



FACULTY OF LAW  
University of Lund

Andrea Algård

Does the Gacaca system in  
Rwanda provide an effective  
remedy in compliance with  
international norms and  
standards?

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20 points

Professor Gudmundur Alfredsson

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# Summary

Rwanda is endeavouring to deal with its evil past of internal war and genocide to enable a peaceful future. Conflicts between Tutsis and Hutus dominate the Rwandan history. An estimated one million persons were massacred during the 1994 genocide directed against Tutsis and moderate Hutus. Those who survived suffer from physical and psychological wounds. This is equally true for the survivors of war crimes and crimes against humanity. Victims and perpetrators are found among Tutsis as well as Hutus. Officially, Rwanda of today denies the existence of the two groups. Nevertheless, the divide is still strong in the minds of the Rwandan people.

With the occurrence of human rights violations such as genocide, follow international and regional obligations for the state in question to provide the victims with a remedy. The state obligation to provide victims of human rights violations with a remedy is included in several international and regional instruments. It is argued that at least some elements of this right form part of customary international law. Remedies may take different forms but should be proportionate to the gravity of the violation and the resulting damage. Included in the notion of an effective remedy is the victims' right to truth, justice and reparation. Truth and justice presuppose thorough investigations and a setting where people dare to tell the truth. For justice to be meaningful it has to be accessible, competent and impartial. In the case of gross human rights violations, reparation should cover both moral and material damages. Further, non-repetition and protection should be guaranteed. In case of violations by non-state actors, the state still has the obligation to provide for a remedy, including access to truth, justice and reparation.

The Rwandan solution chosen to achieve justice, truth and reconciliation is the unique Gacaca system. This system draws on traditional Rwandan justice where the interaction of the community is central. Each Gacaca court consists of judges elected from within the community and all community members are obliged to participate. An estimated number of 700 000 perpetrators are to be tried by the Gacaca courts within the years to come. Although the Gacaca system signifies a big step forward in providing victims with a remedy and combating impunity it is not unproblematic. Problem areas include insufficient education and replacement of judges, practical access to justice for all victims, security for victims and witnesses, and reparation for moral damages. One major deficit is the unwillingness to deal with crimes committed by the Rwandan Patriotic Front, the army (mainly Tutsi) that managed to put an end to the genocide.

For Rwanda to fulfil its legal obligation to provide victims of human rights violations with an effective remedy, improvements are necessary. As the situation stands today, Gacaca may well provide some victims with a remedy but that is not sufficient to discharge Rwanda's legal obligations.

# Preface

First, I would like to express my gratitude to SIDA and the Raoul Wallenberg Institute for Human Rights and Humanitarian Law for giving me the opportunity to go to Rwanda and conduct a field study.

I would like to thank my supervisor, Professor Gudmundur Alfredsson, for his help and advice.

My deepest gratitude goes to all the interviewees in Rwanda who shared invaluable information and took their time to talk to me.

Especially, I would like to thank Félix Ndahinda, Gabriel Gabiro, Denis Bikeshu and the other employees at the SNJG, Placide Magambo and Paul Mugemangango for their kindness and help during my time in Rwanda.

Finally, I want to thank Anders, my family and my friends for all their love, support and encouragement.

# Abbreviations

ACHPR	African Charter on Human and People's Rights
ASF	Avocats Sans Frontiers
AVEGA	Association des veuves du genocide de 1994
FARG	Fonds National pour l'Assistance aux Rescapés du Génocide et des Massacres aux Rwanda
HRC	Human Rights Committee
HRW	Human Rights Watch
LDGL	Ligue des Droits de la personne dans la région des Grands Lacs
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IRDP	Institute of Research and Dialogue for Peace
MRND	Mouvement Révolutionnaire National pour le Développement
NCHR	National Commission of Human Rights
NURC	National Unity and Reconciliation Commission
P.A.P.G	Projet d'Appui de la Societe Civile au Processus Gacaca au Rwanda
PRI	Penal Reform International
RPF	Rwandan Patriotic Front
RTL	Radio et Télévision Libre des Milles Collines
SNJG	National Service of Gacaca Jurisdictions
TIG	Travaux d'Intêret General
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
UNHCR	United Nations High Commissioner of Refugees

# 1 Introduction

This thesis focuses on the rights of victims to an effective remedy in post-conflict Rwanda.<sup>1</sup> Too often in history has impunity prevailed and perpetrators have been left unpunished for the atrocities committed. Impunity has been the political price paid to secure peace. In the case of Rwanda, the International Criminal Tribunal for Rwanda (ICTR) was the response of the international community to end impunity. Still, the ICTR is only trying a minuscule number of cases and a national solution was necessary to end impunity in Rwanda. The solution came to be the national Gacaca courts, launched in 2001 and fully functioning from March 2005. The Gacaca system is an unconventional solution, drawing on traditional participatory justice, and truly unique in its kind. This thesis focuses on how this transitional justice manages to take into account the rights of the many victims.

Rwanda today is a country striving to deal with its evil past to be able to finally move on and develop. The 1994 genocide and the events surrounding it have left deep wounds in the society that are not easy to remedy. The injury inflicted upon victims of genocide is in many respects irreparable. Reconciling lasting peace with justice is a dilemma facing the country. Small resources combined with an enormous caseload pose further problems for Rwanda. Although the official policy is that there are no ethnic groups in Rwanda of today, people are still considering themselves as Hutu, Tutsi or Twa.<sup>2</sup> Victims and perpetrators exist in all groups and the line between victim and perpetrator is often blurred. There are victims of genocide, victims of crimes against humanity and victims of war crimes. The Gacaca courts have jurisdiction over crimes against humanity and crimes of genocide. The Military Tribunals have jurisdiction over war crimes.

How should war-torn and poor countries like Rwanda deal with their past? Options include criminal sanctions, non-criminal sanctions and rehabilitation of the society.<sup>3</sup> What can be required from a legal point of view? The concept of justice is not necessarily the same all over the world, nor is the perception of what constitutes an effective remedy.<sup>4</sup> It is likely

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<sup>1</sup> Throughout this thesis, the word victim is used for both those who died and those who survived a crime. Sometimes I also use the word survivor for those who survived the genocide.

<sup>2</sup> Twa is the smallest group in Rwanda, today they constitute less than 1% of the population. Originally, they inhabited the forests as hunters and gatherers, but were later forced into populated areas as the forests were cut down to leave place for agriculture.

<sup>3</sup> Sarkin, Jeremy, "Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda's approach in the new millennium of using community based Gacaca tribunals to deal with the past", *International Law FORUM du droit international*, 2: 112-121, 2000, p. 115

<sup>4</sup> Black's Law Dictionary defines the term remedy as: "the means by which a right is enforced or the violation of a right is prevented, redressed, or compensated ... [or] any remedial right to which an aggrieved party is entitled with or without resort to a tribunal". *Black's Law Dictionary*, Sixth edition, West Publishing Co. 1990



that one victim will differ from another in his or her opinion of what would constitute an appropriate remedy. Nevertheless, the victims of Rwanda and all other victims of human rights violations around the world want to see something being done. They want the wrongs committed to be redressed to be able to move on. Most of them want to see their perpetrator punished and they want compensation. They want to know the truth about what happened to their loved ones and they want to be able to bury them. Truth, justice and reconciliation are often in conflict with each other, which poses problems when trying to deal with the past in an inclusive manner.<sup>5</sup>

The situation after an internal conflict is unique in the respect that victims and perpetrators have to continue living together. Justice after such a conflict can therefore not only be punitive, but must also be reconciliatory. Rwanda chose a different path in comparison to South Africa where getting the truth was considered enough. The participatory Gacaca system is supposed to achieve truth, justice and reconciliation. Hence, the justice rendered is in part restorative and in part retributive. The basis of retributive justice is moral culpability; the perpetrator is punished in his or her individual capacity and the punishment is proportionate to the crime committed. The crime is viewed as an offence against the state, thus the state has the largest interest in the prosecution. In a purely retributive system, the role of the victim is often marginal.<sup>6</sup> Restorative justice theories focus on repairing the harm caused by the crime, often through participatory proceedings including all stakeholders.<sup>7</sup> Proponents of restorative justice claim that this kind of justice better takes into account the needs of the victims.<sup>8</sup>

Victims' rights have not been in the forefront when dealing with international crimes such as genocide and crimes against humanity, not in international tribunals nor in national courts. Victims of the greatest crimes have so far been the ones facing the biggest challenges in accessing remedies.<sup>9</sup> In legal circles, victims have been absent as subjects with rights. Not until recently has their standing improved from that of being seen as merely witnesses.<sup>10</sup> Proposals for victim-friendly reforms have often raised concerns that they may impede the rights of defendants. The most extensive international norms concerning the rights of victims find themselves in non-legally binding instruments. Which are then the components of victims' legal rights today? Moreover, what is encompassed in the notion of an

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<sup>5</sup> Ibid., p. 116

<sup>6</sup> Roht-Arriaza, Naomi, "Punishment, redress and pardon: theoretical and psychological approaches", Roht-Arriaza, Naomi (ed.), *Impunity and human rights in international law and practice*, Oxford University Press 1995, pp. 15-17

<sup>7</sup> Johnstone, Gerry, *Restorative Justice- Ideas, Values, Debate*, Cullompton Willan 2002, p. 151

<sup>8</sup> Ibid., p. 62

<sup>9</sup> Bottiglierio, Ilaria, *Redress for Victims of Crimes Under International Law*, Martinus Nijhoff Publishers 2004, p. 1

<sup>10</sup> Rock, Paul, "Introduction", Rock, Paul (ed.), *Victimology*, Dartmouth Publishing Company 1994, p. xi

effective remedy? Basic elements emerging as the minimum core include the right to justice and the right to reparation.<sup>11</sup> Additionally, the right to know is another core component of victims' rights.<sup>12</sup> These three rights will be the focus in the following analysis of the Gacaca system.

## 1.1 Purpose

The overall purpose of this thesis is to analyse the Rwandan way of dealing with the past from the point of view of its many victims. The first question is how Rwanda is dealing with the situation through its Gacaca courts and what rights the victims have in that process. The second question is what obligations Rwanda has under international human rights law to provide the victims with a remedy. The third question is whether Rwanda complies with these obligations, and if not which measures can be taken to rectify that.

## 1.2 Method and material

This thesis is mainly based on material collected during a minor field study in Rwanda (conducted between 10 June and 13 August 2005). The field study was possible thanks to a scholarship from SIDA, the Swedish International Development Agency. The purpose of going to Rwanda was to gather information and material through interviews and observations.

During my time in Rwanda, I conducted several interviews with officials from national and international NGOs as well as with government officials and genocide survivors. The interviews were semi-structured, thus allowing flexibility and a two-way communication. This type of interview was more appropriate with regard to the often sensitive issues discussed. Due to my short time in Rwanda, I chose to focus on NGOs and government officials to get a broader picture of the victims' situation. Interviews with survivors provide their respective point of view but they are not necessarily representative for the society as a whole. One of the problems I encountered during my stay was that several NGOs would only give interviews off the record.<sup>13</sup> This was especially true concerning questions on crimes committed by the Rwandan Patriotic Front (hereinafter the RPF). This issue is very sensitive in Rwanda today and it proved difficult to find reliable

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<sup>11</sup> Bottigliero, p. 250

<sup>12</sup> Ibid., p. 183, and "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law", E/CN.4/2000/62, p. 8

<sup>13</sup> Last year, the Parliament labelled a number of NGOs as promoting "divisionism", meaning that they worked against unity and reconciliation by among other things putting forward the issue of war crimes, and called for their dissolution. To be able to function as an NGO in Rwanda today, it seems to be crucial to keep up a good relationship with the state and not to be too openly critical of it. See HRW, World Report 2004, Rwanda. See also Reyntjens, Filip, "Rwanda, ten years on: from genocide to dictatorship", *African Affairs* (2004) 103, 177-210, pp. 185-186, where Reyntjens claims that the civil society in Rwanda is controlled by the regime.

information. Unfortunately, Rwanda seems to have a long way to go in the field of freedom of expression and association.

To see how the Gacaca courts function in practice I attended several trials in different parts of the country. With more than 10.000 Gacaca courts, it was not possible to cover all of them. To get a good picture I found it important to attend trials in different regions and not only in Kigali. I also visited trials on different levels and in different stages of Gacaca. Additionally I gathered written information, such as reports and legislation, from various sources.

Beside the material from Rwanda, I have used written material regarding human rights law, reports from several international NGOs such as Penal Reform International, Human Rights Watch and African Rights, as well as case law from international treaty bodies and courts.

The international conventions of particular interest for this study are the International Covenant on Civil and Political Rights, the ICCPR, the Genocide Convention and the African Charter on Human and Peoples' Rights, the ACHPR. The Protocol establishing the African Court is also included in the study.

Other sources of material are the statutes of the International Criminal Court (ICC), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for Former Yugoslavia (ICTY). While the statute of the ICC is the most progressive so far with regard to victims' rights, the two Ad Hoc Tribunals have been severely criticised for their way of dealing with victims and witnesses.

International non-binding documents in the field of victims' rights are also included in my material. Even though they are not legally binding, they are important in indicating the development in this field. These so-called soft law instruments may lead to binding instruments in the future and they may evolve into customary international law.

### **1.3 Delimitations**

There are numerous aspects affecting victims in a criminal procedure. Most of the so-called victims' rights do not actually constitute binding norms but take the form of mere recommendations. This thesis will not cover all of them. My focus will be on the areas that I consider being the most important and central: truth, justice and reparation.

Furthermore, my thesis focuses on the Gacaca system. The genocide trials and the victims' rights in the ordinary Rwandan courts are not analysed in this thesis. Nevertheless, the overlap between Gacaca and ordinary courts in the classification and information gathering stage is included.

