgency, known as the *Peuple Armé pour la Libération du Rwanda* (PALIR): all of them are ex-FAR, who held important positions in Rwanda before July 1994. Again, the armed conflict had not come to an end.

The ongoing security threats and cross-border movements of Hutu insurgents were among the reasons why a second so-called rebellion was established by Rwanda and Uganda. The RCD (Congolese Rally for Democracy) took off in August 1998. What initially seemed to turn out as a replay of the first rebellion, soon obtained unprecedented regional dimensions. In fact, several countries, including Angola and Zimbabwe, decided to send in armed forces in support of President Kabila. The number of players and interests involved has increased dramatically and this makes a solution much more difficult to attain. In fact, also financial and economic interests have come into play[7]. It remains highly uncertain whether the July 1999 Lusaka Agreement, which provides for a cessation of hostilities, a withdrawal of all foreign forces from DRC territory and the disarmament of all armed groups, including the ex-FAR, will effectively contribute to the ending of what started as an internal armed conflict but, after nearly nine years, has turned into a regional war.

In summary, it is important to note that Rwanda has not been without an armed conflict situation since October 1990. Therefore, Rwanda cannot be seen as a typical post-conflict situation and this has a serious impact on the potential use of both international, national statal or indigenous justice and reconciliation mechanisms. Whether is war is to be seen as prevention of genocide or as an act of agression and attempted annexation of part of DRC by Rwanda[8], the reality is that Rwandese citizens are sent to a foreign country to fight other Rwandese citizens. Many of them end up being killed themselves. The genocide (April-June 1994) may rightly be isolated from an international law and also domestic legal perspective, but the ongoing regional violence which has a direct impact on many families makes it no doubt much more difficult for Rwanda's society to come to terms with the violence of the past, whatever the proposed approach or mechanism - indigenous or not - might be.

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[6] AFRICAN RIGHTS, *Rwanda. The Insurgency in the Northwest*, London, 1998, 263p.

[7] The appointment of Zimbabwean Billy Rautenbach as head of the Congolese mining company Gécamines and the exploitation of Congo's mineral resources by top Ugandan and Rwandan officials are telling illustrations.

[8] LUBALA, E., "Interventions militaires étrangères au Kivu: prévention de génocide ou voie de puissance?" in MARYSSE, S. and REYNTJENS, F. (ed.), *L'Afrique des Grands Lacs. Annuaire 1998-1999*, Paris, L'Harmattan, 1999, pp.284-308.

II.2. Political transition: a long road ahead

Following the Franco-African summit in La Baule, President Habyarimana in July 1990 announced the introduction of multi-partyism in Rwanda.This announcement was made less than three months before the invasion by the RPF rebellion (see section II.1). By early 1991, four opposition parties had been created in addition to the MRND (*Mouvement Révolutionnaire National pour le Développement*)[9]. In March 1992, the extremist Hutu party CDR, *Coalition pour la Défense de la République*, was set up; it had close connections with the now famous RTLM radio station and Kangura magazine and would play a key role in the preparation and implementation of the genocide. Prunier summarized the main difficulty of democratization in Rwanda as coming from "*the conjunction of two forces: the obdurate resistance of the power structure to any type of genuine democratisation and the selfish gree of a large part of the opposition leadershi.*"[10]. There is one element which we would like to add and which would constitute a real challenge for any regime: how to respond to a situation of internal armed conflict and, at the same time, implement a donor driven democratization programme?

The Arusha negotiations process in fact had to respond to both challenges: not only it required a peace agreement to put an end to the internal armed conflict, it also had to consolidate the internal democratization process, including the RPF as a political party. After several ups and downs during the negotiations process, the Arusha Accords included a protocol of agreement on power-sharing within the framework of a broad-based transitional Government, with a nominative distribution of portfolios within the transitional Government (article 56) and a numerical distribution of seats in the transitional National Assembly (article 62). The Arusha Accord were a fragile though detailed agreement that reflected a tripolar political situation, the three poles being the MRND regime, the armed rebellion and the internal opposition. However, as mentioned above (under II.1), the implementation of the Arusha Accords failed to materialize. Among the main reasons for this failure, apart from the lack of political willingness to concede power, was the erosion of the tripolar nature of the political scene. In the context of ongoing political killings and massacres of civilians, but also of the assassination of the first democratically elected Hutu president of Burundi, Melchior Ndadaye in October 1993, all of the internal opposition parties were subject to increasing internal divisions and splits into pro-regime and pro-rebellion factions. Within months after its signature, the tripolar Arusha agreement did no longer correspond to the bipolar political reality[11].

On 17 July 1994, the victorious RPF announced the installation of a transitional Government and a transitional National Assembly along the lines of the Arusha Accords which would continue to form part of the country's Fundamental Law[12]. A five-year[13]

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[9] These were the MDR (*Mouvement Démocratique Républicain*), the PSD (*Parti Social Démocrate*), the PL (*Parti Libéral*) and the PDC (*Parti Démocrate-Chrétien*).

[10] PRUNIER, G., *op.cit.*, p.131.

[11] Guichaoua noted that "*le type d'alliance à conclure avec lui* (= the RPF) *divise chaque parti. D'un côté, la tentation domine de prendre appui sur la puissance militaire du FPR de façon à en finir pour de bon avec le régime Habyarimana, de l'autre est préconisé une stratégie d'autonomie et de maintien d'une position centrale dans le système de confrontation tripolaire. (...) Les stratégies de tension ethnique conduisent inexorablement à la bipolarisation*" (GUICHAOUA, A., *Les antécédents politiques de la crise rwandaise de 1994*, Arusha, 1997, pp.36-37).

[12] However, the seats and ministerial posts which would normally have been awarded to the MRND, CDR or other parties or factions that had played an active role in the genocide, were now to be filled by the RPF.

[13] In June 1999, the RPF decided to extend the transition period by another 4 years (CROS, M.F., "Le pouvoir s'octroie quatre ans de plus", *La Libre Belgique*, 11 juin 1999).

transitional period was declared, which, in accordance with the Arusha Accords, was to result in free and democratic elections. Given the tremendous human and material losses of the country and given the military victory of the RPF, this option for institutions with strong RPF representations combined with the inclusion of the former internal opposition seemed most reasonable. In this new context, the Arusha Accords - the most tangible instrument of power-sharing available - were indeed no longer literally applicable.

However, the evolution since July 1994 is less positive. The challenges which - politically speaking - Rwanda was facing in July 1994 (and is still facing) have been very well summarized by Mamdani: "*To break out of this notion of the state of a representation of a permanently defined majority is the challenge that Rwanda faces today*" or, also, "*How to move from an order based on conquest to one based on consent is the challenge for Rwanda today*"[14]. In other words, neither a system of majoritarian democracy, where a demographic majority equals full and exclusive political power, nor a minority military regime can offer a durable political framework to rebuild society. The role of ethnicity as a politically relevant element, and the existence of ethnic or otherwise defined groups in Rwanda, has been extensively debated. Mamdani states that: *"(...) power-sharing will not be durable without a reform of the structure, so that majority and minority are not permanent artefacts institutionalized in the structures of the state and confirmed by the political processes set in motion by that state. In other words, while the recognition of the Bahutu and Batutsi identities needs to be the starting point for a process of reconciliation, the point of the process must be, not the reproduce these dualities, but to transcend them*"[15]. One technique of acknowledging, incorporating, demining and, finally, transcending group differences which has been successfully applied in different instances of plural societies is called consociational democracy. It would lead us to far in this context to elaborate on this. However, when confronting Arend Lijphart's favourable conditions for consociational power-sharing[16] with the Rwandan context, we found[17] that prospects are rather grim.

Turning back to the political development in Rwanda since July 1994, we find that the power-base of the regime has narrowed down instead of becoming broader and more inclusive. Several leadings politicians - nearly exclusively Hutu - have left or have been forced to leave the government, the national assembly, senior administration posts or the justice system[18]. The army has remained a nearly exclusively RPA and Tutsi bastion. Human rights violations are committed against human rights activists, journalists or other real of perceived political opponents (including members of the catholic church). No political party, other than the RPF, is allowed to conduct the usual political party activities, despite their representation in the National Assembly. The diaspora political opposition is excluded from

[14] MAMDANI, M., "From Conquest to Consent as the Basis of State Formation: Reflections on Rwanda", *New Left Review*, N°216, 1996, p.17.
[15] *ibidem*, p.30.
[16] See LIJPHART, A., *Democracy in Plural Societies. A Comparative Exploration*, New Haven, London, Yale University Press, 1977 and LIJPHART, A., "Changement et continuité dans la théorie consociative", *Revue Internationale de Politique Comparée*, Vol.4, N°3, 1997, pp.697-697. Favorable conditions include a multiple balance of powers, cross-cutting cleavages, overarching loyalties, external dangers perceived as a common threat by all segments, etcetera.
[17] See, in more detail, VANDEGINSTE, S. and HUYSE, L., "Approches consociatives dans le contexte du Rwanda", in REYNTJENS, F. and MARYSSE, S., *L'Afrique des Grands Lacs. Annuaire 1998-1999*, Paris, L'Harmattan, 1999, pp.101-123.
[18] Naming all of them would again lead us too far, but reference can be made to, for instance, Fautin Twagiramungu (MDR Hutu Prime Minister, who resigned and fled in 1995), Seth Sendashonga (RPF Hutu Minister of the Interior, who resigned in 1995 and was assassinated in Nairobi in 1997), Augustin Cyiza (Hutu President of *the Cour de Cassation*, who resigned under pressure in 1998), Faustin Nteziryayo (Hutu Minister of Justice, who resigned and fled in January 1999) and Alype Nkundiyaremye (Hutu President of the Council of State, who fled in June 1999).

participating in the design of Rwanda's politica project for the next millenium. In this context, it should be stressed that not all organized dispora, which includes both Hutu and Tutsi opponents of the current regime, can be automatically labelled as "*génocidaires*", which the regime rightly rejects as political counterparts[19]. The local elections which were held early 1999 at the level of the lowest administrative units under a no-party system have, by some observers, been seen as a first step in a genuine bottom-up election and democratization process[20], but have, as the same time, been strongly criticized for their lack of freedom and fairness[21].

In summary, the political transition process which Rwanda (seemingly?) embarked upon in 1990 has certainly not come to an end and it even seems to have been put down the agenda by the new regime. Nevertheless, the relevance of political power-sharing for the use of indigenous justice and dispute settlement mechanisms in a post-genocide context should be stressed. The type of reconciliation needed transcends in fact the micro-level of local communities and also the one of victim-offender or community-offender reconciliation. It is also related to the way in which power over people and resources is exercised: in a monopolistic manner or through genuine power-sharing.

II.3. Genocide and other crimes against humanity: dealing with the past

The following sections in this paper will deal with the response at the international and national level to the horrible events that took place in Rwanda in 1994. We will not here into detail about how these massive human rights violations were planned and implemented in an unprecedented efficient manner. Others, including African Rights[22] and Human Rights Watch, have published extensively on this episode in the history and the genocidal nature of the crimes committed is beyond any doubt.