As for international instruments including possible victims' rights, I do not deal with all of them. My focus is on the ICCPR and the ACHPR to which

Rwanda is a party. Although the European Convention on Human Rights and the American Convention on Human Rights are both important in this field, I choose not to deal with them due to lack of space. The same is true for the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to which Rwanda is not a state party. Likewise, I do not deal with any of the international humanitarian law instruments due to lack of space.

## **1.4 Disposition**

This thesis divides into three main parts.

The first part includes the case study of Rwanda. I start by going briefly through the historical background and continue with the reasons for choosing Gacaca as a solution. Here I find it necessary to include a section on the notion of victim in the Rwandan society and on the rights of victims of war crimes. Further, I present the complex system of Gacaca in light of the Gacaca legislation and my observations at trials. Finally, I go through the main areas of concern for the victims: truth, justice and reparation.

The second part analyses the notion of effective remedy in international and regional legal instruments. The chapter starts with the Genocide Convention, continuing with the ICCPR and the ACHPR. The end of this section is devoted to international non-legally binding instruments, international criminal tribunals, and the question of victims' rights as customary international law.

The third part encompasses an analysis of the Gacaca system in light of Rwanda's legal obligations. In the end, I present my conclusions and make some recommendations on possible improvements.

## 2 The Rwandan Context

This chapter does not aim at providing a complete picture of the Rwandan history. Instead, it is supposed to be a brief introduction to the subject and the multifaceted problems facing the country today. It is my belief that the current events in Rwanda can only be understood in light of its history.

### 2.1 Identity and independence

What the world came to follow on the news in April 1994 was not a sudden outburst of tribal violence in the middle of Africa. The Rwandan history is a very complex one and there are no easy explanations available to make the genocide understandable. Central to the conflicts of Rwanda are the division of people into groups, especially the division between Hutu and Tutsi. The origin of the two groups has caused much academic debate. Who are the Tutsis and who are the Hutus? Are they the same people or are they different? The Rwandan leadership of today claims that there is no difference whatsoever between the two groups. It is true that the people of Rwanda share the same history, language and culture. Nevertheless, in the minds of the Rwandan people, the divide still exists and everybody knows to which group he or she belongs.

The official history of Rwanda tells a simplified story in which the western colonisers construed Tutsi as the superior race and Hutu as the inferior.<sup>14</sup> Under colonial rule and Christianisation, the Hutu/Tutsi divide became institutionalised through the introduction of race biology and the hamitic hypothesis. The hamitic hypothesis distinguished so-called real Bantu Africans from an outsider race of civilisers who were black in colour but not Negroid in race, the Hamites. According to this hypothesis, the Tutsis were superior because of their hamitic origin.<sup>15</sup> Tutsis were transformed into settlers from abroad, and the Hutus into Rwanda's indigenous people. The Belgian colonisers issued identity cards indicating whether the holder was a Tutsi, Hutu or Twa. Hence, Hutu and Tutsi were enforced as legal identities.<sup>16</sup> Mamdani argues that the difference between the two groups did exist before colonisation but not as fixed identities. A Tutsi was someone who owned a certain amount of cattle and a Hutu could change into a Tutsi if he or she got more cattle. The identities were not racial or ethnic but based on a socioeconomic difference in a feudal system where the Tutsi king ruled.<sup>17</sup>

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<sup>14</sup> Shyaka, Anastase Dr., *The Rwandan Conflict; Origin, Development, Exit strategies*, a study ordered by the NURC, Kigali 2004, p. 20

<sup>15</sup> Mamdani, Mahmood, *When Victims Become Killers – Colonialism, Nativism, and the Genocide in Rwanda*, Princeton University Press 2002, pp. 79-80

<sup>16</sup> *Ibid.*, p. 101

<sup>17</sup> *Ibid.*, p. 57 and p. 70.

At the time of independence, the Belgians and the Catholic Church had suddenly changed from reinforcing Tutsi rule to support the Hutu majority in their fight for equality. A Hutu counter elite emerged and several Hutu movements arose.<sup>18</sup> During the 1959 revolution and in the years that followed, several massacres of the Tutsi population took place.<sup>19</sup> This led to a big refugee movement of Tutsis fleeing Rwanda to find safe haven in the neighbouring countries.

Rwanda became independent in 1962. Kayibanda, a Hutu nationalist and one of the leaders of the so-called social revolution in 1959, was appointed President.<sup>20</sup> In 1973, a coup replaced President Kayibanda. Under the leadership of the new President Habyarimana, and the extremist Hutu elite, the Akazu group, racism and divide became the major means to keep power.<sup>21</sup> The state enforced quotas in the sphere of education and employment. The Tutsi population could participate in the political sphere but to a limited extent.<sup>22</sup>

## 2.2 War and genocide

The Tutsi population that fled in the 1950's and 1960's was not warmly welcomed in their new countries. Congo and Uganda did not grant them full citizenship. The Tutsi Diaspora was not welcome to return to Rwanda, nor was the group welcomed by their new countries. Consequently, they formed a group without an ethnic home. These regional developments led to the establishment of the Rwandan Patriotic Front, the RPF, a Tutsi rebel force, and their invasion of Rwanda in 1990.<sup>23</sup>

The RPF invasion reinforced the hatred among the Hutu population who feared to once more find themselves marginalised under a minority rule. At the same time, Rwanda entered an economic crisis. Coffee prices fell dramatically, leaving many farmers without subsistence. Structural Adjustment Programmes, imposed by the World Bank and the International Monetary Fund, had serious social consequences.<sup>24</sup> In a situation of war, poverty and unemployment, Hutu Power emerged as stronger than ever before and was suddenly found at the very centre of politics. The newspaper Kangura and the infamous hard line radio station "Radio et Télévision Libre des Mille Collines", the RTLM, were born and used as the main propaganda instruments. The RTLM, with countrywide reach, diffused the genocidal message repeatedly through music and jokes, and became the

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<sup>18</sup> Ibid., pp. 117-125

<sup>19</sup> Ibid., p. 130

<sup>20</sup> Ibid., p. 127

<sup>21</sup> Melvern, Linda, *A People Betrayed: The Role of The West in Rwanda's Genocide*, Zed Books Ltd London and New York, 2000, p. 57

<sup>22</sup> Mamdani, pp. 138-139

<sup>23</sup> Ibid., pp. 155-157

<sup>24</sup> Melvern, p. 55

most influential propaganda instrument.<sup>25</sup> Weapons continued to flow into the country mainly from France, Egypt and South Africa. The Rwandan government used loans and aid to buy weapons, but the money did not reach those in need.<sup>26</sup> The ruling party formed a youth section called Interahamwe (in Kinyarwanda, those who work together). The Interahamwe received training in warfare and was equipped with weapons.

Habyarimana's regime and the RPF negotiated several peace agreements, the last one being the so-called Arusha peace agreement. None of them were ever realised in practice. The UN Security Council launched a small peacekeeping force, the UNAMIR, to oversee the implementation of the Arusha agreement. Lt. Gen. Roméo Dallaire was appointed to head the military mission consisting of approximately 2 500 soldiers. UNAMIR's chapter six mandate and its Rules of Engagement allowed the use of force in self-defence, in the protection of the force overall and for the prevention of crimes against humanity.<sup>27</sup>

On April 6<sup>th</sup> 1994, President Habyarimana's plane was shot down in the outskirts of Kigali. It is still unclear who was responsible for the shooting. This came to be the starting point of the genocide. The hardliner Colonel Bagosora quickly gained control over the country after having assassinated all the moderate Hutus in leading positions. Within hours, the slaughter of Tutsis and moderate Hutus escalated.<sup>28</sup> It was soon clear that the UNAMIR would not be able to do anything to stop the killings. Instead of reinforcing the troops, the Belgian contingent pulled out after the killings of 10 Belgian soldiers. As Roméo Dallaire puts it, "the former colonial masters were running from this fight with their tails between their legs".<sup>29</sup> An effective evacuation of expatriates took place; with the Rwandans left behind to their fate. During the following 100 days, the world witnessed almost 1 million people massacred by perpetrators in huge numbers. The Interahamwe, other youth groups, the Rwandan army and ordinary citizens all participated in the slaughter.

The international community was very hesitant to label the slaughter genocide. Not until the end of May did the UN Secretary General formally use the word genocide in his report to the UN Security Council.<sup>30</sup> In June 1994, France launched Operation Turquoise. French troops landed in Rwanda, with a chapter seven mandate, to stop the killings and protect the population. The hidden political purpose of the mission was allegedly to

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<sup>25</sup> Fujii Lee, Ann, "Transforming the moral landscape: the diffusion of a genocidal norm in Rwanda", *Journal of Genocide Research*, 6(1) March (2004) 99-114, pp. 103-104

<sup>26</sup> Melvern, p. 16 and p. 48

<sup>27</sup> Dallaire, Roméo Lt.Gen., *Shake hands with the devil- the failure of humanity in Rwanda*, Carroll and Graf Publishers New York, 2003, p. 174

<sup>28</sup> Des Forges, Alison, HRW, *Leave none to tell the story: the Genocide in Rwanda*, HRW 1999, p. 6

<sup>29</sup> Dallaire, p. 310

<sup>30</sup> Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, S/1999/1257, p. 38

hinder a victory by the RPF.<sup>31</sup> France had close ties to the Hutu Power movement. The country had sent troops to help Habyarimana in 1990, and had supposedly trained parts of the military now involved in the genocide.<sup>32</sup> Operation Turquoise ended up protecting many of the génocidaires instead of disarming them.<sup>33</sup>

## 2.3 Rebuilding Rwanda

When the RPF finally managed to gain control over the country on the 18<sup>th</sup> of July 1994 there was not much of a country left and they faced the inhuman task to rebuild a devastated society. At this point, aid had started to flood into the country and to the many refugee camps in the neighbouring countries. Pasteur Bizimungu, a Hutu belonging to the RPF, was appointed President and held office for the following 6 years.

It is undisputed that the RPF's military advance was the single factor that finally halted the genocide. At the same time, one has to recognize that the RPF invasion in 1990 led to an escalated political polarization and reinforced hatred between Tutsi and Hutu.<sup>34</sup> Throughout the civil war that followed, both sides were involved in human rights abuses.<sup>35</sup> The same was true during the months of genocide. In this context, it should be underlined that the crimes committed by the RPF did not amount to a "double genocide".<sup>36</sup> Nevertheless, Dallaire gives an account of indiscriminate attacks from both sides as the fighting escalated.<sup>37</sup> The RPF is accused of massacres of civilians and summary executions during the offensive and in the years following the genocide. It may be understandable, albeit not excusable, that some of the young RPF soldiers committed acts of revenge as they saw fellow Tutsis massacred all over the country. The government also acknowledged and condemned some revenge killings.<sup>38</sup> According to Des Forges, the RPF killings were widespread and systematic with at a minimum 25 000-30 000 people killed.<sup>39</sup> Des Forges further asserts that high commanders of the RPF knew about these practices and tolerated them.<sup>40</sup>

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<sup>31</sup> Des Forges, p. 668

<sup>32</sup> Melvern, p. 37 and p. 45

<sup>33</sup> Dallaire, p. 457. In November 2005, a French judge conducted an investigation in Rwanda on the alleged French involvement in the genocide. The investigation followed a lawsuit against France lodged in France by six Rwandans. See IRIN, "French judge arrives to follow up genocide allegations", 22/11/2005, [http://www.irinnews.org/report.asp?ReportID=50223&SelectRegion=Great\\_Lakes&SelectCountry=RWANDA](http://www.irinnews.org/report.asp?ReportID=50223&SelectRegion=Great_Lakes&SelectCountry=RWANDA), last visited 22/11/2005

<sup>34</sup> African Rights, *Rwanda, death, despair and defiance*, revised 1995 ed., p. 1062

<sup>35</sup> Ibid., pp. 1075-1078

<sup>36</sup> Extremist Hutu groups active in the DRC are still forwarding the theory of "double genocide" as the truth, and as a defence for the acts committed in 1994.

<sup>37</sup> Dallaire, p. 378 and p. 482

<sup>38</sup> African Rights, *Rwanda, death, despair and defiance*, p. 1085

<sup>39</sup> Des Forges, p. 735

<sup>40</sup> Ibid., pp. 735-736



The ICTR was the international community's response to the genocide. The Tribunal was established in 1995. The fact that Rwanda voted against the establishment of the ICTR in the UN Security Council tells something about the relationship between the tribunal and Rwanda. Over the years, tensions have been apparent. The tribunal has not taken any action regarding RPF offences, even though it has jurisdiction over crimes of genocide, war crimes and crimes against humanity.<sup>41</sup> The former Chief Prosecutor, Carla Del Ponte, initiated investigations into the crimes committed by the RPF. As a response, the Rwandan government barred witnesses from travelling to Arusha and disrupted the work of the Tribunal.<sup>42</sup>

The ICTR has not succeeded in reaching out to the Rwandese. Most people do not feel that the ICTR is there for them, but rather that it was an easy excuse for the passivity of the international community during the genocide.<sup>43</sup> Complaints concern the slowness of the proceedings, the treatment of witnesses during trial and investigation, and the lack of information to ordinary people.<sup>44</sup> This picture seems to be shared by scholars who have written about the ICTR's relationship to the Rwandan people.<sup>45</sup> The adversarial attitude among government officials also influences the ordinary Rwandan's perception of the ICTR.<sup>46</sup>

In 2003, the first ever multi-party legislative and presidential elections were held. Since 2000, Paul Kagame, the former RPF commander, is President of Rwanda. He is now elected until 2010. Under his strong leadership, many areas, including security, level of corruption and infrastructure, have improved. On the downside are restricted civil and political rights, and the worrying use of the label "divisionism" to get rid of political opposition.<sup>47</sup> Critics of the current government are dismissed as genocide-deniers. Many foreign donors, burdened by guilt over their own inaction during the genocide, tend to overlook the current government's human rights abuses.<sup>48</sup> When donor countries do raise criticism, the government is eager to point out that they did not do anything to stop the genocide.<sup>49</sup> Unity and reconciliation is the slogan of the government but criticism arises claiming that Rwanda is instead moving towards dictatorship and exclusion.<sup>50</sup>

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<sup>41</sup> ICTR statute, arts. 2-4

<sup>42</sup> Peskin, Victor, "Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the former Yugoslavia and Rwanda", *Journal of Human Rights*, 4:213-231, 2004, pp. 223-226

<sup>43</sup> Interview with Elizabeth Onyango, programme coordinator, African Rights, Kigali, 26/7/2005

<sup>44</sup> Ibid., and interview with John Seminega, project officer, AVEGA, Rwamagana, 5/8/2005

<sup>45</sup> See for example Lambourne, Wendy, *Justice and Reconciliation: Post-Conflict Peacebuilding in Cambodia and Rwanda*, PhD Thesis, University of Sydney 2003, pp. 341-348

<sup>46</sup> Lambourne, p. 342

<sup>47</sup> HRW, World Report 2004, Rwanda and World Report 2005, Rwanda

<sup>48</sup> HRW, World Report 2005, Rwanda

<sup>49</sup> The Organisation of African Unity, The Report of international panel of eminent personalities to investigate the 1994 genocide in Rwanda and the surrounding events, *Rwanda: The Preventable Genocide*, July 2000, p. 251, para. 23.62

<sup>50</sup> Reytnjens, p. 177

# 3 The Gacaca system

*“Let’s tell what we witnessed, confess what we did and we will be healed.”<sup>51</sup>*

This chapter aims at explaining the complex Gacaca system in a comprehensible way. To start with, I will briefly deal with the factors that lead to the adoption of Gacaca and the notion of traditional Gacaca. One possibly problematic aspect of the Gacaca system is that it has already been reformed once. More changes are likely to occur in the future and parts of this section might then be outdated.<sup>52</sup> Hence, it is worth to notice that this chapter is based on the Gacaca legislation from 2004.<sup>53</sup> Another noticeable aspect is that it is impossible to tell how the Gacaca courts function throughout the entire country. Although they are all acting within the same legislative framework not one is the same as another, something observations make very clear. A multitude of factors such as the amount of survivors left, the way the genocide was carried out in that specific area and the educational background of the judges all contribute to a difference in practice. This chapter tries to provide the broad picture while also adding some examples from the particular Gacaca sessions observed in Rwanda.

## 3.1 Why Gacaca was the chosen solution

Various needs, problems and aims finally resulted in the creation of the Gacaca jurisdictions in 2001.<sup>54</sup> The Rwandan judicial system was almost non-existing at the end of the genocide in 1994. Challenges included lack of human resources, especially of persons who were not themselves involved in the genocide, lack of equipment and widespread corruption. In the whole country less than 20 legal defenders remained.<sup>55</sup> Meanwhile, the prisons were overpopulated with accused perpetrators awaiting trial, many of them without proper case-files. In 2001, approximately 112 000 inmates inhabited Rwanda’s prisons.<sup>56</sup> At the same time, the victims’ organisations and the victims themselves started to urge for justice. The ICTR would only deal

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<sup>51</sup> “Tuvuge ibyo twabonye, twemere ibyo twakoze bizadukiza”, Sensitisation signpost in Rwanda, translated from Kinyarwanda. See picture in Supplement B.

<sup>52</sup> Changes currently underway include creating two courts at each cell level instead of one, and more important to expand the Gacaca courts’ jurisdiction to include also category 1 offenders. The proposed changes aim at further speeding up the proceedings. Interview with Augustin Nkusi, director of legal support unit, SNJG, Kigali 3/08/2005, and Tindiwensi Martin, “Gacaca proceedings to be improved”, *New Times*, 6/10/2005, [http://www.newtimes.co.rw/index.php?option=com\\_content&task=view&id=1475&Itemid=26](http://www.newtimes.co.rw/index.php?option=com_content&task=view&id=1475&Itemid=26), last visited 8/10/2005

<sup>53</sup> Rwandan Organic Law No 16/2004 of 19/6/2004

<sup>54</sup> Rwandan Organic law No 40/2000 of 26/01/2001

<sup>55</sup> Interview with Kerstin McCourt, head of mission, Danish Centre for Human Rights, Kigali 12/08/05

<sup>56</sup> PRI, *Interim report on research on gacaca jurisdictions and its preparation*, (July-December 2001), p. 27

with a very small number of cases, all the rest was for Rwanda to handle on its own. Already in 1996, Rwanda adopted a law on the prosecution of the crime of genocide and the crimes against humanity.<sup>57</sup> The ordinary court system dealt with nearly 6 000 cases of genocide in the years between 1996 and 2000. With that speed, it would still have taken almost 100 years to deal with the enormous backlog of cases.<sup>58</sup> Rwanda needed a new sustainable solution to solve the problem of justice and combat impunity. During the years of 1998 and 1999, several meetings gathering the country's leadership and prominent people took place. Here, they tried to find a not too expensive solution that could meet the Rwandans' expectations on justice. Included among these expectations were to punish the perpetrators, to achieve unity and harmony, and to build a country without divisions. Some of the participants suggested that recourse to the traditional Gacaca, yet in a new shape, could be a viable solution.<sup>59</sup>

Gacaca is presented as the traditional justice system of Rwanda, a system that has been functioning since time immemorial.<sup>60</sup> There is hardly any written material on the original Gacaca, which seems to have worked as an exclusively oral procedure. Before colonisation and the introduction of written legislation, Gacaca was the only judicial system.<sup>61</sup> In the early 1920's, new legislation restricted Gacaca's competence to encompass civil law issues only. Criminal law was hereinafter for the established Western-style courts to handle.<sup>62</sup> Traditional Gacaca built on the principle of participatory justice and the shared responsibility of the family of the wrongdoer. The parties gathered to discuss the issue and to solve it under the supervision and mediation of the judges, the *inyangamugayo*. At the end of the session, the parties normally shared a bottle of banana wine as a symbol of reconciliation.<sup>63</sup> *Inyangamugayo*, in Kinyarwanda person or persons of integrity, were elected among the elderly, persons with education or other highly respected persons within the community.<sup>64</sup> In traditional Gacaca, only men could serve as *inyangamugayo*.<sup>65</sup>

While the proponents of Gacaca contended that this system would be able to meet the expectations regarding justice among the Rwandan population, opponents saw problems in the lack of defence and the difficulty of finding

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<sup>57</sup> Rwandan Organic Law of 30/08/1996 implementing the 1948 Genocide Convention. The Genocide Convention was signed and ratified by Rwanda in 1975.

<sup>58</sup> SNJG, *Introduction on Gacaca jurisdictions*, <http://www.inkiko-gacaca.gov.rw/En/EnIntroduction.htm>, last visited 6/10/2005

<sup>59</sup> NURC, *Report on the National Summit of Unity and Reconciliation*, Kigali 18-20 October 2000, p. 57

<sup>60</sup> National University of Rwanda, "Les Juridictions Gacaca et les Processus de Réconciliation Nationale", *Cahiers du Centre de Gestion des Conflits No 3*, Kigali 2001, p. 31

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*, p. 32

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*, p. 31

<sup>65</sup> Sarkin, p. 119

impartial judges.<sup>66</sup> Some victims' organisations regarded Gacaca as a way of giving partial amnesty to the perpetrators and doubted the impartiality of the process.<sup>67</sup> Another argument is that Gacaca could open old wounds, and in the end lead to a hampered reconciliation process.<sup>68</sup> Despite these fears and complaints, and perhaps influenced by the lack of other alternatives, Gacaca was launched as the Rwandan solution. After pilot Gacaca in some parts of Rwanda, Gacaca has now been fully functioning throughout the country since March 2005.

Although often presented as traditional justice, contemporary Gacaca differs significantly from the traditional justice system. Schabas argues that Gacaca is in reality nothing more than a de-centralised system of justice where non-professionals adjudicate the crimes on a local level.<sup>69</sup> Today's Gacaca system is something imposed by the State through legislation. Traditional Gacaca blends with the classical judicial system, thus creating a hybrid of indigenous and modern justice.<sup>70</sup> Further, while the traditional justice never imposed sentences of imprisonment this is what modern Gacaca will do. Contemporary Gacaca does not adhere to the old system of collective guilt, where the perpetrator's family shared his or her responsibility. Compared to today's Gacaca, where several steps lead to a judgment, the traditional system dealt with the conflict in a more holistic way.<sup>71</sup>

### **3.2 Structure, competence and function of gacaca**

The Gacaca system builds on the well-organised Rwandan administrative structure, the same structure that once contributed to an extremely efficient genocide. Under the President, government and parliament, the country divides into 12 prefectures, 106 districts, 1545 sectors and 9013 cells. The smallest administrative unit is the head of 10 households, the njumbakumi.

Gacaca courts have the competence to try the perpetrators of the crime of genocide, crimes against humanity and other crimes provided for in the Rwandan penal code if committed in relation to criminal acts carried out with the intent of committing genocide or crimes against humanity. The jurisdiction is limited to crimes committed between October 1, 1990 and

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<sup>66</sup> National University of Rwanda, "Les Juridictions Gacaca et les Processus de Réconciliation Nationale", *Cahiers du Centre de Gestion des Conflits No 3*, Kigali 2001, p. 35

<sup>67</sup> Rombouts, Heidy, *Victim Organisations and the Politics of Reparation: a Case-Study on Rwanda*, Intersentia 2004, p. 334

<sup>68</sup> Sarkin, p. 117

<sup>69</sup> Schabas, William A., "Genocide Trials and Gacaca Courts", *Journal of International Criminal Justice*, 3(2005), 879-895, p. 895

<sup>70</sup> Morrill, Constance F., "Reconciliation and the Gacaca: The Perceptions and Peace-Building Potential of Rwandan Youth Detainees", *OJPCR: The Online Journal of Peace and Conflict Resolution*, 6.1 Fall: 1-66 (2004), p. 4. F. Morrill further argues that this may seriously undermine the confidence of the Rwandan population in the system's ability to reveal the truth.

<sup>71</sup> Ibid.

December 31, 1994.<sup>72</sup> Every offence has to be handled by the Gacaca court situated in the area where the offence was committed.<sup>73</sup>

Within the Gacaca system, legal representation is not allowed for any party. In the ordinary courts, all parties may have a legal representative, but the state does not pay for it.<sup>74</sup>

Something that complicates the work of Gacaca is that the crimes were mostly committed in groups. Often, the accused blame each other and it is difficult to assess the intent and acts of each individual.

### 3.2.1 Cell

Each cell has its own Gacaca court and a general assembly consisting of all the adults, meaning 18 years and older, residing in the cell.<sup>75</sup> On this level, collection of information, categorisation and trials of persons categorised as category three, those accused of offences against property, take place.<sup>76</sup> There is no recourse to appeal available for category three offences.<sup>77</sup> Sessions take place one day a week and take most of that day.

The first step on the cell level is the election of inyangamugayo judges. One cell has nine judges and five deputies.<sup>78</sup> These judges are elected within the general assembly itself, some prerequisites to be eligible are to not have participated in the genocide, to be at least 21 years old and to be of high morals.<sup>79</sup>

The second step is the collection of information that will serve as the basis for future judgments and categorisation. Everybody is supposed to participate and contribute to the final lists of information. The njumbakumi plays a special role, not foreseen by the law, where he or she gathers information in his or her ten households and forwards it to the session for validation.<sup>80</sup> The National Service of Gacaca Jurisdictions (hereinafter the SNJG) has distributed booklets with forms to fill in as a help for the judges.<sup>81</sup> Information gathered includes persons killed in the cell, persons injured, persons accused, property looted, persons inhabiting the cell at the time and current location of persons who fled.<sup>82</sup> Rape and sexual torture

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<sup>72</sup> Rwandan Organic Law No 16/2004 of 19/6/2004, Art. 1

<sup>73</sup> Ibid., Art. 44

<sup>74</sup> Interview with Kerstin McCourt, head of mission, Danish Centre for Human Rights, Kigali 12/08/2005. The Danish Centre for Human Rights has trained almost 100 legal defenders working throughout the country.

<sup>75</sup> Rwandan Organic Law No 16/2004 of 19/6/2004, Art. 6

<sup>76</sup> Ibid., Arts. 41 and 51

<sup>77</sup> Ibid., Art. 41

<sup>78</sup> Ibid., Art. 8

<sup>79</sup> Ibid., Arts. 13-14

<sup>80</sup> Interview with Augustin Nkusi, director of legal support unit, SNJG, Kigali 3/8/2005

<sup>81</sup> SNJG, *Gahunda yo gukusanya amakuru akenewe, Munkiko Gacaca*, Information Gathering Booklet distributed to the Gacaca courts, translated in parts from Kinyarwanda.

<sup>82</sup> Ibid., and Rwandan Organic Law No 16/2004 of 19/6/2004, Art. 33

follows a specific procedure.<sup>83</sup> It is prohibited to talk about these crimes in public during a Gacaca session. Instead, victims or witnesses shall talk to a judge who they have confidence in, who forwards the matter to public prosecution, or report directly to the police or the prosecutor. The rationale behind this secret procedure is to spare the victims and their families from stigmatisation.