At this stage we would like to refer to those publication and simply highlight one element in the international community's response during the months of April to June 1994. I was only on 8 June 1994, two months after the start of the genocide, that the UN Security Council, used the word "genocide" in a resolution. There may be various reasons why, despite pressures by international human rights groups and also by UN human rights mechanisms, the Security Council took so long before using the correct name to describe the ongoing horror. One of the elements at stake, at least in the early days, was no doubt the confusion on behalf of key representatives of the international community to distinguish between the resumption of the civil war (see II.1.) and the genocide and crimes against humanity.

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[19] Reference should, for instance, be made to the UFDR (Union of Rwandese Democratic Forces), UNAR (*Union Nationale pour le Rwanda*), CDA (African Democratic Congress), NOUER (*Nouvelle Espérance pour le Rwanda*), RNLM (Rwanda National Liberation Movement).

[20] PRENDERGAST, J. and SMOCK, D., *Postgenocide Reconstruction: Building Peace in Rwanda and Burundi*, Washington DC, US Institute of Peace, September 1999 (www.usip.org/oc/sr/sr990915/sr990915.htm)

[21] IRIN, *Rwandans prepare for first post-genocide elections*, Nairobi, 26 March 1999.

[22] AFRICAN RIGHTS, *Death, Despair and Defiance*, London, 1995, 1201p.; HUMAN RIGHTS WATCH, *Leave None to Tell the Story. Genocide in Rwanda*, New York, 1999, 789p.

In this section, we will briefly describe how the international community and the Government of Rwanda[23] respond to the genocide and crimes against. We will also introduce the current proposals by the Rwandan Government to establish gacaca tribunals as an alternative accountability mechanism for certain levels of responsibilities of genocide suspects.

III.1. The response at the international level

Despite the absence, in several international human rights instruments, of explicit provisions regarding the duty to prosecute and punish those responsible for violations of the rights contained in those instruments, there is now a firmly established legal principle of universal jurisdiction authorizing (and even obliging) states to exercise jurisdiction over the perpetrators of the gravest human rights violations, irrespective of the nationality of the perpetrator or victim and irrespective of the state where the crimes were committed. Genocide is obviously one of those crimes.

As a consequence, the international community's political decision to consider the events taking place as being a genocide, was logically[24] to be followed by the establishment of an appropriate forum to prosecute the alleged perpetrators, many of whom were no longer on Rwandese territory, and, as a consequence, beyond direct reach of Rwanda's national judicial system. Following the deployment of a team of experts on behalf of the UN Secretary-General to determine to mandate of an international ad hoc tribunal, the decision was taken, by UN Security Council Resolution[25], to establish the International Criminal Tribunal for Rwanda (ICTR). Interestingly, the ICTR is not only expected to render justice, by determining guilt for the horrific crimes committed, but also, in accordance with one of the preambular paragraphs in the ICTR Statute, to "*contribute to the process of national reconciliation and to the restoration and maintenance of peace*".

Nearly five years after the adoption of the UN Security Council deciding on the establishment of the ICTR, five high-ranking political leaders, senior government administrators and businessmen (including the Prime Minister of the interim government, Jean Kambanda) have been convicted and sentenced to prison sentences. Thirty-three others are held in pre-trial detention in Arusha[26]. From a perspective of international criminal law and international human rights law, these achievements are certainly positive. Ten years ago, it was hard to imagine that an international institution would be able to contribute in such manner to the fight against impunity for the worst human rights violations. The ICTR experience will also be invaluable for the future International Criminal Court. However, some elements of evaluation, which, in this context, we will not deal with in detail, are less positive. These are related to internal factors, such as poor management and various operational problems which are inherently linked to an ad hoc structure, but also to factors which have a direct bearing on the possible contribution of the ICTR to a national reconciliation process in Rwanda:

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[23] About the difficulties related to the concurrent organization of trials at the national and international level, see, i.a. MORRIS, M.H., "The Trials of Concurrent Jurisdiction: the Case of Rwanda", *Duke Journal of Comparative and International Law*, Vol.7, N°2, 1997, p.349-374 and NCHOUWAT, A., "Arusha et Kigali dans la répression du génocide rwandais: duel ou duo?", *Revue de Droit Africain*, N°8, 1998, p.409-423.

[24] Article 6 of the UN Convention on the Prevention and Punishment of the Crime of Genocide states that "*persons charged with genocide or any of the other acts enumerated in article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction*".

[25] UN Security Council Resolution 955 of 8 November 1994

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

* "Justice delayed is justice denied": for justice to be seen to be done, trials should be held within a reasonable period of time. Victims organizations have been complaining that the ICTR proceedings simply take too long and that this in itself undermines the objective of justice.
* Also, Rwanda has in the meantime been faced with ongoing gross violations of human rights which are not in the ICTR's mandate: the massacres of Hutu refugees and other civilians in Eastern Zaïre in early 1997 by AFDL and RPA forces were qualified as crimes against humanity (and possibly, subject to further investigation, genocide) by a Special Investigative Team of the UN Secretary-General[27]. Nevertheless, the mandate *ratione temporis* of the ICTR does not permit this international judicial body to prosecute the suspected perpetrators of these violations.
* The above limitation of the mandate is seen as an additional indication that the ICTR is rendering justice on behalf of the victor, i.e. the militarily strongest party. This perception is also fed by the lack of investigation into war crimes committed by the RPF, which do fall within the ICTR mandate.
* Generally, the involvement of victims is almost completely lacking and possibilities for victims to obtain reparation (compensation) through the ICTR are non-existent[28]. Also, privileged eye-witnesses have denounced the enormous (mental) distance between the population and the ICTR: "*They are incapable of approaching those who have experienced the genocide. They do not know how to ask the right questions. They have a behaviour and opinions which hurt people. The Rwandans had placed great hope in the ICTR. They are very disappointed*"[29].

In addition to the establishment of the ICTR, trials against suspected perpetrators before national judicial systems in other countries than Rwanda, are also part of the international response. Some countries, including Cameroon, Kenya, Zambia, Belgium and others, have arrested and, at the request of the ICTR, extradited some of the key suspects currently held in Arusha. The direct exercise of universal jurisdiction, through the organisation of trials before domestic institutions, has, as far as criminal prosecution is concerned, so far been limited to one case: Fulgence Niyonteze, a former mayor of Mushubati, was sentenced to life imprisonment by a Swiss military court in April 1999. The start of three trials against suspected *génocidaires* has been announced by the former Belgian Minister of Justice for the end of 1999 and earlier this year, a French Court of Appeal overruled an earlier decision of a lower court and decided that French courts do have jurisdiction to prosecute in the case of father Wenceslas Munyeshyaka[30]. In addition to criminal prosecution, some states also recognize the rights of the victims to seek (civil) compensation before their courts. The case against Jean-Bosco Barayagwiza, one of the leaders of the extremist CDR political party, before a New York district court, resulted in the

[27] "*(...) the systematic massacre of those remaining in Zaire was an abhorrent crime against humanity, but the underlying rationale for the decisions is material to whether these killings constituted genocide, that is, a decision to eliminate, in part, the Hutu ethnic group*" (para.96).
[28] Unlike in Napoleontic legal systems (including Rwanda), victims cannot constitute themselves "*partie civile*" (civil claimants). However, under Rule 106 of the ICTR Rules of Procedure and Evidence, the ICTR Registrar shall transmit to the competent authorities of the States concerned the judgment finding the accused guilty of a crime which has caused injury to a victim. Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation. For the purposes of this claim, the judgment of the ICTR shall be final and binding as far as the criminal responsibility of the convicted person for such injury is concerned.
[29] SIBOMANA, A., *Gardons espoir pour le Rwanda*, Paris, Desclée De Brouwer, 1997, p.166. (my translation)
[30] See, in more detail, AFRICAN RIGHTS, *Father Wenceslas Munyeshyaka: In the Eyes of the Survivors of Sainte Famille*, London, 1999.

decision, in April 1996, to award compensation amounting to 105 million US$ to the group of survivors who initiated the proceedings[31].

III.2. The response at the level of the national judicial system

The prosecution of perpetrators of mass human rights violations was one of the major stated objectives of the new Rwandan Government that came to power in July 1994. Fighting impunity is seen as the key instrument of rendering justice and justice is considered an essential pre-condition for reconciliation in Rwanda. At the level of the national judiciary, the Rwandan Government chose to combine a double objective: (1) a rehabilitation of the justice system, which, in terms of both human and material resources, had been most seriously affected and brought to nearly complete standstill by the war and genocide, (2) the organization of genocide trials before the same judicial system. In the context of this paper, we will limit ourselves to summarizing the main preparatory steps that were taken to enable the organization of genocide trials. We will present a short state of the art on and some elements of evaluation[32].

III.2.1.Legal and Institutional reforms

Although Rwanda had ratified the 1948 Genocide Convention, it had failed to enact domestic legislation[33]. After lengthy debates within the Government and at the level of the National Assembly, the necessary legal instrument was adopted and, on 1 September 1996, the Official Gazette of the Republic of Rwanda published the "Organic Law of 30 August 1996 on the organization of prosecutions for offences constituting the crime of genocide or crimes against humanity since 1 October 1990". One of the main characteristics of the law is the categorization of suspects (article 2). Category 1 includes the planners, organizers and leaders of the genocide, persons acting in a position of authority, "notorious murderers" and persons who committed acts of torture. Category 2 is made up of all others who committed homicide. Persons who committed other serious assaults against persons fall in category 3. Category 4 includes persons who committed offences against property. The Organic Law also establishes a confession and guilty plea procedure. This procedure was seen as an instrument to overcome the main obstacle for the prosecution of genocide suspects: the lack of evidence. Apart from some written evidence of the involvement of top leaders in the planning of genocide (through lists of arms distributions, training of *interahamwe* militia members, radio broadcasts, newspaper articles, etcetera), there is hardly any evidence to substantiate the involvement of the large majority of "ordinary" killers: most eyewitnesses had been killed or had left the country. It was soon realized that this would be the major problem for the preparation of legal case-files by the prosecution department. Therefore, a confession and guilty plea procedure was introduced, offering a considerable penalty reduction for those

[31] In the absence of any assets of Barayagwiza in the U.S., the actual payment of this compensation remains yet to be made.

[32] For more details, please refer, i.a., to: FERSTMAN, C.J., "Domestic Trials for Genocide and Crimes against Humanity: The Example of Rwanda", *African Journal of International and Comparative Law*, Vol.9, 1997, p.857-877 and DRUMBL, M.A., "Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials", *Columbia Human Rights Law Review*, Vol.29, N°3, 1998, p.545-639.

[33] Article 5 of the Genocide Convention states that "*The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article 3"*.

perpetrators who confess and provide evidence that can be used against other suspects[34]. As of 30 June 1999, and according to Ministry of Justice figures, more than 15,000 detainees have reportedly confessed[35]. In accordance with the general criminal procedure, the Organic Law allows for the participation of victims in the criminal proceedings as civil claimants (*partie civile*). The tribunals have jurisdiction to award civil damages, even to victims who have not yet been identified. In the latter case, the Organic Law provides for the payment of damages to a future Victims Compensation Fund.