One cell consists of at least 200 persons, and the information gathering sessions often give a rather confused impression, in particular when trying to locate people. As there is no register of inhabitants for the whole country, the system is dependent on the fact that someone in the audience knows the current whereabouts of a witness or an accused. The district level is responsible for the issuance of identity cards and it is not that difficult to get more than one or to change one's name.<sup>84</sup> Time is also spent to find out whether certain persons are imprisoned or not, this being something that one could presuppose that the seat would have information on.<sup>85</sup> There is a notable difference between different cell courts regarding the activity of the inhabitants of the cell. In places where there are no survivors left, no one seems keen to contribute with any information and the audience is mostly silent. When they do intervene, it is to accuse people from outside of the cell.<sup>86</sup>

Once the information-gathering phase is finished, the seat of the cell court proceeds to categorise those accused and to send their cases to the right instance. Category three stays at the cell level, category two proceeds to the sector Gacaca and category one, the most serious crimes including particularly cruel killings, rape, sexual torture and mutilation of dead bodies, are forwarded to public prosecution and ordinary courts.<sup>87</sup>

The last phase at the cell level is the trial phase where category three offences are tried. The law encourages amicable settlements between the perpetrator of the property offence and the victim; if such a settlement fails, the seat will sentence to civil reparation for what was damaged.<sup>88</sup>

### **3.2.2 Sector and appeal**

Additionally, every sector has its own Gacaca court dealing with cases committed in all the cells in that sector. The sector level as a first instance handles all cases categorised as category two, which consists of persons accused of participating in or aiding murder or serious attacks against

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<sup>83</sup> Rwandan Organic Law No 16/2004 of 19/6/2004, Art. 38

<sup>84</sup> Interview with NGO official in Kigali, July 2005

<sup>85</sup> Gacaca observation at cell level, Kigali, 18/6/2005

<sup>86</sup> Gacaca observation at cell level, Ruhengeri, 25/7/2005

<sup>87</sup> Rwandan Organic Law No 16/2004 of 19/6/2004, Arts. 34 and 51

<sup>88</sup> *Ibid.*, Arts. 51 and 75. See also chapter 4.2.6.1.

others.<sup>89</sup> At the same level is the Gacaca court of appeal, which deals with appeals of the judgments pronounced by the sector level as a first instance.<sup>90</sup>

The nine judges and five deputies at the sector level are elected by and among all the elected judges from the cells constituting the sector. The judges of those cells make up the general assembly of the sector. A similar procedure is followed when electing the nine judges and five deputies who form the seat of the court of appeal.<sup>91</sup>

A trial at the sector level typically start with the judges reading out the accusations, followed by the views of the accused, often in form of a guilty plea. The trial continues with the testimonies from summoned witnesses and commentaries from the audience. Anyone can speak at anytime with the permission of the seat. Sometimes written evidence in form of other perpetrators' guilty pleas adds to the case. The trial may go on for several hours, all depending on the nature of the crime, the willingness to speak among witnesses, audience and accused, and maybe of most importance the ability of the judges to ask pertinent questions.

Each session ends with the deliverance of the judgment. The judges withdraw for considerations, normally lasting for 15-30 minutes, and then return to read out the judgment. A convicted person is asked whether he or she wants to appeal the case and is given a form of appeal to fill in on the spot or to hand in within 15 days. Parties against him or her, meaning victims or next of kin of victims, are also able to lodge an appeal.<sup>92</sup>

On appeal, new information and testimonies can be added. The focus is often on whether the accused has provided the whole truth in his or her guilty plea or if he or she is still hiding something.<sup>93</sup>

### **3.3 Victor's justice?**

Gacaca was launched as participatory and reconciliatory justice, a system beneficial for all Rwandans. It is true that Gacaca, if it works as planned, will eradicate the culture of impunity with regard to the crime of genocide. The first Gacaca legislation of 2001 included a reference to war crimes and the Additional Protocol II to the Geneva Conventions.<sup>94</sup> This reference is not included in the new law of 2004, which means that war crimes are now outside the competence of Gacaca.<sup>95</sup> So why did the law change? According to the SNJG, people had been asking about crimes committed by the RPF during the pilot phase and, although these crimes are at the same time affirmed to have been only sporadic, Gacaca would not be able to deal with

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<sup>89</sup> Ibid., Arts. 42 and 51

<sup>90</sup> Ibid., Art. 43

<sup>91</sup> Ibid., Arts. 7 and 13

<sup>92</sup> Rwandan Organic Law No 16/2004 of 19/6/2004, Arts.90-91

<sup>93</sup> Gacaca observation at appeal level, Kigali Ngali, 13/7/2005

<sup>94</sup> Rwandan Organic Law No 40/2000 of 26/1/2001, Art. 1

<sup>95</sup> Rwandan Organic Law No 16/2004 of 19/6/2004, Art. 1

them as well.<sup>96</sup> Another reason put forward is that it was necessary to rebut the theory of a “double genocide”.<sup>97</sup> The change was needed to show that there was only one genocide and that was the one committed against Tutsis.<sup>98</sup> Even if war crimes had remained punishable under the Gacaca legislation, many of them had not been within the scope of jurisdiction as they were committed after 1994.

Genocide victims and RPF victims are treated as two separate groups in the Rwandan society. For the individual, it is difficult to grasp the difference between genocide and war crimes. Your suffering will not be different if you lost your family through an act of genocide or through a war crime.<sup>99</sup> Neither will your need for support and assistance be different. While victims of genocide have access to Gacaca, RPF victims do not have a voice in that forum but are referred to the Military Courts. There are several victims’ organisations operating on behalf of genocide victims but none for victims of RPF crimes. Genocide victims are perceived as innocent victims while the innocence of RPF victims is questioned.<sup>100</sup> There is a common idea that a surviving Hutu by necessity has to be a genocide perpetrator, leading to a feeling of collective guilt among Hutus.<sup>101</sup>

It should be noted that Gacaca has competence to try crimes against humanity. This means, in theory, that RPF crimes, if considered to constitute crimes against humanity, could be tried by Gacaca.<sup>102</sup> However, the political interpretation of the law rules out that possibility, although such an interpretation is not compatible with the actual wording of the law.<sup>103</sup> According to the Military High Court, it has judged around ten cases involving war crimes committed by the RPF in the years of 1990-1997.<sup>104</sup> It

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<sup>96</sup> Interview with Augustin Nkusi, director of legal support unit, SNJG, Kigali 3/8/2005

<sup>97</sup> Interview with Francois Mugabo, coordinator of the Gacaca Programme, ASF, Kigali 12/7/2005

<sup>98</sup> Interview with Augustin Nkusi, director of legal support unit, SNJG, Kigali 3/8/2005

<sup>99</sup> Interview with Elizabeth Onyango, programme coordinator, African Rights, Kigali 26/7/2005

<sup>100</sup> Rombouts, p. 221 and p. 362

<sup>101</sup> Tiemessen, Alana Erin, “After Arusha: Gacaca Justice in Post-Genocide Rwanda”, *African Studies Quarterly*, Volume 8 Issue 1 Fall 2004, p. 68

<sup>102</sup> The analysis of whether RPF crimes actually constitute crimes against humanity lies beyond the scope of this thesis. A crime against humanity is an act committed as a part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (ICC Statute Art. 7). Notable is that Des Forges describes the crimes of the RPF as widespread and systematic involving deliberate killings of the civilian population (Des Forges, p. 734).

<sup>103</sup> Fierens, Jacques, “Gacaca Courts: Between Fantasy and Reality”, *Journal of International Criminal Justice*, 3 (2005) 896-919, pp. 908-909

<sup>104</sup> Interview with Judge Lt. Nautiye, the Military High Court, Kigali 10/8/2005. He contends that war crimes committed by the RPF were only isolated and sporadic. I receive a copy of the case of Lt.Col. Ibingira (case number RMP0016/AMG/NJ/96), who was convicted to 18 months imprisonment for his involvement, as a commander, in the Kibeho massacre. According to the Military High Court, more than 300 people were killed in the refugee camp in Kibeho.



is argued that most of the processes against the RPF do not lead anywhere, and when they do, the sentences are very lenient and rarely executed.<sup>105</sup>

Although RPF victims have recourse to a remedy in theory, it does not seem to work that way in practice. The separation of victims of genocide, i.e. Tutsis, and victims of RPF crimes, i.e. Hutus, seems to reinforce the officially non-existent divide between the two groups. This polarisation and politicisation of victimhood may seriously affect the process of reconciliation.<sup>106</sup> It is hard to imagine a successful reconciliation process when not all individuals are held accountable for their crimes. If the majority of the population perceives Gacaca as one-sided justice, participation is likely to be low.<sup>107</sup> The oversimplified identifications of the notions of victims (i.e. Tutsis) and perpetrators (i.e. Hutus) are probable to result in future collective violence.<sup>108</sup>

Clearly, victims of RPF crimes are in need of a domestic remedy, otherwise, the problem will move on to future generations.<sup>109</sup> As the situation stands today, victims of RPF crimes are nowhere near an effective remedy and past patterns of impunity are reinforced.

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<sup>105</sup> Interview with Lucy Umukundwa, journalist, Voice of America, Kigali 15/6/2005, and Reyntjens, p. 208.

<sup>106</sup> Rombouts, p. 363

<sup>107</sup> According to the HRW this is already the case. See HRW, World Report 2005, Rwanda

<sup>108</sup> Corey, Allison and Joireman, Sandra F., "Retributive Justice: The Gacaca Courts In Rwanda", *African Affairs* (2004) 103, 73-89, p. 87

<sup>109</sup> Interview with Elizabeth Onyango, programme coordinator, African Rights, Kigali 26/7/2005

## 4 Victims' rights within Gacaca

This chapter aims at describing the rights of victims within the Gacaca system. Two main headlines, truth and justice, are used to structure the chapter. Finding out the truth about the genocide and the deliverance of justice are two of the three main aims of Gacaca, (the last one is reconciliation). Although most issues are interrelated, I found it easier to give a coherent picture by using this structure. As an example, security is of importance in both the context of getting the truth and the context of justice. The same is true for guilty pleas, those are important for getting the truth but also important in the context of justice, as they could be seen as partial amnesties.

### 4.1 Truth

*“All that happened, happened during daytime, you all lived here, you all saw it. Why do we spend a whole day here in vain? When will we get the truth? Does this court concern all Rwandans or only a few?”<sup>110</sup>*

Most transitional justice scholars believe that learning the truth about what happened is necessary to heal a society after mass violence.<sup>111</sup> Gacaca aims at finding out the truth. To achieve this goal, Gacaca needs to create an atmosphere of truth telling where people participate and dare to tell everything they know. For the victims, getting to know the truth is crucial. Many victims regard the revelation of the truth as the first requirement of justice. In their struggle to move on, finding out the truth is part of the process of healing. They want to locate the bodies of their loved ones to be able to bury them properly.<sup>112</sup> If the perpetrator acknowledges what he or she did and shows regret, reconciliation is facilitated.<sup>113</sup> Understanding how someone became a perpetrator can contribute to acceptance and be a step towards forgiveness.<sup>114</sup> Finding out the truth is moreover of importance to provide for measures of reparation and to prevent the past from reoccurring.

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<sup>110</sup> Female judge at Gacaca observation at sector level, Gitarama, 27/7/2005. At the end of that trial, one of the witnesses had to follow the convicted back to the prison to serve a sentence of three months for knowingly withholding the truth.

<sup>111</sup> Fletcher, Laurel E. and Weinstein, Harvey M., “Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation”, *Human Rights Quarterly*, 24 (2002) 573-639, p. 586

<sup>112</sup> During my time in Rwanda, this was something that almost all survivors and survivors' organisations mentioned as one of the major benefits of Gacaca. To be able to bury your loved ones seems to be crucial in the reconciliation process.

<sup>113</sup> Staub, Ervin, Pearlman, Laurie Ann, Gubin, Alexandra and Hagengimana, Athanase, “Healing, Reconciliation, Forgiveness and the Prevention of Violence after Genocide or Mass Killing: An Intervention and its Experimental Evaluation in Rwanda”, *Journal of Social and Clinical Psychology*, 24 (3) 297-334, 2005, p. 304

<sup>114</sup> Ibid.

In the context of Gacaca, truth is broader than truth as legal evidence. The Gacaca courts are to judge testimonies as true or untrue and weigh different evidence against each other. Nevertheless, the truth telling in Gacaca aims not only at establishing the foundation for a verdict. It is furthermore aimed at giving the persons concerned an opportunity to express sorrow, regret and other emotions. Anyone can step forward and tell his or her story. This element differs from ordinary justice where a story is only of importance as legal evidence.

This section will deal with issues central to getting to know the truth in Gacaca. These are participation, including sensitisation of the population, security and investigation. Without participation, nothing will come out of Gacaca as the whole system builds on the idea of participatory justice. For participation to be meaningful, people have to understand the system with its aims and procedures. In particular, they must understand the role they are supposed to play. In this respect, sensitisation is very important. Threats, fears and violence against victims, witnesses and perpetrators who confess are problems in Gacaca. With low security, the risk of people not daring to participate and speak out is increased. Investigating the crimes is closely connected to prosecution and punishment of those responsible. Nevertheless, investigation is included in this section as it is of crucial importance for the victims in getting to know the truth. The procedure of pleading guilty is dealt with under the headline of justice although it is also an incentive for perpetrators to tell the whole truth about their actions. If the system of guilty pleas works, the likelihood of getting to know the truth will be improved for the victims.

#### **4.1.1 Participation**

Gacaca is a community-based system where the audience acts as prosecutor, witnesses, victims and perpetrators. The interaction of the audience is necessary and counted on by the legislators. Every Rwandan is obliged to participate at the information gathering stage of Gacaca. Someone who refuses to testify about what he or she knows can be sentenced to prison for a minimum of three months and a maximum of one year.<sup>115</sup> According to the SNJG, persons who refuse to attend Gacaca get help and assistance rather than punishment. It is acknowledged that both perpetrators and victims can be traumatised and therefore refuse to attend.<sup>116</sup> Even though there is supposedly no legal sanction for non-attendance, as long as you are not on the list of the court, you may face repercussions in the countryside.<sup>117</sup> As an example, the local authorities may refuse to issue a birth certificate or other important papers.<sup>118</sup>

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<sup>115</sup> Rwandan Organic Law No 16/2004 of 19/6/2004, Art. 29

<sup>116</sup> Interview with Domitilla Mukantaganzwa, executive secretary, SNJG, Kigali 8/7/2005

<sup>117</sup> Interview with Irenée Bugingo, researcher, IRDP, Kigali 20/7/2005

<sup>118</sup> Interview with Lucy Umukundwa, journalist, Voice of America, Kigali 15/6/2005

Despite the obstacles described below, participation is today relatively high.<sup>119</sup> It has to be kept in mind though that attendance is not equal to active participation.

#### **4.1.1.1 Psychological and economic effects of participation**

*“When the survivor gives testimony, he suffers too much. After testifying, he cannot eat or sleep. The perpetrator feels relief and start going out in public.”<sup>120</sup>*

Speaking out about what happened, whether as a bystander, perpetrator or victim, is painful and takes a lot of courage. For some, telling about the events of 1994 reopens old wounds and leads to trauma. The fear of showing trauma in public may deter some from speaking out in Gacaca. The lack of trained trauma counsellors is apparent.<sup>121</sup> As put by African Rights: the whole population is mentally traumatised.<sup>122</sup>

For the many victims of rape and sexual torture, the Gacaca legislation prescribes a secret reporting procedure.<sup>123</sup> Victims, or witnesses, may confide in a trusted Gacaca judge or go directly to the police or the prosecutor. Speaking out about rape in public leads to stigmatisation and this has silenced many victims. On top of the stigma of having been raped is the fear of having contracted HIV/AIDS, and if so the subsequent stigma of the disease. If the victim is re-married, the new husband is expected to leave if he finds out about the rape. Additionally, her children are likely to face harassments if the villagers get to know about the rape.<sup>124</sup> The problem with the secret procedure is that it in most cases will be an open affair. The majority of these victims live in small villages where everybody knows each other. Even if the woman does not speak out in public, there is a great risk that the accused do.<sup>125</sup> As rape belongs to the first category, trials are held in the ordinary courts behind closed doors. Still, anonymity is not likely to be ensured as villagers will notice who leaves the community to go to the court. With regard to these consequences, and the redress that can be achieved (i.e. prosecution and punishment without reparation), many victims of rape will probably continue to remain silent. It is also important to recognise that the underlying problem cannot be solved by legislation. Of much greater importance is to address and try to change the prejudices connected to rape and sexual torture.

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<sup>119</sup> Interview with Philbert Kagabo, Gacaca Project coordinator, NHRC, 22/6/2005

<sup>120</sup> Interview with male survivor and inyangamugayo, Kigali Ngali, 19/7/2005. He lost more than 20 family members during the genocide.

<sup>121</sup> See further Chapter 4.2.3

<sup>122</sup> Interview with Elizabeth Onyango, programme coordinator, African Rights, Kigali 26/7/2005

<sup>123</sup> Rwandan Organic Law No 16/2004 of 19/6/2004, Art. 38

<sup>124</sup> Interview with Odette Kayirere, head of AVEGA eastern region, Rwamagana, 5/8/2005.

<sup>125</sup> Interview with Elizabeth Onyango, programme coordinator, African Rights, Kigali, 26/7/2005, and Interview with Francine Rutazana, executive secretary, LDGL, Kigali 7/7/2005

Family members are supposed to testify against each other. Naturally, this creates big problems in the families concerned.<sup>126</sup> It is easy to imagine that some people will choose to keep quiet to maintain peace within the family. This is equally true for perpetrators who have to reveal what their accomplices and friends did.

On a more material account, participation in Gacaca means spending one day a week without working.<sup>127</sup> Employers have to allow their employees to attend Gacaca instead of going to work. For a poor farmer, one day away from the field every week can have a significant impact. Officially, Gacaca will be finished by 2008. This is something that most organisations working in Rwanda believe is unrealistic.<sup>128</sup> Considering the caseload and the possibilities of appeal, at least five more years seem realistic.<sup>129</sup>

To overcome the abovementioned obstacles people need to see the benefits of participation. To avoid secondary victimisation, i.e. victimisation that occurs not as a direct result of the criminal act but through the response of institutions and individuals, it is crucial that the perspective of the victim is taken into account throughout the stages of Gacaca. Most important, people need to feel that Gacaca is helpful for them. For someone who does not have enough to eat, lacks proper shelter and cannot afford medication, participation in Gacaca may seem meaningless.

#### **4.1.1.2 Sensitisation**

*“Gacaca courts are coming- tell the truth about what you saw.”<sup>130</sup>*

To get people to participate, different sensitisation campaigns showing the positive aspects of Gacaca have been launched. A monthly newspaper, the Inkiko Gacaca, is distributed, signposts are all over the country and Radio Rwanda broadcasts a programme hosted by two lawyers from the SNJG three times a week.<sup>131</sup> The SNJG has, as a way of using different channels to reach out to the people, invited journalists and religious leaders to training sessions on Gacaca.<sup>132</sup> Further, local leaders receive training on how to sensitise and mobilise the population.<sup>133</sup> In some parts of the country, local theatre groups teach the population about Gacaca through Gacaca plays.<sup>134</sup>

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<sup>126</sup> Interview with Francine Rutazana, executive secretary, LDGL, Kigali 7/7/2005

<sup>127</sup> Each Gacaca court meets once a week. In Kigali, most sessions take place during weekends, in other cities and in the countryside, weekdays are more common.

<sup>128</sup> Interview with Maximilien Nshimayezu, national coordinator, PAPG, Kigali 11/7/2005,

Interview with Philbert Kagabo, Gacaca Project coordinator, NHRC, Kigali 22/6/2005,

Interview with Francois Mugabo, Gacaca programme coordinator, ASF, Kigali 12/7/2005

<sup>129</sup> In mid-July 2005, 1 545 cases were completed. Interview with Gregory Kanyemera, information office, SNJG, Kigali 21/7/2005

<sup>130</sup> Part of the lyrics of a song about Gacaca often played on the state owned Radio Rwanda, translated from Kinyarwanda.

<sup>131</sup> Interview with Gregory Kanyemera, information office, SNJG, Kigali 21/7/2005

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Gacaca theatre observation, Rusagara, 13/7/2005. The Rusagara theatre group consists of 14 actors, both Hutus and Tutsis, and was initiated by the population itself. The play

Sensitisation campaigns are also running in remaining refugee camps in the neighbouring countries. Approximately 50 000 refugees, almost exclusively Hutus, have not yet returned to Rwanda from these camps.<sup>135</sup> There are a multitude of reasons for not returning, for example scarcity of land and misinformation. The sensitisation aims to take away the non-political reasons for non-return, but is not likely to succeed with the hardliners of the Hutu Power movements.<sup>136</sup> Unfortunately, these hardliners have a big influence in the camps and spread a lot of misinformation. Rumours include that Gacaca forms part of a plan to exterminate all Hutus, and that the government has bought a new machine that will turn all Hutus into sand.<sup>137</sup> Ridiculous as this may sound, it has had an effect on people. When Gacaca was launched all over Rwanda in March 2005, a few thousand persons fled to Burundi. Although not all of them fled because of fear of Gacaca, some of them did. In June 2005, the Rwandan government repatriated about 4 000 refugees from Burundi. Officially, this was a voluntary repatriation. In reality, it was probably repatriation with force.<sup>138</sup> Some of the repatriates have since returned to Burundi and are now likely to once again be repatriated to Rwanda.<sup>139</sup> These events show the importance of reaching out to people with correct information about Gacaca and its aims.

Clearly, efforts are made to reach out to people with information on Gacaca. Whether these efforts are enough can be questioned. Events such as the recent refugee movement to Burundi show that not everybody understands or believe in Gacaca. For sensitisation to succeed, it is vital that local authorities are positive about Gacaca. Persons on top of each administrative unit will have a much greater influence than will any State official from Kigali.<sup>140</sup> For honest and full participation, especially from the side of the accused, an open and tolerate political climate where human rights are respected is crucial.<sup>141</sup> Of even greater importance is to deal with the alleged crimes of the RPF. If victims of these crimes are not taken seriously, they are likely to regard Gacaca as victor's justice and refrain from participation.

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shows how a Gacaca court in the judging phase works. It also includes a dramatic trauma outburst by an actor who is sitting among the audience. According to the Gacaca coordinator in Rusagara, theatre has worked extremely well as a sensitisation tool and has contributed to high participation in the area.

<sup>135</sup> Interview with Volker Schimmel, external relations officer, UNHCR, Kigali 14/7/2005

<sup>136</sup> Ibid.

<sup>137</sup> Ibid., and Uzaramba, B., "Malaise dans le processus Gacaca", *AMANI, Mensuel d'Information et d'Analyse de la LDGL*, Mars-Avril 2005, 10e année, No. 60-61, p. 24

<sup>138</sup> Interview with Lucy Umukundwa, journalist, Voice of America, Kigali 15/6/2005. The UNHCR was barred from supervising the repatriation. The UN Secretary General Kofi Annan and the UNHCR criticised Rwanda for having violated the 1951 Refugee Convention. See UNHCR News Stories, "UNHCR urges Burundi to stop involuntary returns", 14 June 2005, <http://www.unhcr.ch/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&id=42aed3c24>, last visited 25/10/2005

<sup>139</sup> IRIN, "Officials agree to repatriate "asylum seekers"", 18 October 2005, [http://www.irinnews.org/report.asp?ReportID=49629&SelectRegion=Great\\_Lakes&SelectCountry=BURUNDI-RWANDA](http://www.irinnews.org/report.asp?ReportID=49629&SelectRegion=Great_Lakes&SelectCountry=BURUNDI-RWANDA), last visited 25/10/2005

<sup>140</sup> Interview with Volker Schimmel, external relations officer, UNHCR, Kigali 14/7/2005

<sup>141</sup> Amnesty International, *Gacaca: A question of justice*, December 2002, AI Index: AFR 47/007/2002, p. 44

### 4.1.1.3 Does Gacaca concern all Rwandans?

Among educated Rwandans, Gacaca has frequently been seen as something for the peasants. Repatriates who did not live in Rwanda during the genocide have not seen why they should attend Gacaca.<sup>142</sup> According to PRI, the rate of abstention is high among Hutus and those who returned after the genocide.<sup>143</sup> In the beginning, participation of authorities in Gacaca was low.<sup>144</sup> This reinforced the feeling that Gacaca was only for some people and not for all. It is important that the authorities themselves participate and serve as good examples. Today, this has changed for the better and most authorities, including ministers in the government, do attend Gacaca.<sup>145</sup> So far, at least 600 persons in powerful positions are accused of participation in the genocide.<sup>146</sup> Among them are the chamber of deputies' speaker and the minister of defence.<sup>147</sup> They are now obliged to bear witness in the Gacaca process. It is asserted that some of them have started to advocate against Gacaca and spread false rumours to undermine the system.<sup>148</sup>

### 4.1.2 Security

*"When someone tells the whole truth, others become enemies."*<sup>149</sup>

To tell the truth in Gacaca can sometimes be a dangerous affair. This is a problem and could well be an obstacle on the way to achieve the goals of Gacaca. The issue of security has been largely debated within Rwanda since the start of Gacaca. The national media is eager to cover all cases of violence and intimidation against victims and witnesses.<sup>150</sup> This has further increased the view that it can be dangerous to speak in Gacaca. Threats and pressure directed against witnesses or the seat of the Gacaca court are punishable under the Gacaca legislation.<sup>151</sup>

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<sup>142</sup> Interview with Irenée Bugingo, researcher, IRDP, Kigali 20/7/2005

<sup>143</sup> PRI, Research Report on the Gacaca, Report VI, *From camp to hill, the reintegration of released prisoners*, May 2004, p. 14

<sup>144</sup> P.A.P.G., *Rapport d'Activites*, IVème Trimestre, Exercice 2003, Kigali Janvier 2004, p. 11. The P.A.P.G. is a coalition of Rwandan NGOs, (LDGL, CLADHO, IBUKA, PROFEMMES and CCDAIB), with the aim of monitoring Gacaca. They are funded by Belgium and the EU, and have 60 monitors in the field.

<sup>145</sup> Uzaramba, B., "Malaise dans le processus Gacaca", *AMANI, Mensuel d'Information et d'Analyse de la LDGL*, Mars-Avril 2005, 10e année, No. 60-61, p. 22

<sup>146</sup> Interview with Francine Rutazana, executive secretary, LDGL, Kigali 7/7/2005. The number of accused authorities ranges between 600 and 1 500. Other sources talk about as many as 7 000 accused if the local authorities are included in the figures.

<sup>147</sup> Munyaneza, James, "Cabinet may examine Mukezamfura's case", *New Times*, June 17-19 2005, p. 5

<sup>148</sup> Interview with Francine Rutazana, executive secretary, LDGL, Kigali 7/7/2005

<sup>149</sup> Interview with male inyangamugayo, Rwamagana 5/8/2005

<sup>150</sup> I got the feeling that most cases of violence directed against genocide survivors are perceived as acts aiming at silencing their voices in Gacaca. Although there is no doubt that there have been such cases, I do believe that it is important to distinguish these cases from others to avoid an exaggerated fear among the participants in Gacaca.