Given the massive number of criminal offences that had been committed, in combination with the nearly complete breakdown of the law enforcement and justice system after the genocide, a massive number of people had been arrested illegally, i.e. not in accordance with the relevant legal provisions. Many suspects have been arrested by ordinary soldiers who do not have the legal authority to carry out arrests and virtually no arrest was submitted for a judicial review and confirmation within the delays prescribed by the Code of Criminal Procedure. On 15 September 1996, date of its publication in the Official Gazette, the *Law relating to provisional modifications to the Criminal Procedure Code* entered into force retro-actively, with effect as of 6 April 1994. Its objective was the regularization of tens of thousands of illegal arrests and detentions that have taken place since the new Government came to power, through temporary derogations from statutory deadlines for the issuance of an arrest record ("*procès-verbal d'arrestation"*) by a JPO, of a provisional arrest warrant ("*mandat d'arrêt provisoire*") by an OMP and of a preventive detention order ("*ordonnance de mise en detention préventive*") by a judge. These 3 elements of a legal dossier are essential to legally detain suspects. Given the total disintegration of the judicial institutions, it was rightly argued that it was absolutely impossible to respect the strict legal delays for the preparation of these documents. The Rwandan Government explicitly refered to the derogation clause in article 4 of the ICCPR to justify the modifications to the Criminal Procedure Code. However, the adopted derogations were excessive[36] to the extent that the law enacted in September 1996 allowed the authorities to legally arrest a person, for instance, on 1 December 1997 and detain him until 14 July 1998 without a review of his pre-trial detention by a judge. As could be expected, the deadlines have not been met in a large number of cases, and in January 1998, an additional modification to the Code of Criminal Procedure was published to extend the 'regularization' period with another two years until December 1999. Even if this new time limitation is respected - which is extremely unlikely, see footnote 37 - , some suspects will have spent over 5 years without a judicial review of their pre-trial detention. This situation is not only contrary to international human rights norms. It has obviously also been conducive to large numbers of arbitrary arrests, mainly by military but also by administrative authorities, often on the basis of poorly substantiated denounciations and in the context of a settlement of personal scores[37]. In October 1998, the Minister of Justice announced that 10,000 pre-trial detainees without legal case-files would be soon

[34] In fact, for a confession to be admissible under the Organic Law, a detailed description must be given of the offences which the applicant committed, including the date, time and location of each act, as well as the names of victims, witnesses, accomplices and instigators (article 6).

[35] AVOCATS SANS FRONTIERES, *Justice pour Tous au Rwanda. Rapport Semestriel. 1er semestre 1999*, Bruxelles, Kigali, Septembre 1999, p.14.

[36] According to René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, this clause cannot be invoked in this case (*Report on the situation of human rights in Rwanda*, UN Doc. E/CN.4/1997/61, 20 January 1997, para.112).

[37] Following accusations by IBUKA (the main genocide survivors' organization) against Elysée Bisengimana, a newly appointed RPF member of parliament from Cyangugu prefecture, even RPF Secretary-General Charles Muligande denounced these arbitrary denounciation practices: "*Le FPR s'engage à aider le Gouvernement dans la recherche des voies et moyens pour combattre cette habitude d'accuser faussement des gens de participation au génocide et massacres*" (cited in *Le Verdict*, May 1999, p.13).

released. A public campaign was set up by IBUKA (the main genocide survivors' organization) to denounce this measure[38]. As of 15 June 1999, only 3,365 had been released[39].

The problem of legal representation of defendants before domestic genocide tribunals was exacerbated by the absence of national lawyers willing to take up the defense of genocide suspects. A number of lawyers had been assassinated, others had participated in the genocide and either left the country or been arrested. Most, if not all, of the remaining lawyers had suffered from the genocide, lost relatives or property and some of them were not ready to represent suspected "*génocidaires*". Others were intimidated and abstained from intervening due to fears for reprisals. Though not an immediate solution to the lack of defense lawyers, the first time ever establishment of a bar (or law society) in Rwanda was nevertheless an important step in the reconstruction of a functional judicial system. The law establishing the bar was published in the Official Gazette of 15 April 1997. On 30 August 1997, the bar was officially established: 44 Rwandan holders of a university degree in law were admitted to the bar. The law also provides for a corps of judicial defenders, who do not hold a university law degree, but who are entitled to assist and represent parties at the level of the tribunals of first instance. Among those who are allowed to serve as judicial defenders are "*those who have earned a six-month training certificate in law*" (article 95). In 1998, the first judicial defenders participated in a training programme, funded by the Danish Centre for Human Rights. In practice, an important part of the lawyers (Rwandese and international), both on behalf of the defense and of the civil claimants, have operated in the context of the "Justice for All"-project of Attorneys without Borders (*Avocats sans Frontières*)[40]. By the end of the year 2000, Attorneys without Borders will have left Rwanda. It anticipates that a sufficient number of Rwandan attorneys and judicial defenders will be available (and willing) to provide legal counsel to genocide suspects.

In addition to this summary of the main legal reforms, reference should be made to the creation, by the Organic Law, of Specialised Chambers within the existing Tribunals of First Instance with exclusive juridiction to handle genocide cases and to the training of a remarkable number of judges, prosecutors, judicial police inspectors and administrative personnel. By August 1997, the number of human resources exceeded the pre-April 1994 figures. However, a proposal to call upon foreign judges - albeit on a temporary basis - was unfortunately rejected by the National Assembly. The participation of foreign experts might definitely have helped to raise the legal quality of trials, as well as the perception of independence and impartiality of the justice rendered. The number of judges involved in the genocide trials has continued to rise: as of May 1999, 104 judges were appointed at the Specialised Chambers (versus 76 in November 1998)[41]. Unforunately, the absenteeism of judges remains important, and is a major cause of delayed hearings.

III.2.2. Current State of the Art

Domestic genocide trials have started in December 1996. According to official figures of the General Prosecutor's office of the Supreme Court, some 304 persons have been judged in 1997 and some 864 persons in 1998. During the first six months of 1999, 634 persons have

[38] See also MASSENET, P., "La libération des détenus sans dossier doit continuer", *Le Verdict*, June 1999, p.7.
[39] "Les 'sans dossiers' accusés de génocide continuent d'être libérés", *Le Verdict*, July 1999, p.14.
[40] In accordance with article 6 of the law, "*a lawyer who is a member of a bar of a state other than the Republic of Rwanda that has provided in its national legislation for reciprocity may provide legal services in Rwanda on an occasional basis in accordance with Rwandese rules respecting the regulation of the profession*".
[41] AVOCATS SANS FRONTIERES, *Justice pour Tous au Rwanda. Rapport Semestriel. 1er semestre 1999*, Bruxelles, Kigali, Septembre 1999, p.5.

been judged[42]. The total number of judgments (in first instance) as of 30 June 1999 therefore amounts to 1,802. Given that the number of pre-trial detainees is estimated to be around 122,000[43], it may, statistically speaking, take over 200 years to complete the genocide trials. This in itself is the most convincing indication that the one-track criminal justice approach which the Rwandan Government has so far opted for, is insufficient to deal with the past (see also below under III.2.3.).

In the early stages of the national trials, various violations of fair trial standards and other criticisms were reported. These were related i.a. to the lack of defense lawyers, to the strong limitations of the possibilities for a judicial review, to the intimidation of defense witnesses, to the generally hostile atmosphere in the court rooms vis-à-vis the defendants, etcetera[44]. Generally speaking, the quality of trials has considerably improved: the number of defense lawyers has dramatically increased (where Attorneys Without Borders was active, in 1997 and 1998, some 50% of defendants were assisted by a defense lawyer[45]), relatively unexperienced judges have benefitted from their on-the-job training, convictions are generally better substantiated, etcetera[46]. Some of the major problems remaining are: (1) the large number of pre-trial detainees, a large majority of whom remain without a regular judicial review of their detention[47], (2) the one-sidedness of the investigations[48]and threats that continue to be expressed against defense witnesses (*témoins à décharge*)[49], (3) rearrests of persons who have been released (prior to their trial or following their acquittal), (4) despite major improvements, legal assistance is not given to every defendant and remains limited to the trial stage[50], (5) cases of sexual crime remain, for various reasons, largely uninvestigated

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[42] AVOCATS SANS FRONTIERES, *op.cit.*, p.22. This increase is mainly due to the increased 'group trial' approach: for instance, the Tribunals of First Instance of Butare, Gikongoro, Byumba, Nyamata and Rushashi together have judged 249 defendants in 22 trials in the first six months of 1999 (KAMASHABI, F., "1999: Avancement des procès au cours de ce premier semestre, les chambres spécialisées ont accompli un travail satisfaisant", *Le Verdict*, Juillet 1999, pp.3-4).

[43] Although official figures may not fully correspond to the real number of detainees, the Ministry of Justice recently counted approximately 120,000 pre-trial detainees and approximately 1,500 convicts. According to Attorney's without Borders' recent report, some 86,292 suspects (including 4,104 women) are held in civilian prisons, some 33,327 in communal detention centre and some 3,208 in other lock-ups, which amounts to a total number of 122,827 pre-trail detainees. The number has decreased by some 2,200 compared to the December 1998 figures (125,028) (AVOCATS SANS FRONTIERES, *op.cit.*, p.14).

[44] See, i.a., AMNESTY INTERNATIONAL, *Rwanda. Unfair trials: Justice denied*, London, 1997.

[45] Some defendants benefitted from the assistance organized by the *Bureau de Consultation et de Défense* of the Kigali Bar Association (LIPRODHOR, *Procès de génocide au Rwanda. Deux ans Après (décembre 1996 - décembre 1998)*, Kigali, 1999, p.8).

[46] See, in more detail, AVOCATS SANS FRONTIERES, *Justice pour Tous au Rwanda. Rapport Annuel 1998*, Bruxelles, 1999.

[47] The activities of the council chambers (*chambre de conseil*), where pre-trial detentions are supposedly judicially reviewed, remain unacceptably limited, which is one of the major concerns from a human rights perspective. As of May 1999, approximately 20% of detainees have had a judicial review of their pre-trial detention in council chamber (AVOCATS SANS FRONTIERES, *Justice pour Tous au Rwanda. Rapport Semestriel. 1er semestre 1999*, Bruxelles, Kigali, Septembre 1999, p.14).

[48] Under Rwandan law, the public prosecutor has to investigate a case *à charge* and *à déchargé*. Both elements of proof indicating guilt and counterarguments should be taken into account. Very often, however, defense witnesses are not heard by the public prosecutor.

[49] It should be noted that also *témoins à charge*, be it in a less 'official' manner, have received threats.

[50] Rwandan law (Code of Criminal Procedure) limits the right to legal counsel to the hearings in council chamber (*chambre de conseil*, when the judicial review and, possibly, confirmation of the pre-trial detention is done) and to the trial hearings in court, but no legal assistance is permitted during the investigative stage (when the case is in the hands of the prosecution department). It should be noted that due to the poor performance of the council chambers, Attorneys Without Borders suspended its interventions at that level and urged the Minister of Justice, in May 1999, to take initiatives to improve the "*justice de façade*" which it considers to be rendered by the council chambers.

and tried[51]. Reports about corruption, which were virtually non-existent in the early months of the trials, have increased. Earlier this year, Ibuka (the main genocide survivors organization) denounced the "*early release of suspects by corrupt judges for 50,000 Rwandese Francs*" (approximately 150 US$). This is obviously directly linked to the fact that, also for the truly innocent who are held in pre-trial detention without a judicial review, bribes may turn out to be the most efficient way to obtain a release, as well as to the extremely low salaries of the judges and other judicial personnel. However, victims rightly refuse to accept these practices as justice. In a number of cases, this seems to have led to popular revenge and so-called "disappearances" of suspects after their return home[52].

As far as criminal sentences are concerned, the number of death penalties as a percentage of overall sentences has decreased. For the years 1997 and 1998, death penalties were pronounced in some 232 (or 18.2%) of all sentences; for the first semester of 1999, this amounted to 9% of cases only. Twenty-two convicts, some of whom had not benefitted from assistance by a defense lawyer, were publicly executed in Kigali in April 1998. Life imprisonment was imposed in 32.1%. The number of acquittals has risen importantly: on average, 18% of all defendants were acquitted in 1997 and 1998 (21% for the first semester of 1999)[53]. Statistically speaking, on the basis of the latter percentage, over 25,000 persons (21% of 122,000) are detained despite their innocence. Needless to say that prison conditions in severely overcrowded prisons, especially in municipal detention centres, often amount to cruel, inhuman and degrading treatment.

Victims can actively participate in legal proceedings as civil claimants (*partie civile*). In a considerable number of cases, defendants have not only been convicted to a criminal sentence but also to payment of an amount of compensation. This 'declaratory judgment' can be seen as an element of reparation in itself. Actual payments of compensation have so far been virtually non-existent. The proposed use of public utility work as a sanction to allow partial conversion of prison sentences (as proposed in the draft law on the establishment of gacaca tribunals) might be more interesting from the perspective of reparation for victims (see below).

III.2.3.Some elements of evaluation

The Rwandan Government has been remarkably succesful in rehabilitating the state and its structures: local and national administrative structures have been restored, the education system was quickly rebuilt, a completely new communal police force has been trained and deployed, roads have been repaired and new ones are being built, etcetera. The justice system is another example of this effort: in a relatively short period of time, some important legal reforms have been carried out and essential structures (such as the Supreme Court, the Supreme Council of Magistrates) put in place, court buildings have been repaired, human resources have been trained and new judicial personnel has been appointed, while some minimal operating equipment has been provided. The Rwandan Government should be commended for its strategy to combine both the organization of trials for genocide suspects and the rehabilitation of the "normal" judicial system. In the long term, this will definitely benefit the sustainability of donor support in this area. In the short term, looking at the bare figures, the number of national trials (and judgments) exceeds by far the number of ICTR

[51] SCHOTSMANS, M., "Violences sexuelles pendant le génocide: les femmes réclament justice", *Le Verdict*, August 1999, p.18.
[52] See, for instance, REMY, J.P., "Une justice à risques au Rwanda", *Libération*, 10 June 1999.
[53] Acquittals are often hardly accepted by certain components of the population. This has contributed, in a minority of cases, to a certain reluctance to release the acquitted, which is obviously extremely worrisome (AVOCATS SANS FRONTIERES, *op.cit.*, September 1999, p.6).

judgments. According to defence lawyers involved in individual cases, convictions have indeed in most cases been based on sufficient elements of proof against the accused (notwithstanding the valid concerns expressed by several human rights watchdogs regarding the violations of fair trial standards)[54].

In spite of these major achievements, and in addition to the above-mentioned violations of fair trial standards, there is an important concern which applies not only to the army, the communal police and other parts of the administration, but also to the judiciary. The concern may not so much affect the technical performance of the judicial system (where rendering justice and the quality of trials are an *objective* in itself), but may jeopardize the role of the justice system as an *instrument* of peace and reconciliation. Many Rwandans outside and inside Rwanda (and not only those in prison) do not sufficiently recognize the state as theirs and do not sufficiently recognize the justice rendered as theirs. It is a widely shared perception - whether fully accurate or not - among Hutu (including the so-called "moderate" ones) that a victor's justice is taking place. This is a major problem, as "*justice must not only be done, it must also be seen to be done*": even if the reportedly predominant Tutsi judiciary were to act evenhandedly and fairly (which is an enormous challenge in itself), the perception of bias is very real[55]. The refusal to incorporate some experienced Hutu judges and prosecutors, who remained in the country or who returned after the RPF's victory, as well as the arrest[56], assassination or departure into exile of a number of them, only exacerbated the problem. This problem is not necessarily an *ethnic* matter; it is primarily a matter of inclusiveness: the same concern would apply to a situation where all judicial personnel originate from the same prefecture (a *regional* bias), or where all judicial personnel are men (a *gender* bias)[57], or where all judicial personnel are Muslim (bias based on *religion*), etcetera[58]. Furthermore, efforts to end the culture of impunity would require the systematic prosecution of RPA military responsible for human rights violations. In cases where such abuses have caused international concern (such as the large-scale massacres of Hutu refugees in Eastern Congo), the official RPF line has been that those responsible would be prosecuted and punished. However, despite some reports that transparency and efficiency of the military justice system are improving[59], prosecution and punishment seem to remain rather the exception than the rule.

Rendering justice to victims is one of the major stated objectives of the Government's justice policy. Judgments establishing guilt and innocence and punishment of convicts are in themselves important instruments of recognition of victims' sufferings. However, as far as the position of victims and their reparation rights are concerned, several problems can be identified, not only, as mentioned above, in obtaining payments of compensation, but also

[54] For a more detailed evaluation, see INTERNATIONAL CRISIS GROUP, *Cinq ans après le génocide. La justice en question*, April 1999, Brussels (www.intl-crisis-group.org/projects/csafrica/reports/rw01frepa.htm).

[55] Though a sociological field research would be necessary to give a more scientific character to this assertion, it is worth referring to a study conducted by Gerard Prunier who made an 'ethnic count' of senior civil servants. According to his estimates, at the end of 1996, 15 of the 22 cabinet directors, 16 of 19 director generals, 6 of the 11 prefects, 80% of burgomasters and 95% of all soldiers, gendarmes and police officers were Tutsi (PRUNIER, G., *The Rwanda Crisis. History of a Genocide*, Colombia University Press, New York, 1997, p.369).

[56] According to a memo *(Le harcélement, les tracasseries, les menaces, bref la persécution du personnel judiciaire*) of the former Minister of Justice, the late Alphonse Nkubito, by May 1996, about 30 JPOs, JPIs, OMPs and judges were in prison.

[57] In fact, only a small minority of judicial personnel are women.

[58] On the role of justice as an instrument of reconciliation, see also NSANZUWERA, F.X., *La justice traditionnelle rwandaise et la Commission "vérité et réconciliation": pistes de solutions pour que la justice au Rwanda lutte contre l'oubli et cimente la réconciliation nationale*, Brussels, May 1997.

[59] PRENDERGAST, J. and SMOCK, D., *op.cit.*, p.18.

before and during the trial proceedings[60]. Despite radio messages announcing forthcoming trials, victims are often unaware that court hearings are taking place. The process of identifying the victims, of obtaining the necessary official certificates and of estimating the damages is extremely cumbersome and expensive compared to average victims' incomes. Establishing a causal link between the criminal act and the damage may be difficult in many cases. But the major difficulty remains with the actual payment of compensation. Also, despite the publication of the "Law of 22 January 1998 establishing a national assistance fund for needy victims of genocide and massacres committed in Rwanda between October 1, 1990 and December 31, 1994" in the Official Gazette of 1 February 1998, in reality, as of June 1999, the fund is still not operational[61]. It should however be noted that full civil compensation of all damages, given their magnitude, will not be possible. As of May 1999, the compensation awarded to civil claimants by the tribunals of first instance amounts to some 90 million US$. This raises the more general issue - which we will not be able to develop in more detail in the context of this paper - whether and how, especially in instances of transitional justice after massive human rights violations, a collective settlement of reparation claims can go hand in hand with a case-by-case approach[62].

The main conclusion is however that, mainly because of the magnitude of the problem, in addition to the still limited capacity of the judicial system, the judicial approach of individual criminal trials only will not suffice. It should be noted that probably no other criminal justice system in the world would be able to deal with such a large number of cases in a satisfactory manner, i.e. within a reasonable period of time and with due respect for all human rights norms[63]. As a consequence, the whole process is generally perceived as being extremely slow. As Attorneys without Borders, in its latest report, states "*There is a clear progress and justice is at work, but justice is non convincing (la justice ne convainc pas)*"[64]. This conclusion begs the question which supplementary, alternative solutions might be available. An alternative approach might consist of the establishment of a national or international truth and reconciliation commission for Rwanda. Though from a international law perspective, the case could be made that, in the case of genocide, there is no alternative to criminal prosecution of all individual perpetrators[65], some authors have attempted at studying the opportunities and constraints for the establishment of a national truth and reconciliation commission in Rwanda[66]. "*Unless an independent institution is developed that provides the*

[60] For an excellent summary of victims' concerns, see SCHOTSMANS, M., "Les difficultés rencontrées par les victimes au cours des procès de génocide", *Le Verdict*, Juin 1999, pp.3-4.

[61] See SCHOTSMANS, M., *op.cit.*, p.4 and GAKWAYA RWAKA, T., "SOS pour l'indemnisation des victimes du génocide", *Le Verdict*, May 1999, pp.6-7.

[62] See, in more detail, TOMUSCHAT, C., "Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law" in RANDELZHOFER, A. and TOMUSCHAT, C. (eds.), *State Responsibility and the Individual. Reparation in Instances of Grave Violations of Human Rights*, The Hague, Martinus Nijhoff Publishers, 1999, p.18.

[63] Expectations that justice be rendered timely and correctly are nonetheless extremely justified, and should not necessarily be perceived as "Western arrogance" as some observers seem to indicate (CHRETIEN, J.P., "Impunité et réconciliation au Rwanda et au Burundi" in DESTEXHE, A. and FORET, M. (eds.), *De Nuremberg à La Haye et Arusha*, Brussels, Bruylant, 1997, pp.73-74).

[64] AVOCATS SANS FRONTIERES, *op.cit.*, September 1999, p.38. (my translation)

[65] See, i.a., LANDSMAN, S., "Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions" in BASSIOUNI, C. and MORRIS, M. (eds), *Accountability for international crimes*, Special Issue of *Law and Contemporary Problems*, Vol.59, No.4, Autumn 1997, p.148-167. See also ROHT-ARRIAZA, N. (ed.), *Impunity and Human Rights in International Law and Practice*, New York, Oxford University Press, 1995.

[66] See, i.a., SARKIN, J., "The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda", *Human Rights Quarterly*, 1999, pp.767-823, and VANDEGINSTE, S., *A Truth and Reconciliation Approach to the Genocide and Crimes Against Humanity in Rwanda*, Working Paper, University of Antwerp,

opportunity for victims to tell their stories and for those who are guilty of human rights violations to confess, Rwandan society will continue to live under the shadow of division, tension and violence. (...) This body need not replace criminal prosecutions or grant amnesties. In fact, international law prohibits the granting of amnesty for the gross violations of human rights that have occurred in Rwanda. The Commission should instead complement other activities already under way in Rwanda, serving as a forum in which victims can tell of their suffering and be heard and acknowledged, and so regain their dignity"[67].