<sup>151</sup> Rwandan Organic Law No 16/2004 of 19/6/2004, Art. 30. The prison sentence ranges from three months to one year, for repeated offence from six months to two years.

Security is important also from the point of view of getting justice. Cases of threats, violence and killings can be seen as a breach on behalf of the state in ensuring non-repetition and protection from human rights violations stemming from private persons.

While these incidents seem to have diminished this year, cases do occur and there is a persistent feeling of fear in many areas. The situation of security differs in different parts of the country: the biggest problems arise in rural areas with few survivors. In the following, some examples of threats and violence are given. The section continues with the provisional release of prisoners and the measures taken to ensure security.

#### **4.1.2.1 Threats, fears and violence**

*“Four people in my sector have been killed. For me, I met so many difficulties and sufferings so I do not have any fears of death, I will die when the time comes so I testify.”<sup>152</sup>*

Unfortunately, there are numerous examples of threats and violence against witnesses and victims. Other targeted groups include judges and prisoners who denounced their accomplices. In 2003 and 2004, the situation was at its worst with several cases of murder.<sup>153</sup> Since then, the situation has improved with fewer cases. This picture seems to be agreed upon by both survivors’ organisations and authorities.<sup>154</sup> In November 2005, two cases of murder of genocide survivors, one of them murdered only hours after testifying in Gacaca, resulted in a reheated debate on security in connection to Gacaca.<sup>155</sup>

Cases of threats and violence have occurred in all parts of the country but have been more intense in some.<sup>156</sup> Verbal threats seem to be the most common way of trying to deter witnesses and victims. These threats occur before, during and after the Gacaca session.<sup>157</sup> Verbal threats are likewise directed against judges. As an example, a suspect who wanted his name removed from the list of accused threatened to kill a female *inyangamugayo*

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<sup>152</sup> Interview with female survivor and widow “X”, AVEGA, Rwamagana 5/8/2005. Every time she is about to testify in Gacaca, unknown people come during the night and throw stones at her house.

<sup>153</sup> Interview with Francine Rutazana, executive secretary, LDGL, Kigali 7/7/2005

<sup>154</sup> Interview with Joseph Mutaboba, secretary general, Ministry of Internal Security, Kigali 5/8/2005, Interview with Maximilien Nshimayezu, national coordinator, PAPG, Kigali 11/7/2005, Interview with Francine Rutazana, executive secretary, LDGL, Kigali 7/7/2005 and others.

<sup>155</sup> *New Times*, “Another survivor murdered”, 6/11/2005, [http://www.newtimes.co.rw/index.php?option=com\\_content&task=view&id=2072&Itemid=26](http://www.newtimes.co.rw/index.php?option=com_content&task=view&id=2072&Itemid=26), last visited 7/11/2005, and Hirondele News Agency, “Genocide survivors in danger, says IBUKA”, 17/11/2005, <http://www.hirondele.org/arusha.nsf/English?OpenFrameSet>, last visited 21/11/2005

<sup>156</sup> P.A.P.G., *Les Cas d’Insecurite des Temoins et des Réscapes du genocide dans les Jurisdictions Gacaca*, Kigali August 2004

<sup>157</sup> *Ibid.*, pp. 13-32



and her children.<sup>158</sup> Another common incident is the throwing of stones at houses during the night.<sup>159</sup> There are also several cases where the houses of survivors have been burnt down.<sup>160</sup> Another problem is the silent harassments, much harder to pinpoint and deal with. Neighbours might stop talking to someone who spoke in Gacaca, or suddenly all the customers disappear from a small shop owned by a victim or witness forcing it to shut down.<sup>161</sup> Denouncing co-perpetrators, by pleading guilty, often causes tensions among prisoners and their families. At one Gacaca session, a prisoner spoke about the threats against him, and of inmates poisoning those who had confessed.<sup>162</sup>

The province where the most killings have taken place is Gikongoro.<sup>163</sup> In 2003, seven cases of murder created a lot of fear.<sup>164</sup> A case that caught some attention this year was a woman who got her tongue cut off to steer clear from testifying in Gacaca.<sup>165</sup>

The effect on survivors and witnesses by these incidents varies. Some, like the woman cited on top of this section, suffer by the threats and violence but are still determined to speak in Gacaca. Others may well refrain from speaking out because of fear of repercussions. Naturally, it is very difficult to get any statistics on this matter and to assess the impact of threats and violence on Gacaca in the long-term. Another aspect is that threats and violence are likely to re-traumatize victims. It is important that the judges do not tolerate any misbehaviour by the audience during Gacaca sessions. Unfortunately, it seems to be rather common that the audience for example whispers or laughs during testimonies.<sup>166</sup>

#### **4.1.2.2 Provisional release of prisoners**

*“Whenever we see them back something is hurting. I do not know how to get information on which prisoners that are being released, I just see them when they are back.”<sup>167</sup>*

So far, prisoners have been provisionally released in big numbers on two occasions. The first release was in 2003, when about 23 000 prisoners were released. The second release took place in July 2005, when nearly 36 000

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<sup>158</sup> Interview with Odette Kayirere, head of AVEGA East, Rwamagana 5/8/2005

<sup>159</sup> P.A.P.G., *Les Cas d’Insecurite des Temoins et des Réscapes du genocide dans les Jurisdictions Gacaca*, Kigali August 2004, pp. 13-27

<sup>160</sup> Ibid.

<sup>161</sup> Interview with Francois Mugabo, Gacaca programme coordinator, ASF, Kigali 12/7/2005

<sup>162</sup> Gacaca observation at sector level, Kigali Ville, 23/7/2005

<sup>163</sup> This province suffered many massacres during the genocide, one of the worst ones was in Murambi where approximately 50 000 persons were killed. Today, some parts of Gikongoro have very few genocide survivors, others none.

<sup>164</sup> P.A.P.G., *Les Cas d’Insecurite des Temoins et des Réscapes du genocide dans les Jurisdictions Gacaca*, Kigali August 2004, pp. 27-30

<sup>165</sup> Interview with Esperance Uwimana, Gacaca logistics coordinator, Gikongoro 29/6/2005

<sup>166</sup> Based on my own Gacaca observations

<sup>167</sup> Interview with female survivor and widow “X”, AVEGA, Rwamagana 5/8/2005

prisoners were released.<sup>168</sup> Most of the released prisoners have pleaded guilty before the prison Gacaca, and their release is provisional in the respect that they still have to face Gacaca where they can be sentenced to prison.<sup>169</sup> The released prisoners first have to attend a one-month solidarity camp, an Ingando, where they receive education and training to facilitate re-integration.<sup>170</sup> The Ingando education includes several different subjects. Among them are history, the Gacaca system, democracy, HIV/AIDS and re-integration.<sup>171</sup> After the solidarity camp, they are supposed to return to their old communities where they are to await Gacaca trials.

The provisional releases have been largely criticised by victim organisations and human rights organisations. The main reason for this is that some of the released genocide suspects in 2003 intimidated, threatened and even killed survivors and potential witnesses.<sup>172</sup> African Rights argues that the mass release will put too much pressure on the Gacaca system, that there is a lack of assurances to prevent released prisoners from going into hiding or exile, and that the releases will have a negative impact upon all the parties involved in Gacaca.<sup>173</sup> Further, the mass releases have a severe impact on survivors making them lose faith in the system and contributing to an increased fear.<sup>174</sup> To bump into one's perpetrator on the street can be very traumatizing, especially as no warning is given on beforehand to the victims.<sup>175</sup> A list of the released is on the website of the SNJG.<sup>176</sup> It is also possible to contact the prosecutor to ask whether a certain prisoner is released or not. To be useful, these channels of information require that the concerned victims know about them, and that they have to possibility to use either a computer or a phone.

Prisoners released in the summer of 2005 have now left the solidarity camps and returned to their villages. So far, there have been no reports of prisoners re-arrested for threats or violence against victims and witnesses.

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<sup>168</sup> Muyaneza, James, "36 000 genocide suspects freed", *New Times*, July 29-31 2005, pp. 1-2

<sup>169</sup> The prisons have their own internal Gacaca, not regulated by any law, where prisoners elected as judges receive guilty pleas and gather information. This information is later compared to the information gathered in ordinary Gacaca. Interview with Augustin Nkusi, director of legal support unit, SNJG, Kigali 3/8/2005

<sup>170</sup> The Ingando system has been criticised for being a tool of indoctrination used by the RPF to consolidate power. See Mgbako, Chi, "Ingando solidarity camps: Reconciliation and Political Indoctrination in Post-Genocide Rwanda", *Harvard Human Rights Journal*, Volume 18, 2005 (201-225), p. 208

<sup>171</sup> PRI, Research Report on the Gacaca, Report VI, *From camp to hill, the reintegration of released prisoners*, May 2004, p. 17

<sup>172</sup> Muyaneza, James and Mazimpaka, Magnus, "Government, IBUKA clash over released suspects", *New Times*, August 8-9 2005, p. 2

<sup>173</sup> African Rights, *Prisoner Releases- A Risk for the Gacaca System*, 16 January 2003

<sup>174</sup> Interview with Elizabeth Onyango, programme coordinator, African Rights, Kigali 26/7/2005

<sup>175</sup> Ibid.

<sup>176</sup> SNJG, "List of persons accused of genocide, provisionally released on 29/8/2005 according to the communiqué from the President's office", <http://www.inkiko-gacaca.gov.rw/En/EnIntroduction.htm>, last visited 31/10/2005

### 4.1.2.3 Preventive measures

*“Security is there, it is a fact.”<sup>177</sup>*

The Ministry of Internal Security is responsible for ensuring security in Rwanda through the police, the prison wardens and the local defence forces. The local defence forces are young unpaid volunteers elected in their villages.<sup>178</sup> They receive training from the police. Some of them, but far from all, carry guns. Usually there are two of them in each village and they are supposed to attend all Gacaca sessions to ensure security.<sup>179</sup> Although this is the rule, the local defence forces are not always present during Gacaca sessions.<sup>180</sup> Each district has one police station. In every village, at least the executive secretary has a phone that can be used to call the police in a situation of emergency.<sup>181</sup>

According to the Ministry of Internal Security, security is first a matter of sensitisation. A person has to know that security depends on him- or herself, before the police enter the picture.<sup>182</sup> This view is criticised; how can the protection come from within the society when the society itself forms the threat?<sup>183</sup> This is especially the case in communities with very few survivors.<sup>184</sup> The view of the Ministry of Internal Security is that the njumbakumi, the elected head of ten households, has an important role to play. The njumbakumi should first try to mediate between the parties, and only if that fails report the matter to the police.<sup>185</sup> Victims are encouraged to organise themselves in victims’ organisations such as AVEGA or IBUKA.<sup>186</sup> If there is a problem, these organisations can help to inform the authorities.<sup>187</sup>

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<sup>177</sup> Interview with Joseph Mutaboba, secretary general, Ministry of Internal Security, Kigali 5/8/2005

<sup>178</sup> The Committee on the Elimination of Racial Discrimination has expressed concern about the setting up of village-based local defence forces where young persons are armed although they receive little training. See Concluding Observations of the Committee on the Elimination of Racial Discrimination: Rwanda, 19/04/2001, CERD/C/304/Add.97.

<sup>179</sup> Interview with Joseph Mutaboba, secretary general, Ministry of Internal Security, Kigali 5/8/2005

<sup>180</sup> ASF, *Observation des Juridictions Gacaca, Province de Kibuye*, Mai 2005, p. 6, ASF, *Observation des Juridictions Gacaca, Province de Umutara*, Mai 2005, p. 15, and own Gacaca observations.

<sup>181</sup> Interview with Joseph Mutaboba, secretary general, Ministry of Internal Security, Kigali 5/8/2005. As far as my own observations concern, the use of cell phones in villages is not always easy. Often, one has to be on top of a hill to get reception. Ordinary phones are rare.

<sup>182</sup> Ibid.

<sup>183</sup> Interview with Francine Rutazana, executive secretary, LDGL, Kigali 7/7/2005

<sup>184</sup> Ibid.

<sup>185</sup> Interview with Joseph Mutaboba, secretary general, Ministry of Internal Security, Kigali 5/8/2005

<sup>186</sup> AVEGA (Association des veuves du genocide de 1994) and IBUKA (in Kinyarwanda, remember) are two of the biggest organisations for survivors of the genocide.

<sup>187</sup> Interview with Joseph Mutaboba, secretary general, Ministry of Internal Security, Kigali 5/8/2005

In extreme cases, there is a possibility to relocate people at the expense of the state. Other available measures are to restrict the movements of the criminal, or to ask the local authorities to keep an eye on the situation. All these measures are rarely used.<sup>188</sup>

One reason for the decreasing numbers of cases of violence against victims and witnesses could be that previous cases have been severely dealt with. These perpetrators get long prison sentences and they have to serve their sentences in isolation cells.<sup>189</sup>

The authorities and the civil society seem to concur in the view that the security situation has improved.<sup>190</sup> Nevertheless, security remains on top of the agenda and the debate on what the government could do better will continue.

### 4.1.3 Investigation

Within the Gacaca system, investigations are not conducted in the way that we are used of from ordinary criminal justice systems. In Gacaca, the police deal only with security issues and not with investigations. The Gacaca judges are responsible for the carrying out of investigations. To their help, they have the administrative authorities and the Gacaca coordinators of the cell and the sector.<sup>191</sup> In reality, it seems like investigations mainly take place during the actual Gacaca sessions. This means that truthful testimonies and guilty pleas are the key to find out what really happened. Forensic evidence is virtually non-existent. After so many years, and with so many perpetrators, it is not viable or financially possible to search for e.g. fingerprints or weapons. For those prisoners who have case files, these documents are forwarded to the Gacaca courts responsible for adjudicating their cases.