Interestingly, one of the only agreements of the Arusha Accords which the current Government has not implemented, relates to article 16 of the Protocol of Agreement on the rule of law which states that "*the two parties also agree to establish an International Commission of Inquiry to investigate human rights violations committed during the war*". Such international commission might have been a stepping stone to the establishment of an internationally sponsored and staffed truth commission (similar to the one in El Salvador, for instance). Obviously, as follows from article 16, this would require looking into human rights violations committed by both parties, irrespective of the military outcome of the war.

III.3. The proposed establishment of popular gacaca tribunals.

Instead of opting for an international or national truth and reconciliation commission, the Rwandan Government currently proposes the establishment of popular gacaca tribunals. This section will first try to describe the traditional concept of gacaca, before presenting in more detail the current proposal, which, as mentioned above, will be tabled for discussion in commission and, later, in plenary session at the National Assembly later this year.

III.3.1. Gacaca

Defining gacaca is a hard thing to do. As a society-rooted phenomenon, it is more appropriate to describe than to define it: its setting strongly depends on the community in which it operates[68]. A gacaca is not a permanent judicial or administrative institution, it is a meeting which is convened whenever the need arises and in which members of one family or of different families or all inhabitants of one hill participate. There are no generally applicable rules or criteria to determine the number of participants in the discussions. However, traditionally, unless women are a party to the conflict to be solved, only male adults take part in the proceedings, which are chaired by family elders, supposedly wise old men, who will seek to restore social order by leading the group discussions which, in the end, should result in an arrangement that is acceptable to all participants in the gacaca. The gacaca intends to "*sanction the violation of rules that are shared by the community, with the sole objective of reconciliation*"[69]. The "modern" distinction between judges, parties, witnesses and audience is hardly applicable: given the disruption of social order, all members of society are affected and, as a consequence, "parties" to the conflict. The objective is, therefore, not to determine guilt nor to apply state law in a coherent and consistent manner (as one expects from state courts of law) but to restore harmony and social order in a given society, and to re-include the

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May 1998, 64p. (also published as "L'approche 'vérité et réconciliation' du génocide et des crimes contre l'humanité au Rwanda" in REYNTJENS, F. and MARYSSE, S. (ed.), *L'Afrique des Grands Lacs. Annuaire 1997-1998*, Paris, L'Harmattan, 1998, pp.97-140).

[67] SARKIN, J., *op. cit.*, pp.822-823.

[68] For a micro-study on gacaca in the rural setting of Ndora commune (Butare prefecture), see REYNTJENS, F., "Le *gacaca* ou la justice du gazon au Rwanda", *Politique Africaine*, Décembre 1990, pp.31-41.

[69] MBONYINTEGE, S., "Gacaca ishobora ite kongera kuba inzira y'ubwiyunge bw'abanyarwanda", *Urumuri rwa Kristu*, 15 août 1995, p.15 (translation by C. Ntampaka and S. Vandeginste).

person who was the source of the disorder. The outcome of the gacaca may therefore not at all be in accordance with the state laws of the country concerned[70]. This situation, which prevails in many other, if not all, African countries is known as legal pluralism: the body of legal prescriptions is made up of two (or more) major components. On the one hand, there are indigenous norms and mechanisms, largely based on traditional values, which determine the generally accepted standards of an individual's and a community's behaviour. On the other hand, there are the state laws, largely based on the old colonial power's own legislative framework and introduced together with the nation state and its general principles of separation of powers, rule of law, etcetera.

Generally, the types of conflict dealt with by the gacaca are related to land use and land rights, cattle, marriage, inheritance rights, loans, damage to properties caused by one of the parties or animals, etcetera. Most conflicts would therefore be considered to be of a civil nature when brought before a court of law. However, conflicts amounting to criminal offenses (generally of a minor kind, such as theft) may also be settled, though they will not result in a typically criminal sanction (imprisonment) but in some sort of civil settlement, for instance an amount of compensation, possibly exceeding the damage incurred by one of the parties. For instance, in the case of theft of a goat, the gacaca may decide that the thief should return two goats to the owner. It should also be stressed that, traditionally, it was not the individual but the whole family who was responsible for executing the sentence. The sentence has a double objective: it should be a sanction which allows the person concerned to better understand the gravity of the damage caused, but, at the same time, it should allow the same person to reintegrate in the local community. As a consequence, a prison sentence is unknown under the gacaca system, since this sentence would not be instrumental in meeting the second objective mentioned: it is of a purely repressive, not of an inclusive nature[71].

Major conflicts involving, for instance, thefts of cows and assassination of several people were not dealt with by the gacaca, but put directly before the *mwami* (or king), the traditional political authority. A sociological inquiry conducted in 1996 by a group of experts of the *Institut de Recherche Scientifique et Technologique (IRST)* showed, similarly, that people generally felt that genocide should not be dealt with by the gacaca but by the highest political authority, i.e. the state (and, in a system of separation of powers, this should then be understood as the judicial power). Once guilt is established, it was felt that he who had killed, should also be killed (or someone of his family should be killed). This will allow to forget and forgive and lead to a reconciliation of the families involved[72]. Similarly, under the traditional *mwami* justice, cattle thieves were very often convicted to impalement and died of their injuries.

However traditional the roots of the gacaca, it gradually evolved to an institution which, though not formally recognised in Rwandan legislation[73], has found a *modus vivendi* in its relation with state structures. With the loosening of family ties, leaders of the smallest administrative units ("*cellule*" or "*secteur*") have sometimes replaced family elders to chair the gacaca proceedings. The *tribunal de canton* (or "cantonal tribunal", situated at the bottom

[70] The above-mentioned study by Reyntjens showed that some 45% of the gacaca decisions were in accordance with state law, while some 55% were not (REYNTJENS, F., *op.cit.*, p.36).

[71] NTAMPAKA, C., "Droit et croyances populaires dans la société rwandaise traditionnelle", *Dialogue*, Juillet-Août 1999, p.13.

[72] Summary of the inquiry by Smaragde Mbonyintege, reported in JYONI WA KAREGA, J. (ed.), *Gacaca. Le droit coutumier au Rwanda. Rapport final de la première phase d'enquête sur le terrain*, Haut Commissaire aux Droits de l'Homme des Nations Unies, Kigali, 1996, pp.29-30.

[73] This is clearly different from the situation in Burundi, where the institution of the *Bushingantahe* (or "Council of Notables") was formally recognized as an auxiliary judicial institution in the new Code on Judicial Organisation and Jurisdiction of 1987.

of the hierarchy of judicial institutions) is considered the appropriate forum to deal with conflicts that are not solved by the gacaca or to file appeals against gacaca decisions. Also, gacaca meetings were gradually more held at regular intervals and decisions were registered in writing.

III.3.2.Post-genocide gacaca

Following the war (which started in October 1990) and the genocide (April - June 1994) which devastated the country, there were (and still are) a very large number of legal and other conflicts to be settled. At the same time, the capacity of the national justice system was extremely limited, even more than was already the case before 1990. In its action plan on justice of August 1994, the new Rwandan Government hoped for a revalorisation of the gacaca in order to promote a peaceful settlement of disputes and in order to reduce the number of cases submitted to the formal judicial structures.

However, in order for the gacaca to be operational, some pre-conditions need to be fulfilled. As a traditional, community-based dispute settlement mechanism, it is based on certain common values and norms of reciprocity. It has been rightly argued that the genocide and other crimes against humanity have not only caused an exceptionnally high number of deaths, refugee movements and internal displacements, destroying existing communities, but that these events have also destroyed the fundamental value structures which formed the basis for the gacaca. "*He confirms that the gacaca can no longer function today, because custom was based on fundamental values of respect for the human being which today are no longer in existence*"[74]. This illustrates how a conflict can fundamentally alter or even reduce the availability of existing traditional reconciliation and dispute settlement mechanisms. The above-mentioned IRST study has shown that, in many villages, the gacaca has spontaneously been reactivitated, partly because of the lack of functioning state courts (*tribunal de canton*), but that its nature has been fundamentally altered due to the new circumstances, which are, for instance, related to the new composition of the local population after the genocide. Also, as shown in a micro-study on gacaca in Kigombe commune (Ruhengeri prefecture) by Philbert Kagabo, the gacaca has been "modernized" through the introduction of formal procedural modalities, the new location (a municipality building), the fixed timing (every week on Tuesday and Thursday), the "distance" between the families involved and the gacaca jury, the behaviour of "arbitrators" as if they were civil servants, etcetera[75].

The above-mentioned IRST inquiry noted that, generally, the population was strongly in favour of a reactivation of the gacaca but that the major constraints to put this into practice were related to: (1) the fact that, in many areas, the population is made up of young people only, who are not sufficiently familiar with the roots and traditions of the gacaca, and the absence of elder people to give guidance; (2) the suspicion and lack of confidence and social cohesion among "new" groups that have emerged within local communities: genocide survivors, new case-load returnees (refugees of 1994) and old case-load returnees (many of whom have spent decades abroad and are used to different social conventions)[76].

It can be concluded, on the one hand, that traditional conflict resolution schemes were a useful instrument to make up for the lack of formal judicial structures to deal with "ordinary" (i.e. not related to the genocide) disputes, but, on the other hand, that the traditional mechanism itself has severely suffered from the crisis, which may seriously

[74] NTAMPAKA, C., "Le retour à la tradition dans le règlement des différends: le *gacaca* du Rwanda", *Dialogue*, Octobre-Novembre 1995, p.96 who refers to the article of MBONYINTEGE, S., *op.cit.*
[75] JYONI WA KAREGA, J. (ed.), *op.cit.*, pp.29-30.
[76] JYONI WA KAREGA, J. (ed.), *op.cit.*, p.14.

undermine its credibility and its popular acceptance for the resolution of the types of disputes it was traditionnally dealing with.

III.3.3. The role of women in the gacaca

As mentioned above, the role of women in the traditional gacaca was virtually non-existent. Women were represented by the heads of family or other male descendants. Males were seen as the main responsible for the well-being and the survival of the family. Also, women were only exceptionally owners of land or cattle and could not inherit from their descendants or their husband. From that perspective, the exclusion of female participation from the gacaca was only "normal". There were some exceptions to the rule. In disputes opposing husband and wife or the husband's family and his wife, in which she was directly involved, a direct participation was allowed. Also, in cases involving "bad behaviour" of a woman, the decision could somtimes be taken by so-called wise old women instead of men. Apart from this highly exceptional direct participation by women, reference should also be made to their indirect influence, as private advisors or counsellors of their husbands, sons, brothers or fathers[77].

This begs the question about the role of women in the proposed gacaca tribunals. In the Government proposal, there is an explicit reference to the eligibility of women, which in fact merely confirms constitutional and international provisions on equal treatment (article I.1.1). Will they also in practice be elected as members of the gacaca tribunals (on the composition of the proposed gacaca tribunals, see below, III.3.4.)? It cannot be excluded that the population (especially the older generations) perceive this gender-neutral approach as yet another indication of the non-indigenous nature of the so-called gacaca tribunals, which may, in turn, undermine the credibility of the institution and the popular participation in the proceedings.