During Gacaca observations, it was noticeable that not all the facts of the cases were clarified during the sessions. Even though a judgment was passed, details such as who actually killed the victim or how many victims a certain perpetrator killed remained unclear. This was in particular true in cases involving several perpetrators. As perpetrators committed most of the crimes in large groups, it is probably not always possible to clarify these facts. Nevertheless, for the surviving victims and the families of deceased victims these questions are very important.

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<sup>188</sup> Ibid. Protected identities have only been given to persons who have testified at the ICTR, in particular in rape cases.

<sup>189</sup> Ibid.

<sup>190</sup> See supra note 140

<sup>191</sup> Interview with Augustin Nkusi, director legal support unit, SNJG, Kigali 3/8/2005.

## 4.2 Justice

*“Justice is reconciling the Rwandese and resolving their problems. People who are guilty should be punished, and those who are innocent should be released.”<sup>192</sup>*

The notion of justice includes many things, and the perception of justice differs depending on whom you ask. The expectations on Gacaca are high, and some people are likely to be disappointed in the end. Especially problematic is that many seem to expect that Gacaca will solve all problems, including socio-economic hardships. This section will highlight the most important aspects of justice in the context of Gacaca.<sup>193</sup>

Included in this section are several different but interrelated aspects of justice. Many years have passed since the genocide. Not until now is Gacaca fully functioning throughout the country. The issue of time is of importance in the context of getting justice. A precondition for justice is practical, as opposed to theoretical, access to justice. The war and the genocide led to a massive displacement of people both within and outside Rwanda. As Gacaca takes place where the crimes were committed, it is often necessary for victims and other stakeholders to travel to get access to justice. For justice to be meaningful, it has to be impartial. As for impartiality, this chapter will include a more detailed account on the inyangamugayo, the Gacaca judges. Another part of this section covers the assistance given to victims in the process. The system of guilty pleas is a peculiarity in the Gacaca system. Some survivors regard the reduced sentences with mistrust; others think that it is a good way to get to know the truth. Of importance is to ask the question whether this system amounts to a partial amnesty or not. Many survivors believe that the guilty plea procedure constitutes a de facto amnesty.<sup>194</sup>

### 4.2.1 Time

One saying is that “justice delayed is justice denied”. Most of the genocide victims of Rwanda have so far waited for more than 11 years. With the introduction of Gacaca, there is new hope that justice will actually be done in their lifetime. The long time between crime and trial is problematic and not only so because it has been difficult for the victims and the accused to cope with the long waiting. Many victims have managed to go on with their lives and have now to relive the events of 1994 again. For some, this suffering can be unbearable. On the other side, reliving the trauma could be necessary for a new start. On a more negative note, 11 years is a long time

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<sup>192</sup> Interview with female survivor and widow “X”, AVEGA, Rwamagana 5/8/2005.

<sup>193</sup> My focus is on the aspects of justice with concern for the victims in the process. Gacaca can of course be, and has been, researched with focus on the rights of accused. This lies beyond the scope of this thesis.

<sup>194</sup> Wolters, Stephanie, “The Gacaca Process: Eradicating the culture of impunity in Rwanda?”, *Situation Report*, 5 August 2005, Institute for Security Studies, p. 16

for the human memory. After so many years, it is likely to prove more difficult to get accurate testimonies. In the end, this could contribute to a weaker justice where the truth never comes out.

As has already been mentioned, the situation Rwanda had to cope with after 1994 was not an easy one.<sup>195</sup> It is questionable how much blame we can put on the government for not speeding up the trials. Still, I believe that time is a factor that should be considered when we are talking about justice for the victims.

## **4.2.2 Access to justice**

There are two aspects of the issue of access to justice in Rwanda. First, all victims should be ensured access to justice. Another aspect is that many victims will never get access to justice because their perpetrators are outside of Rwanda.

### **4.2.2.1 Refugees and internally displaced persons**

Approximately 50 000 refugees have never returned to Rwanda after 1994 and 1996. Almost all of them are Hutus, it was never an option for Tutsis to flee to refugee camps already cramped with the perpetrators of the genocide.<sup>196</sup> Important to underline is that it is not suggested that most of these refugees are also perpetrators. However, it is beyond doubt that at least a small part of them are. It is not probable that they will return to face Gacaca, nor is it likely that their new countries of origin will bring them to trial for crimes committed in Rwanda. This means that impunity will prevail for some perpetrators.

The war and the genocide lead to massive internal displacements of both Hutus and Tutsis. One can assume that at some point almost the entire population was displaced.<sup>197</sup> In 1998-1999, around 650 000 persons, mainly Hutus, lived in camps for internally displaced in Northern Rwanda.<sup>198</sup> It has proven very difficult to find any reliable statistics on internal displacement and on how many who later returned to their villages.

### **4.2.2.2 Problems facing displaced victims**

The picture given by interviewees is that many victims have never returned to their old villages.<sup>199</sup> Many survivors, especially those who originally come from areas where few survivors are left, feel safer in the cities.<sup>200</sup>

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<sup>195</sup> See chapter 2.3 and chapter 3.1

<sup>196</sup> Interview with Volker Schimmel, external relations officer, UNHCR, Kigali 14/7/2005

<sup>197</sup> Ibid.

<sup>198</sup> Global IDP Project, Norwegian Refugee Council, *Ensuring durable solutions for Rwanda's displaced people: a chapter closed too early*, 8 July 2005, p. 4

<sup>199</sup> Interview with Domitilla Mukantanzwa, executive secretary, SNJG, Kigali 8/7/2005, Interview with Francine Rutazana, executive secretary, LDGL, Kigali 7/7/2005, Interview with Benoit Kaboyi, executive secretary, IBUKA, Kigali 18/7/2005, Interview with Elizabeth Onyango, programme coordinator, African Rights, Kigali 26/7/2005

<sup>200</sup> Interview with Francine Rutazana, executive secretary, LDGL, Kigali 7/7/2005

For the victims no longer residing where they were in 1994, access to Gacaca can be a problem. The crimes committed against them are tried where they took place. Hence, they have to travel to the right Gacaca to be able to participate. If the court asks them to attend, they are obliged to come. In the end, this boils down to an issue of means. Money is needed not only for transport, but also frequently for food and a place to stay during the night if the Gacaca is far away. Additionally, they might have to find someone who will take care of their children while they are away.<sup>201</sup> It is likewise an issue of time. If you live in Kigali and have to go back to a village in Northern or Southern Rwanda, transportation alone will take you several hours one-way. The State does not provide any means for transportation to Gacaca.<sup>202</sup> Instead, this is something that some of the victims' organisations try to do. Likewise, they try to accompany scared and anxious victims to Gacaca.<sup>203</sup> The problem is that no one has adequate funding to help all.

For many survivors, returning by yourself to your old hill is too frightening.<sup>204</sup> Many have never returned after the flight in 1994. The fear of facing your perpetrator, being ridiculed by your old neighbours and having to relive it all again is a deterrent to return. It is possible to submit written information to Gacaca and some victims make use of this possibility.<sup>205</sup> Even so, written evidence will not be as powerful as an oral testimony before the court. Especially for those who want to attend Gacaca, the lack of means for transport constitutes a sad barrier to justice.

### 4.2.3 Assistance

*“Most people are traumatised during Gacaca.”<sup>206</sup>*

To meet the needs of victims in the Gacaca process, in particular legal and psychological assistance is of importance. There exists no comprehensive scheme on assistance to victims in Gacaca proceedings. What does exist is a combination of efforts from the state and several national and international non-governmental organisations. Victims' organisations seem to do their utmost to assist victims in need but lack sufficient funding.

Legal assistance is, as has already been mentioned, not allowed in Gacaca. In principle, this is not a barrier to seek legal advice before or between the Gacaca sessions. What is prohibited is to be represented by someone during the actual Gacaca session. Legal defenders are few and difficult to get hold of in Rwanda. The legal defenders funded by the Danish Centre for Human

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<sup>201</sup> Interview with Domitilla Mukantaganzwa, executive secretary, SNJG, Kigali 8/7/2005

<sup>202</sup> Ibid. The SNJG has started a study with IBUKA to see how common transports could be organised.

<sup>203</sup> Interview with Benoir Kaboyi, executive secretary, IBUKA, Kigali 18/7/2005, Interview with Auréa Kayiganwa, executive secretary, AVEGA, Kigali 4/8/2005

<sup>204</sup> Interview with Francine Rutazana, executive secretary, LDGL, Kigali 7/7/2005

<sup>205</sup> Interview with Domitilla Mukantaganzwa, executive secretary, SNJG, Kigali 8/7/2005

<sup>206</sup> Interview with female survivor and widow “Y”, AVEGA, Rwamagana 5/8/2005.

Rights represent both accused and victims. Even though this means that they could give advice to parties before or after Gacaca hearings, this has not happened in practice.<sup>207</sup> AVEGA and IBUKA, two of the largest victims' organisations, both have legal advisers working for their members.<sup>208</sup> Their advisers accompany victims to ordinary court proceedings as well as Gacaca, they also help victims who face security problems.<sup>209</sup> However, their role seems to be supportive rather than purely legal.

Cases of trauma and other psychological problems are common. Gacaca sessions are likely to enhance these problems, at least to begin with. Most victims' organisations have trained volunteers to deal with trauma cases.<sup>210</sup> Additionally, the Ministry of Health has educated two trauma counsellors in each sector to be present at trials.<sup>211</sup> Nevertheless, most Gacaca sessions are conducted without the presence of a trauma counsellor.<sup>212</sup> The efforts mentioned are still far from covering the enormous need for counselling and assistance.

## 4.2.4 Impartiality

Lawyers often say that justice is blind, meaning that it is impartial and non-discriminatory. Perhaps unfortunate, justice is never an independent creature but made up of people with their own minds, opinions and prejudices. In Gacaca, justice is to be done by no less than 170 000 individuals elected to serve as judges. Unlike judges in ordinary justice systems, these persons do not share a common educational history besides the one week of initial training. Instead, they form an extremely heterogenic group where some can barely read and others have university degrees. They are supposed to share the aims of Gacaca, truth, justice and reconciliation, and help to fulfil them inside their own communities. This section will deal with the role of these judges and some of the problems encountered along the way towards justice.

### 4.2.4.1 The inyangamugayo

*“We do it out of love for our country, for our children, for a better future.”<sup>213</sup>*

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<sup>207</sup> Interview with Kerstin McCourt, head of mission, and Elias Habimfura, legal defender, The Danish Centre for Human Rights, Kigali 12/8/2005

<sup>208</sup> Interview with Benoir Kaboyi, executive secretary, IBUKA, Kigali 18/7/2005, Interview with John Seminega, project officer, AVEGA, Rwamagana 5/8/2005

<sup>209</sup> Ibid.

<sup>210</sup> IBUKA has 32 counsellors working throughout the country, AVEGA has 50 voluntary counsellors.

<sup>211</sup> Interview with Domitilla Mutaganzwa, executive secretary, SNJG, Kigali 8/7/2005

<sup>212</sup> P.A.P.G., *Rapport d'Activites*, IVème Trimestre, Exercice 2003, Kigali Janvier 2004, p. 13

<sup>213</sup> Interview with Odette Kayirere, inyangamugayo and head of AVEGA Eastern Region, Rwamagana, 5/8/2005. Originally in French: “Nous le faisons pour l’amour de notre pays, pour nos enfants, pour un avenir meilleur”.



The elected judges, the *inyangamugayo*, play a central role in Gacaca. They lead the procedures, prepare the case files, summon witnesses and decide the final judgments. Further, their mission is not complete with the verdict; they are expected to continue to work for reconciliation by encouraging the two sides to come together after the judgment.<sup>214</sup> Hence, the importance of these persons in achieving the stated goals of Gacaca cannot be overestimated.

Nearly 170 000 persons are elected and trained to work as judges in Gacaca. The only remuneration given to them is an annual health insurance covering themselves and their families.<sup>215</sup> Judges describe a sturdy task, where they normally spend around 15 hours a week working for justice.<sup>216</sup> Despite the workload in Gacaca, they still have to continue with their normal jobs.

It has been difficult to get a straight answer on what is included in the education given to judges. The same is true for the length of education. The time of education does not seem to be uniform. Different officials at the SNJG give various answers where the time of initial training varies from one week to two months.<sup>217</sup> According to African Rights and ASF, the initial training takes place during six days.<sup>218</sup> The aim of the education is to teach the judges to understand and apply the legislation in an unbiased manner.<sup>219</sup> Issues dealt with include categorisation, data collection, trauma counselling and victims' rights.<sup>220</sup> Besides the initial training, additional training sessions are arranged to meet identified needs and weaknesses.<sup>221</sup> The legal officers at the SNJG educate the teachers, who in their turn educate the judges.<sup>222</sup> The teachers receive ten days of training, most of them already have a background in the field of law.<sup>223</sup>

The Gacaca legislation is complicated with several difficult provisions. Issues requiring a thorough legal examination include for example categorisation. To determine whether someone is an instigator or a planner poses delicate problems. Other legally complicated areas include the distinction between genocide and crimes against humanity. Uneducated judges find it hard to understand how to implement the law.<sup>224</sup>

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<sup>214</sup> Interview with Gregory Kanyemera, information office, SNJG, Kigali, 21/7/2005

<sup>215</sup> Interview with Denis Bikisha, legal officer, SNJG, Kigali, 26/6/2005. Translated into money, the annual cost for a health insurance is 5 000 Rwandan Francs, around 9 USD.