The bare fact that, after the 1994 genocide and war, women constitute a demographic majority in Rwanda and that, in many cases, the male head of families have been killed or are now in prison, will necessarily have an impact on the role of women in the gacaca. A socio-demographic survey done in November 1996, showed that women account for 53.7% of the polulation, versus 46.3% men. In 34% of all families (in the sense of family nucleus), women were heads of family and 20% of all heads of family were widows[78].

III.3.4. The proposed gacaca tribunals

It is extremely important, in light of the current proposals by the Government of Rwanda, to note that the role and functioning of the gacaca as described above was based on the common understanding of the members of a given family or community, and not on a decree adopted and imposed by any (traditional or state) political authority whatsoever. It logically follows from the above introduction (III.3.1. and III.3.2.) that the indigenous gacaca (in its traditional or more modern version) would not have any competence in cases of genocide or other massive human rights violations[79]. Also, even if, purely hypothetically, the gacaca would judge genocide suspects, the impossibility to impose criminal sanctions would render this indigenous mechanism itself incompatible with international human rights law on

[77] JYONI WA KAREGA, J. (ed.), *op.cit.*, pp.30-32.
[78] ONAPO-FNUAP, *Enquête socio-démographique. Résumé des principaux résultats*, Kigali.
[79] "*La justice de Gacaca serait incompétente en matière de génocide, puisqu'il ne pouvait même pas juger un cas d'homicide*" (JYONI WA KAREGA, J. (ed.), *op.cit.*, p.20).

impunity. Though not explicitly referring to prison sentences, the latter considers prosecution and punishment as integral parts of the observance of substantive human rights provisions.

However, on the other hand, when looking at the stated objectives which the Rwandan Government hopes to attain through the establishment of gacaca tribunals, there are some clear similarities with the indigenous mechanism: the proposal aims at increasing popular participation in the organization of genocide trials, through some process of 'truth telling' at the local level, and at promoting concord, harmony and reconciliation.

We will now briefly summarize the relatively complicated structure of this new, parallel gacaca justice system. We will do so on the basis of the most recent available official document, which dates back to 8 June 1999 (see footnote 1). This document forms the basis of the ongoing discussions and consultations and will be submitted for debates at the National Assembly in the coming months.

i) the administrative structures of Rwanda

Since the piramidal structure of the proposed gacaca system (to be established at four different levels) is strongly linked with the administrative structures, it is necessary, by way of introduction, briefly to present the concepts of cell (*cellule*), sector (*secteur*), commune (or municipality) and prefecture (or district). At the top of the administrative structure, there are 12 prefectures, subdivided in 154 communes, each commune totalling an average number of some 50,000 citizens (the total population was estimated at 7.5 million in 1997). Each commune is further subdivided in (on average) 10 sectors. There are 1,531 sectors in all. Each sector is composed of (on average) 6 cells. There are 8,987 cells in all. Statistically speaking, one cell respresents an average of 830 citizens.

ii) the structure, composition and functioning of the gacaca tribunals

All adult inhabitants of one cell (the general assembly of the gacaca tribunal) will, through an elections process and on the initiative of the chief of the cell, choose 20 persons of 'high integrity' who will compose the bench (*le siège*) of the gacaca tribunal at cell level. The bench will choose its own coordinating committee of 5 persons.

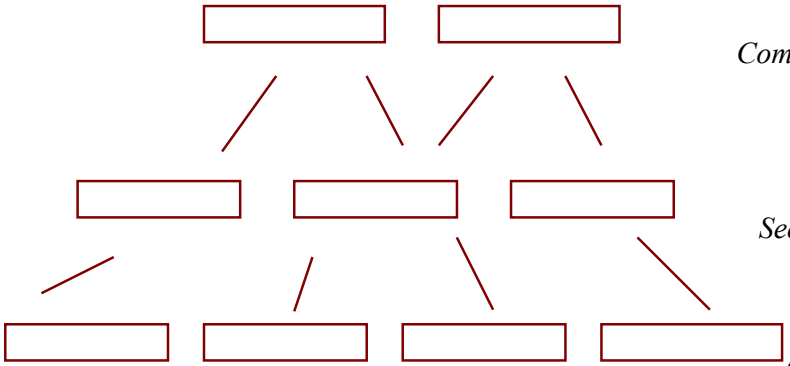
The gacaca tribunal at sector level will have a general assembly of 50 cell level representatives, chosen and delegated by the general assemblies at cell level. The general assembly at sector level will choose a bench of 20 persons. The bench will choose its own coordinating committee of 5 persons.

The gacaca tribunal at commune level will have a general assembly of 50 sector level representatives, chosen and delegated by the general assemblies at sector level. The general assembly at commune level will choose a bench of 20 persons. The bench will choose its own coordinating committee of 5 persons.

Finally, the gacaca tribunal at prefecture level will have a general assembly of 50 commune level representatives, chosen and delegated by the general assemblies at commune level. The general assembly at prefecture level will choose a bench of 20 persons. The bench will choose its own coordinating committee of 5 persons.

In all, more than 10,000 gacaca tribunals will be created. Administrative authorities and members of parliament cannot be elected for the gacaca tribunals.

Prefecture gacaca tribunals (12)



Commune gacaca tribunals (154)

Sector gacaca tribunals (1,531)

Cell gacaca tribunals (8,987)

Each gacaca tribunal is structured as follows:

General Assembly	C.Cee Bench

At the level of the cell, the general assembly of all the inhabitants of each cell will provide testimonies and other possible elements of proof on the suspected perpetrators. For the territory of the cell, it will help the bench in drawing up a list of victims and of all persons who participated in their killings. From this perspective, the proposed gacaca tribunals can be seen as yet another attempt to collect evidence, which has been one of the main constraints for the ongoing criminal trials. Those who refuse to testify are subject to criminal prosecution. The general assembly will choose the members of the bench. The bench of the cell gacaca tribunal will draw up the list of victims and of those who participated in the killings. It will conduct investigations on the basis of the testimonies and classify the suspects in categories in accordance with the Organic Law. The bench can request assistance from persons of high integrity with legal expertise. It decides by consensus, or, alternatively, by majority voting. It will judge the category 4 suspects. No appeals against its rulings are possible. The files of category 3 suspects will be transferred to the sector gacaca tribunal. The files of category 2 suspects will be transferred to the commune gacaca tribunal. The files of category 1 suspects will be transferred to the commune gacaca tribunal (from where they will subsequently be transferred to the prosecutor's offices operating at the level of the current tribunals of first instance). The coordinating committee will supervise the activities of the general assembly and the bench. It will write down the judgments, which will be kept in a special ad hoc register.

At the level of the sector, the general assembly (composed of 50 cell representatives of high integrity) will participate in the hearings of the sector gacaca tribunal, without actively taking part in the judgments. It will choose (and, when necessary, replace) the members of the bench. The bench will conduct investigations on the basis of the testimonies and judge the category 3 suspects. It can request the assistance of persons of high integrity with legal expertise, to be chosen by the general assembly of the sector from a list of persons proposed by the communal development council. The bench of the sector gacaca tribunal will also control and coordinate the activities of the cell gacaca tribunal and register the reports of their activities. It will help in solving any kind of problems that may arise at the level of the cell gacaca tribunal.

At the level of the commune, the general assembly (composed of 50 sector representatives of high integrity and initially convened by the burgomaster) can equally participate in the hearings of the commune gacaca tribunal, without actively taking part in the judgments. It will choose (and, when necessary, replace) the members of the bench. The bench will transfer to the prosecutor's offices the files of category 1 suspects. It will conduct investigations on the basis of the testimonies and judge the category 2 suspects. Appeals[80] against sector gacaca tribunal decisions will be brought before the bench of the commune gacaca tribunal. The latter can request the assistance of persons of high integrity with legal expertise, to be chosen from a list of persons proposed by the prefectural security council. The bench of the commune gacaca tribunal will also control and coordinate the activities at sector level and register the report of the sector tribunals' activities.

At the level of the prefecture, the general assembly (composed of 50 commune representatives of high integrity and initially convened by the prefect) can also participate in the hearings, without actively taking part in the judgments. It will choose (and, when necessary, replace) the members of the bench. Appeals against commune gacaca tribunal decisions will be brought before the bench of the prefecture gacaca tribunal, which does not have any jurisdiction in first instance.

iii) jurisdiction and powers of the gacaca tribunals

As a general rule, the proposal (article I.3.1) specifies that the gacaca tribunals have the combined powers of the "ordinary" tribunals and the public prosecution department[81]. More specifically, they can summon anyone to appear and testify (and transfer to the public prosecutor anyone who refuses to appear or gives false witness), they can issue search warrants and do house searches, they can confiscate goods and order the return of confiscated goods to those defendants that have been acquitted, they can impose criminal sanctions and they can request the public prosecution department to clarify the case-files and past investigations.

As far as the punishments are concerned, the following proposals are made:

* Category 1 genocide suspects continue to be judged by the tribunals of first instance[82] and are liable to the death penalty. This penalty remains unaltered compared to the current system.
* Category 2 genocide suspects (under the jurisdiction of the commune gacaca tribunal) who refuse to confess and plead guilty are liable to a prison sentence ranging from a 25 years prison term to life imprisonment. This is obviously one of the best illustrations of the non-indigenous nature of the proposed tribunals, and, at the same time, the most worrisome situation from a human rights perspective. Those who confess after an indictment are liable to a prison term between 12 and 15 years. A new element in the execution of punishment is being proposed: 8 years need to be spent in prison, the remaining part will be spent outside the prison compound and converted into public utility work. Those who confess prior to an indictment are liable to a prison term between 7 and 11 years. Here as well, a new element in the execution of punishment is being proposed: 3 years need to be spent in prison, the remaining part will be spent outside the prison compound and converted into public utility work.

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[80] Article 24 of the Organic Law states that "*Appeals shall be based solely on questions of law or flagrant errors of fact*." Does the same (limited and exceptional) definition of an appeal also apply in the context of the gacaca tribunals?

[81] Nevertheless, the proposal reaffirms the powers of the public prosecution department to continue its usual investigation activities. The case-files on individual suspects and related elements of proof will be transferred to the relevant gacaca tribunal level (article I.2.5).

[82] The specialised chambers will be abolished.

* Category 3 genocide suspects (under the jurisdiction of the sector gacaca tribunal) are liable to prison terms as determined by the Organic Law of 30 August 1996. Irrespective of their confession (and the timing of the latter), a new element in the execution of punishment is introduced: half of the prison term will be spent outside the prison compound and converted into public utility work.
* Category 4 convicts (under the jurisdiction of the cell gacaca tribunal) will repair the damages they caused or, else, carry out works that can be considered equivalent to the damage done.

Especially for category 2 suspects who have very good reasons not to confess, but, as a consequence, are liable to life imprisonment, it might be preferable to use the current, 'ordinary' trial system, where the usual fair trial guarantees are better respected than may turn out to be the case in the gacaca tribunal system.

The overall supervision and control of the activities of the gacaca tribunals will be done at the national level by a new Gacaca Tribunals Department within the Supreme Court. The president of the department of gacaca tribunals will be a lawyer of high integrity chosen by the National Assembly from a list of two candidates proposed by the Government. Though, procedurally, this proposal is in accordance with article 29 of the Arusha Protocol of Agreement on Power-sharing within the framework of a broad-based transitional government, it is nevertheless noteworthy, since the Supreme Court, in its current form, already includes a department of courts and tribunals[83].

The Ministry of Justice needs to closely monitor the process in order to prepare possible further legal amendments. It will also play a leading rol in the sensitization of the population and the training of the gacaca members. In addition, it will lead the fundraising for the gacaca tribunals and can also, where necessary, assist the Gacaca Tribunals Department in its supervision activities.

iv) preparatory steps to be taken

A number of laws will need to be reviewed in order to enable the creation of gacaca tribunals and in order to streamline their creation with the currently existing justice system. Article 26 of the Arusha Protocol of Agreement on Power-sharing within the framework of a broad-based transitional government (which is an integral part of the Fundamental Law of the country) limits the number of ordinary and military jurisdictions and will need to be modified[84]. Article 28 of the same Protocol of Agreement lists the five departments of the Supreme Court, to which one will need to be added. The Organic Law of 30 August 1996 will need to be thoroughly reviewed to include the above-mentioned proposal. In addition, a Ministerial Decree will be necessary to detail the implementation of the proposed conversion of part of the prison sentences into public utility work. The Code of Judicial Organization and Competence, the Criminal Code as well as the Organic Law of 23 February 1963 on the Supreme Court[85] will need to be reviewed.

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[83] The creation of this new department within the Supreme Court appears illogical and may - deliberately or unintendedly - add to the already important divisions within the Supreme Court, some of which have been brought to the public scene. See, for instance, the articles on the Supreme Court published in *Le Baromètre*, a local bimonthly periodical, of January 1999.

[84] Similarly, though not explicitly mentioned in the current government proposal on the gacaca tribunals, article 88 of the Constitution of 10 June 1991 will also need to be amended.

[85] The Supreme Court had been abolished in 1978 and it was the Organic Law of 6 June 1996 relating to the Organization, Working and Competence of the Supreme Court which re-established it, referring to the 1963 legislation.

Apart from the legal amendments needed, this whole new process, which will involve an extremely large number of people, will require careful planning and important resources from a logistical point of view. The government proposal identifies several challenges:
* A large and ongoing sensitization campaign[86] will be needed to explain the objectives and functioning of the new tribunals to the population. Given the complicated structure of this parallel justice system and given the link between the ongoing trials and the new structures, this need is certainly there. However, the mere fact that there is such need for a government funded and coordinated, highly intensive sensitization campaign, may in itself be the best indication of the non-indigenous nature of the proposals.
* The elections process, starting at the level of the 8,989 cells is, from a logistical point of view, an enormous challenge. Also, how exactly these elections will be conducted (secret ballot or not, etcetera) remains to be clarified.
* A training programme will need to be given to all members of the bench at all different levels. Will this training also involve the persons with legal expertise whom the bench can call upon during the gacaca trial hearings?
* Funds will need to be raised to pay stipends to the members of the bench, to pay their transportation costs, to provide for the necessary material resources that are needed for the operations. A draft budget estimate amounted to approximately 6.6 billion Rwandese Francs for the first year (i.e. some 18 million US$), and 5.1 billion Rwandese Francs for the second year (i.e. some 14 million US$)!

It seems to us that the interaction between the two parallel justice systems will need to carefully studied prior to implementation. Among the number of questions that will need to be looked at more closely, we would like to mention the following:
* How will the transfer of case-files between the prosecution department and the gacaca tribunals (and vice versa) be handled?
* What will happen when the categorization of suspects differs between the tribunals of first instance and the gacaca tribunals?
* How to ensure a coherent approach to the same events which may involve both category 1 and category 2 suspects and which, as a consequence, will be dealt with by both justice systems? How to address these and other cases of connexity?
* What is the relation between hearings of the council chamber in view of a judicial review of the pre-trial detention and the gacaca tribunals?
* Will the prison sentences that have been imposed by the current justice system possibly be converted under the new scheme?

III.3.5. Conclusion and evaluation

It is obviously premature to present a thorough evaluation of the possible contribution of the proposed gacaca tribunals to the attainment of the objectives of justice, reconciliation and reparation in Rwanda. The proposals are still at a preliminary stage and will, without any doubt and similarly to the Organic Law of 30 August 1996, be the subject of lengthy debates at the National Assembly. However, some provisional comments and interim evaluation can be made.

i. The proposed gacaca tribunals, an indigenous dispute settlement mechanism?

Taking into account the above-mentioned description of the traditional gacaca (section III.3.1.), the similarities with ten of the most salient features of traditional justice systems, as

[86] The campaign started in June 1999.

summarized in an excellent, unpublished literature review by Penal Reform International[87], are striking:

1. Traditional justice systems tend to be located in face-to-face communities, where the problem is viewed as not only that of the disputants or offender, but also that of the whole community;
2. The emphasis is on the restoration of social harmony rather than the determination of guilt or innocence;
3. The process involves a high degree of public participation;
4. Traditional arbitrators are usually chiefs, elders or influential persons from the community and know both parties to the dispute;
5. A decision is more in the nature of a compromise which takes into account not only customary rules of law but also the underlying factors which led to the dispute and factors which may have a bearing on successfull reconciliation;
6. During the hearing, traditional judges will not rule out testimony on the basis of strict rules of evidence;
7. Professional legal representation is not a feature of the traditional justice system;
8. The process is voluntary and the "decision" based on agreement;
9. "Penalties" emphasize restoration as opposed to retribution;
10. Enforcement is secured through social pressure rather than physical coercion.

Some of these features do not only apply to the traditional gacaca, but also to the proposed gacaca tribunals. The proposed role of the gacaca general assembly to open up participation to all adult citizens seems to correspond to the traditional widespread involvement of the population in the process and to the traditional objectives which going beyond rendering justice in the strict sense. Accordingly, increased socio-political effects of justice can rightly be expected. The use of the cell as a key level for the active involvement of the general population in the hearings is a positive element: initially conceived as units of 50 families, the cell seems a reasonable 'translation' of the traditional family of inter-family based approach; however, the commune level to try category 2 cases may be too "distant" (both mentally and physically) for people actively to participate. The "decentralization" of justice to the cell level may have an overall positive impact, not only on the active participation of the population, but also on the perception that justice is being done and on the acceptance of verdicts. Similarly, the judgments pronounced by roving Specialised Chambers of the Tribunals of First Instance, where hearings are held closer to the people involved, are reported to be better perceived and more readily accepted[88]. Also, the possibility of conversion of part of the prison sentences into public utility work indicates a shift from a purely retributive to a joint restorative and retributive approach. The equal treatment of men and women (at least, as a general policy line) may be illogical from the traditional perspective but is in line with the changing composition of the local communities (female heads of families) and the overall constitutional and international principles of non-discrimination.

There are, however, also some very important differences between, on the one hand, the 'average' traditional justice system and the traditional gacaca, and, on the other, the proposed gacaca tribunals. The most striking differences include, first of all, the establishment itself of the tribunals by the state legislator and their state law determined composition, functioning and jurisdiction. Secondly, the gacaca tribunals are expected to apply state law, which is contrary to the traditional approach and which, in itself, underscores the need for legal knowledge (and, logically, also the need for professional legal assistance...). The

[87] PENAL REFORM INTERNATIONAL, *Traditional and Informal Justice Systems in Africa, South Asia and the Caribbean*, London, March 1999, 75p.
[88] AVOCATS SANS FRONTIERES, *op.cit.*, September 1999, p.6.

possible conviction to criminal sentences, up to life imprisonment, is strongly different from the traditional approach. The execution of these sentences will be secured through state law enforcement agents and in state prison buildings. Finally, the strongly piramidal and centrally (Supreme Court, Ministry of Justice) steered and funded nature of the gacaca tribunal system is also a-typical. In summary, whereas social pressure is at the heart of a typical informal and traditional justice system[89], in this case, state coercion - the ultimate feature of a formal state justice system - may turn out to be the ultimate engine for the proposed gacaca tribunal justice[90]. In fact, the current Rwanda government proposal seems to contradict some of the general observations and recommendations of the above-mentioned PRI report[91]:

1. Existing traditional and informal courts should not be incorporated into the formal state system. "*Linking the two systems tends to undermine the positive attributes of the informal system. The process becomes no longer voluntary and is backed up by state coercion. As a result, the court need no longer rely on social sanctions and public participation loses its importance*"[92];
2. Informal systems should remain entirely voluntary, and their decisions non-binding;
3. The State should not interfere with the appointment of informal arbitrators within a community, nor impose which norms are to be followed.

Among the reasons why this question of qualification - traditional or indigenous justice system versus formal, state justice system - is important, two elements should be mentioned. First of all, it may have an important impact on the genuine acceptance and participation of the local communities in the process. This in itself has an important bearing on the reconciliatory effects of the justice rendered. And, secondly, the qualification may also have an impact on the question whether and to what the usual human rights norms (fair trial standards and other) should apply to the gacaca tribunal system (see below).

ii. The proposed gacaca tribunals from the perspective of genocide survivors, victims and their families

Some survivors groups have expressed fears that the current proposals amount to some form of disguised amnesty. They refer, i.a., to the possibilities for a category 2 suspect (a person guilty of intentional homicide or of a serious assault causing death) to confess and, as a consequence, to be released after a three year prison term (which, in practice, often amounts to an immediate release, in light of the period of pre-trial detention). Although, in some instances, the prison sentence may indeed be importantly reduced, neither the penalization of the acts committed, nor the determination of guilt are put into question by the proposed legislation. The proposal can therefore not be seen as an amnesty measure in the strict legal sense. In fact, even though the net outcome of the process may result in a reduction of the

[89] PENAL REFORM INTERNATIONAL, *op.cit.*, p.41.
[90] Does the above-mentioned explicit penalization of the refusal to testify provide an indication in this respect?
[91] Newick Park Initiative (NPI), the international branch of the UK Relationships Foundation, in collaboration with its local Rwandese partners, had developed an alternative model of "Gacaca Truth Enquiries", which seems much more in accordance with the general PRI observations and recommendations:
- only local communties who 'volunteer' for participation in the alternative process would be involved;
- as a pre-condition, all sections of the local communities need to buy into the process;
- a Gacaca Truth Enquiry would use a more collective, rather than perpetrator oriented approach, resulting in a historical record, also of heroic deeds;
- a Gacaca Truth Enquiry would only recommend non-binding sentences to the judiciary.

Early 1999, plans to run a pilot project under this Gacaca Truth Enquiries model were received with fairly moderate enthusiasm by the Ministry of Justice.
[92] PENAL REFORM INTERNATIONAL, *op.cit.*, p.44.

number of detentions, there will be establishment of guilt (which is a form of reparation in itself).

Concerns have been raised that the acts of genocide will be trivialized through the proposed justice system. The fight against impunity, a duty under international law, requires in the first place that the 'crime of crimes' be punished in an appropriate manner, through individual criminal accountability procedures and sanctions that are at least as strict and severe as non-genocidal criminal offences.

Fears have been expressed that the proposed system may be used to settle personal scores through some form of collusion between defendants and elected bench members. Collusion between defendants and inhabitants may lead to a conspiracy of silence and to organized non-disclosure of the truth[93]. Especially in rural areas with very pronounced demographic Hutu majorities, these fears may be well-founded. Given certain social antagonisms referred to below, the bargaining power of the 'defendants' group in the community may by far exceed the bargaining power of the 'survivors' group. This phenomenon may be strengthened where the same population does not wholeheartedly buy into the process. How will the election process take this valid concern into account?

There are no possibilities to be involved as civil claimants (*partie civile*) in the hearings, which, at least in theory, diminishes possibilities for an active involvement in the trials. However, proceedings may be more easily (physically) accessible for victim participation than under the current system. Also, possibilities will hopefully be studied by the National Assembly to amend the current proposals in order to allow the gacaca tribunals to decide on who can rightfully claim to be a victim - this semi-official recognition of victim status being some form of reparation in itself - and on the amount of damages incurred. The actual financial compensation may then be left to the above-mentioned National Assistance Fund for genocide victims or the normal justice system. It should also be noted that, through the conversion of prison sentences into public utility work, the *de facto* reparation (through restitution or compensation) might be more important than under the current system.

iii. The proposed gacaca tribunals from the perspective of convicts, pre-trial detainees and their families

The proposed gacaca tribunals will dramatically increase the overall capacity to try suspects. This in itself makes it more likely for individual cases to be dealt with more rapidly, which, in turn, should reduce the overall period of pre-trial detention. However, the initial announcement that all suspects would be brought to justice in 2 years time[94] and that the new tribunals would be operational as of January 2000, may turn out to be overly optimistic. The proposed introduction of this parallel system should also by no means be used as an excuse not to release the remainder of the pre-trial detainees without case-files (as announced by the Government in October 1998) and to seriously reactivate the council chambers.

The proposed system, with its possibilities for the conversion of prison sentences, will also result in the early release of a number of convicts who, under the current system, would spend a longer period of time in prison. On the other hand, some strict control will need to be exercised on the public utility work in order to avoid that convicts (and their families) perceive this - accurately or not - as some kind of slavery-like practice, which will have the opposite effect in terms of community level reconciliation.

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[93] MUBERANTWALI, T., *Procès de génocide: l'institution imminente des tribunaux populaires constitue-t-elle une panacée?*, ARI/RNA, 25-31 March 1999, p.8.
[94] MUGABE, J.P., (no title), *Le Tribun du Peuple*, Décembre 1998, p.35.

Investigations, "indictment", prosecution, judgment and sentencing will be done by one and the same institution. In combination with the absence of legal counsel, and, for category 2 suspects who have good reasons not to confess, the possibility of life imprisonment as a criminal sanction, some serious concerns arise from the perspective of fair trial standards and other human rights norms (see also below). The National Assembly may consider a review of the current proposal and present the gacaca tribunal system as a voluntary, alternative option for category 2 suspects who are convinced of their own innocence.

Also, if the proposed gacaca tribunal system is primarily perceived as a state law institution and not as an indigenous, community based mechanism, it may very well be seen as an instrument of state power and oppression. Throughout Rwandan history, the judicial power has rarely been seen as the guarantor as the individual's rights vis-à-vis the state. As a result, people's perception can hardly be expected to differ in this case. Related to this issue of perceived lack of impartiality is the question whether and to what extent, through these local hearings, a historical record will be compiled of war crimes or other human rights violations committed by the former RPF rebellion.

Finally, reference should also be made to fears for an overly strict central control on the election process and on the gacaca proceedings in general. Similarly to worries expressed above on behalf of the victims' and survivors' group, the concern has been raised that the system may be used to settle personal scores in case of collusion between elected bench members; local authorities and victims. This may be particularly relevant in more urbanised centres, with concentrations of Tutsi citizens.

iv. The proposed gacaca tribunals and the need to conform with human rights norms

Will defendants in the gacaca trials have the right to consult their case-files? Will they have sufficient time to prepare their trial? Will they be authorized to call defense witnesses? No explicit reference to these and other fair trials guarantees is made in the June 1999 Government proposal. Some observers seem to indicate that the usual human rights norms should not apply to the gacaca trials, given that the gacaca tribunals are not a state law justice system but an extra-judicial conflict resolution and dispute settlement mechanism[95].

On the one hand, it can be argued that, in the Rwandan context, full respect for human rights standards may not be practically attainable in each and every individual case. This, in itself, should not necessarily imply that partner countries or other donors can by no means support current attempts to try and find supplementary mechanisms.

However, we strongly disagree with the position that, as a matter of principle, human rights standards do not and should not apply to the gacaca tribunal justice system. Similarly, the European Court of Human Rights has repeatedly ruled that all fair trial standards equally apply to administrative and, more interestingly in this context, also to disciplinary legal procedures. The delegation by the state of its own power of justice administration to private institutions (e.g. disciplinary bodies) does not mean that the fair trial standards and other

[95] According to a legal expert, justice advisor to an important donor in Rwanda, "*Il est clair qu'on ne peut en aucun cas évaluer ce système en se reférant aux garanties formelles prévues par les textes internationaux en matière de jugement. Certes, les effets du système d'arbitrage sont de nature judiciaire (des peines). Mais l'économie et la philosophie du système ne sont pas judiciaires. Il s'agit d'un mécanisme socio-politique puisé dans une tradition revisitée. Il faut donc accepter d'abandonner les critères habituels propres aux décision judiciaires*." (internal report of February-March 1999). Attorneys without Borders, in its September 1999 report, states that "*sans occulter que des sanctions seront prononcées, la gacaca doit plutôt être considérée comme un mode extra-judiciaire de règlement du contentieux de génocide. Il serait vain de se référer aux critères habituels de fonctionnement de la justice classique*" (*op.cit.*, p.41).

norms under the European Convention on Human Rights do no longer apply. It would require a more detailed legal research, which would go beyond the scope of this paper, to study the case-law under the International Covenant on Civil and Political Rights or under the African Charter on Human and Peoples' Rights, but there seems little reason to believe that a delegation of the administration of justice, especially where it may result in prison sentences, would be an acceptable mechanism to circumvent the application of human rights norms. The gacaca tribunals are established by state law, they will apply state law, overall control will be exercised by state institutions (both judicial and executive power), penalties will be executed in state prisons... what more is needed to conclude to the applicability of international human rights norms?

Furthermore, the Dakar Declaration, adopted on 11 September 1999, following the Seminar on the Right to Fair Trial in Africa, organized by the African Commission on Human and Peoples' Rights, interestingly states that "*It is recognized that traditional courts are capable of playing a role in the achievement of peaceful societies and exercise authority over a significant proportion of the population of African countries. However, these courts also have serious shortcomings which result in many instances in a denial of fair trial. Traditional courts are not exempt from the provisions of the African Charter relating to fair trial*". The latter observation should, *a fortiori*, also apply to Rwanda's future gacaca tribunals.

v. General concluding remarks

Although some local communities have clearly expressed their desire to reactivate the gacaca dispute settlement scheme, the gacaca mechanism itself has been seriously affected by the 1994 events. Also, the general atmosphere to address these questions of dealing with the past remains extremely tense. Through a preliminary field-study conducted in 1998 in three communes in southern Butare, the *Programme Santé Mentale Communautaire* of Dr. Simon Gasiberege inquired about the views of the population with regard to responsibilities for the rehabilitation of goods and persons after the war and genocide. The researchers found, first of all, that Rwandans are extremely suspicious of inquiries about this subject matter. It apparently took the researchers an enormous effort to explain that they were no intelligence agents. Also, the social coexistence in Rwanda is made more difficult due to the antagonism[96] between two categories of population: genocide survivors and their families versus genocide suspects and their families[97]. Obviously, the local situation in a specific community may differ, to an important extent, from these general conclusions. In some communities, the general willingness to participate in an open discussion on truth, responsibility, guilt, acknowledgement and punishment may be available. However, the prevalence of extreme suspicion and social antagonism in certain other communities may make any top-down attempt at imposing collective truth telling and restoration of social harmony a lost cause. For justice to be rendered, especially through the proposed gacaca tribunals, and for the latter to have the desired restorative and reconciliatory effect, people need to buy into the process: this in itself requires a high degree of freedom of speech and a political spirit of openness and room for dissenting opinion. As one member of the Liprodhor human rights organization was quoted saying, for people to express their belief in this system, and, as a direct consequence,

[96] This antagonism was already tangible in early 1996 when the proposed Organic Law on genocide trials was at the heart of the public debate. Genocide survivors did not accept the proposed penalty reductions: since genocide is the crime of crimes, penalties should at least be as severe as for similar crimes committed outside the context of a genocide. Detainees and their families considered this to be a highly irrelevant theoretical discussion: their illegal pre-trial detention was seen as the ultimate proof of the severe repression imposed by the new regime.

[97] PSMC-UNR, *Le rôle de la communauté dans la restauration de la justice. Rapport général*, Butare, 8 octobre 1998, p.4.

for the gacaca tribunal justice system to function, you would ideally "*have some sort of referendum. But who, in today's Rwanda, would dare to say no? Those who protest are soon indirectly threatened. During commune assembly meetings, for instance, a burgomaster sometimes denounces the behaviour of someone who disagees, by saying that he 'thinks like the previous regime'. This comes close to an accusation of complicity in genocide. Therefore, people prefer to remain silent*"[98].

In addition to these features of today's Rwanda at micro- or local community level, the challenges for Rwanda at macro- or national political level are different from many other post-conflict transitional justice situations. The number of crimes, victims and perpetrators exceeds by far the "average". The ongoing conflict situation and lack of political power-sharing constitutes a major difference between Rwanda and, for instance, South Africa, where the question of political power-sharing came first and where the instrument to deal with the past was agreed upon only at the last stage in the negotiations process[99]. Also, despite the possible overall consensus regarding the need to eradicate impunity, the perception of the current approach varies importantly. Victims perceive the current situation as ongoing impunity, since only a small percentage of the total number of perpetrators has been found guilty. Others perceive the current situation as massive political (and even ethnic) oppression, since tens of thousands of families are affected by the detention of one of theirs, despite the fact that they should be considered innocent until proven guilty.

Mahmood Mamdani wrote that "*After 1994, the Tutsi want justice above all else, and the Hutu democracy above all else. The minority fears democracy. The majority fears justice. The minority fears that democracy is a mask for finishing an unfinished genocide. The majority fears the demand for justice is a minority ploy to usurp power forever*"[100]. One of the ways forward is to overcome the apparent dichotomy between both concepts (justice and democracy) and to facilitate ways of combining these seemingly opposite directions. Genuine reconciliation at community level and at macro-level may be the end-result of a lenghty process of acceptance of both justice and democracy (or, to avoid a taboo word, 'power-sharing'). For justice to be accepted as an instrument of reconciliation, it should meet certain conditions, which go even beyond criteria of independence and impartiality of the judiciary. These conditions include its embeddedness in an overall process towards transparency, political participation and inclusiveness. At the same time, history has shown that, in the context of Rwanda's plural society, political participation can by no means equal majority democracy, but requires a balanced system of power-sharing, including minority rights' protection and security guarantees.

Antwerp, 9 October 1999

[98] Cited in REMY, J.P., *op.cit.* (my translation).

[99] See, i.a., HUYSE, L., *Young democracies and the choice between amnesty, truth commissions and prosecutions*, Leuven, 1998, p.15.

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