<sup>216</sup> Interview with *inyangamugayo*, sector level, Kigali Ngali, 19/7/2005, and Interview with *inyangamugayo*, AVEGA, Rwamagana, 5/8/2005

<sup>217</sup> Interviews at the SNJG, June-August 2005

<sup>218</sup> African Rights, *Gacaca Justice- A Shared Responsibility*, Kigali 2003, p. 7, and Interview with Francois Mugabo, Gacaca programme coordinator, ASF, Kigali 12/7/2005

<sup>219</sup> Interview with Gregory Kanyemera, information office, SNJG, Kigali, 21/7/2005

<sup>220</sup> Interview with Domitilla Mukantaganzwa, executive secretary, SNJG, Kigali, 8/7/2005. Unfortunately, I never managed to get hold of someone who could tell me more about the content of the education concerning victims' rights.

<sup>221</sup> Ibid.

<sup>222</sup> Interview with Denis Bikisha, legal officer, SNJG, Kigali, 26/6/2005

<sup>223</sup> African Rights, *Gacaca Justice- A Shared Responsibility*, p. 7

<sup>224</sup> Interview with Francois Mugabo, Gacaca programme coordinator, Avocats Sans Frontiers, Kigali 12/7/2005

One of the challenges met by the judges is that they often know the audience, as well as the victims and the perpetrators. To avoid biased judgments, a judge is obliged to withdraw from the seat in a trial where one of the parties is a close relative, an enemy or a close friend. This is equally true in any case where the judge's independence is questioned because of his or her relation to a party. The withdrawn judge may participate in the trial as a witness.<sup>225</sup>

#### 4.2.4.2 Seats with problems

So far, almost 17 000 judges have been replaced due to accusations of participation in the genocide.<sup>226</sup> Naturally, this may seriously reduce the credibility and the belief in the system among the population. When one out of every ten judges is accused of participating in the genocide, the impartiality of the system is doubted. Distressing is that there are cases where judges have formed coalitions to protect each other from accusations.<sup>227</sup> The civil society is asking for a system of control where at least the criminal records of judges are checked.<sup>228</sup> Another worrying aspect brought forward is a lowered standard because of replacements. There are not enough people to fill the seats of the replaced judges, and the result is an increased number of judges with insufficient literacy skills.<sup>229</sup>

Monitoring reports from the National Commission of Human Rights (hereinafter the NCHR) and non-governmental organisations reveal problems in the behaviour of the judges.<sup>230</sup> Some judges do not understand how to conduct the categorisation<sup>231</sup>, some are bribed to withdraw names from the lists of accused<sup>232</sup>, and others intimidate the witnesses<sup>233</sup>. In some courts, the secretary of the seat has neglected to write down testimonies.<sup>234</sup> Judges have also helped accused to escape and protected them.<sup>235</sup> Despite the provision prohibiting judges to decide in cases where they are biased,

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<sup>225</sup> Rwandan Organic Law No 16/2004 of 19/6/2004, Art. 10

<sup>226</sup> Figure received through e-mail from Gregory Kanyemera, information office, SNJG, 24/10/2005

<sup>227</sup> Interview with Francine Rutazana, executive secretary, LDGL, Kigali 7/7/2005

<sup>228</sup> Ibid.

<sup>229</sup> Interview with Elizabeth Onyango, programme coordinator, African Rights, Kigali, 26/7/2005

<sup>230</sup> The NCHR has a Gacaca Monitoring Project funded by the EU. Currently, 24 observers travel the country to observe Gacaca trials and identify problems by using a questionnaire. Focus lies on observing issues such as application of the law, participation, security and respect of the rights of the parties. Interview with Philbert Kagabo, Gacaca Project coordinator, NCHR, Kigali, 22/6/2005

<sup>231</sup> NCHR, *Rapport d'Observation des Juridictions Gacaca, Avril- Juin 2004*, Kigali 2004, p. 18

<sup>232</sup> NCHR, *Rapport d'Observation des Juridictions Gacaca, Septembre-Octobre 2003*, Kigali 2003, p. 10

<sup>233</sup> NCHR, *Rapport d'Observation des Juridictions Gacaca, Novembre-Decembre 2003*, Kigali 2004, p. 32

<sup>234</sup> P.A.P.G., *Rapport d'Activites, IVème Trimestre, Exercice 2003*, Kigali Janvier 2004, p. 8.

<sup>235</sup> Interview with Joseph Mutaboba, secretary general, Ministry of Internal Security, Kigali 5/8/2005

there have been occasions where judges have judged their own family members.<sup>236</sup> A common fault seems to be the omission of judges to inform the parties and the audience about the procedure at the beginning of each session. Information should be given on the specific procedure governing rape and sexual torture, on the legal consequences of false or incomplete testimonies, and on the factors that makes a judge biased.<sup>237</sup> Another problem is the deliverance of non-motivated judgments<sup>238</sup>, and the omission of modalities of reparation in the judgment.<sup>239</sup>

Judges have additionally made the mistake of trying ordinary crimes not covered by the jurisdiction of Gacaca. Even more serious is that some Gacaca courts have tried rape cases.<sup>240</sup> Rape cases belong to category one and are tried by ordinary courts.<sup>241</sup> It is prohibited to publicly talk about the sensitive issue of rape in Gacaca.

The abovementioned problems all contribute to a feeling of mistrust in the system. For Gacaca to succeed, it is crucial to deal with them as soon as possible. According to the NCHR, these problems are still existent but steadily diminishing.<sup>242</sup>

#### 4.2.5 The procedure of guilty plea

*“If your family has been killed and the killer receives 6 years because he pleaded guilty- you cannot be happy.”<sup>243</sup>*

One characteristic of the Gacaca system is the procedure of guilty plea. The confession procedure aims at striking a balance between justice and reconciliation, while at the same time speeding up the process.<sup>244</sup> This procedure applies to those accused of crimes falling under category one and two. To get a commutation of penalties, an accused under the first category has to plea guilty before the cell draws up the list of accused.<sup>245</sup> An accused falling under the second category can plea guilty either before or after his or her name appears on the list, but the commutation of the sentence will differ depending on when the guilty plea is done.<sup>246</sup>

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<sup>236</sup> Interview with Francine Rutazana, executive secretary, LDGL, Kigali 7/7/2005

<sup>237</sup> ASF, Observation des Juridictions Gacaca, Province de Ruhengeri, Mai 2005, p. 1, ASF, Observation des Juridictions Gacaca, Province de Kigali Ngali, Mai 2005, pp. 2-3, ASF, Observation des Juridictions Gacaca, Province de Umutara, Mai 2005, p. 1, ASF, Observation des Juridictions Gacaca, Province de Kibuye, Mai 2005, p. 2

<sup>238</sup> ASF, Observation des Juridictions Gacaca, Province de Kigali Ngali, Mai 2005, p. 2, ASF, Observation des Juridictions Gacaca, Province de Umutara, Mai 2005, p. 2

<sup>239</sup> ASF, Observation des Juridictions Gacaca, Province de Kigali Ngali, Mai 2005, p. 2

<sup>240</sup> Interview with Gregory Kanyemera, information office, SNJG, 21/7/2005

<sup>241</sup> Rwandan Organic Law No 16/2004 of 19/6/2004, Art. 38. See also sections 3.2.1 and 4.1.1.1.

<sup>242</sup> Interview with Philbert Kagabo, Gacaca project coordinator, NCHR, Kigali, 22/6/2005

<sup>243</sup> Interview with Benoir Kaboyi, executive secretary, IBUKA, Kigali 18/7/2005

<sup>244</sup> Wolters, Stephanie, “The Gacaca Process: Eradicating the culture of impunity in Rwanda?”, *Situation Report*, 5 August 2005, Institute for Security Studies, p. 9

<sup>245</sup> Rwandan Organic Law No 16/2004 of 19/6/2004, Art. 55

<sup>246</sup> *Ibid.*, Arts. 56 and 73

A valid guilty plea has to fulfil a number of requirements. It has to include the full confession, a guilty plea whereby the victims are re-humanised in the mind of the confessor, repentance and apologies to the victims and the Rwandan Society.<sup>247</sup> Guilty pleas are made before the seat of the Gacaca court, before the public prosecutor or before the police.<sup>248</sup> If done before the prosecutor or the police, the guilty plea is forwarded to the Gacaca court of the cell for validation.<sup>249</sup>

An accepted guilty plea means a drastically reduced sentence, often to half of the full sentence.<sup>250</sup> To plead guilty may also contribute to a release before trial. Most of the prisoners benefiting from the provisional mass release this summer had pleaded guilty.<sup>251</sup> The prospect of release after 11 years could contribute to partial or even false confessions. The cases of the released prisoners are given priority in Gacaca, this means that innocent prisoners still in jail have to wait even longer to get their cases heard.<sup>252</sup> Allegedly, there have also been cases where wealthier prisoners have tried to bribe others to plea guilty.<sup>253</sup> Additionally, a valid guilty plea has to reveal the truth about co-perpetrators, a criterion that is problematic.<sup>254</sup> This creates rife conditions for retaliation and increased violence as many perpetrators fear denunciation.<sup>255</sup>

Although the system of guilty pleas can help in getting perpetrators to confess and tell the truth, it has also been criticised. How is it possible to ascertain that someone tells the whole truth and truly regrets what he or she did? Necessarily, this will be a subjective assessment by the *inyangamugayo*. Partial guilty pleas are a problem and in many cases, the whole truth never comes out.<sup>256</sup> A general impression that confessions are not sincere and that the forgiveness is fake could seriously hamper the reconciliation process. Some victims feel that the sentences are far too lenient and that the survivors are sacrificed for peace.<sup>257</sup>

## 4.2.6 Reparation

*“Donors are ready to support prisoners but not survivors- why?”*<sup>258</sup>

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<sup>247</sup> Ibid., Art. 54, and interview with Denis Bikesha, legal officer, SNJG, 13/6/2005

<sup>248</sup> Rwandan Organic Law No 16/2004 of 19/6/2004, Art. 58

<sup>249</sup> Ibid., Arts. 60-61

<sup>250</sup> Ibid., Art. 73

<sup>251</sup> Interview with prison official, Kigali Central Prison on the day of the mass release, Kigali 29/7/2005

<sup>252</sup> Wolters, Stephanie, “The Gacaca Process: Eradicating the culture of impunity in Rwanda?”, *Situation Report*, 5 August 2005, Institute for Security Studies, pp. 10-11

<sup>253</sup> Ibid., p. 10

<sup>254</sup> Rwandan Organic Law No 16/2004 of 19/6/2004, Art. 54. See also chapter 4.1.2.1

<sup>255</sup> Zorbas, Eugenia, “Reconciliation in Post-Genocide Rwanda”, *African Journal of Legal Studies*, (2004)1, 29-52, pp. 36-37

<sup>256</sup> Interview with Elizabeth Onyango, programme coordinator, African Rights, Kigali 26/7/2005

<sup>257</sup> Interview with Benoir Kaboyi, executive secretary, IBUKA, Kigali 18/7/2005

<sup>258</sup> Ibid.

Reparation is central in the context of getting justice. During the genocide people lost their loved ones, they suffered psychological and physical injuries and many lost everything they owned. For most of them, justice is not complete unless the process includes reparation for both material and moral damages. Reparation would mean the difference between abject poverty and restored dignity for numerous survivors. Although reparation can take many forms, this section focuses on reparation in the form of compensation and restitution for material and moral damages. This does not denounce that other elements of Gacaca, such as prosecution and getting to know the truth, can constitute reparation for the victims. Nevertheless, when victims in Rwanda talk about reparation they refer to restitution and compensation. Hence, this section analyses reparation from the point of view of the current debate in Rwanda.

The issue of reparation is a subject of debate within Rwanda. The most pressing problem is who should be responsible to pay: the perpetrators, the Rwandan state or the international community? Rwanda faces the same problem as most countries in transition where the new government has to deal with the atrocities committed by the old regime. As most perpetrators do not have any means to pay compensation, the problem moves to the state. The alleged responsibility of the international community is a very sensitive matter. Whenever a discussion on reparation takes place, international responsibility is part of the discussion. In a resolution, the UN General Assembly encouraged member states to contribute to the assistance of genocide survivors. The resolution is carefully drafted to avoid giving the impression that some member states have a duty to give reparation to victims in Rwanda.<sup>259</sup> The International panel of eminent personalities, appointed by the Organisation of African Unity to investigate the genocide, went a step further and concluded that actors in the international community owe reparations to Rwanda.<sup>260</sup> In reality, it is highly unlikely that any country will step forward and accept responsibility for the genocide.<sup>261</sup> This means that Rwanda has to deal with the problem alone, though it should be mentioned that international donors finance 60 % of Rwanda's public spending.<sup>262</sup>

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<sup>259</sup> UN General Assembly Resolution 59/137, adopted on 17 February 2005, *Assistance to survivors of the 1994 genocide in Rwanda, particularly orphans, widows and victims of sexual violence*, A/RES/59/137

<sup>260</sup> The Organisation of African Unity, International panel of eminent personalities, *Rwanda: The Preventable Genocide*, p. 266, para. 12

<sup>261</sup> The issue of international responsibility to indemnify victims in Rwanda is very interesting and could easily be an independent subject of study. Due to limited space and time, further analysis lies outside the scope of this thesis.

<sup>262</sup> The World Bank, Country Brief, Rwanda, [http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/RWANDA\\_EXTN/0,,menuPK:368714~pagePK:141132~piPK:141107~theSitePK:368651,00.html](http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/RWANDA_EXTN/0,,menuPK:368714~pagePK:141132~piPK:141107~theSitePK:368651,00.html), last visited 30/10/2005. At least half of the international budget support is not earmarked and could be used for anything, including compensation for victims.

The large number of victims makes reparation hard. Altogether, an estimated number of one million people could claim compensation, when including next of kin of deceased.<sup>263</sup> Should the state compensate for each lost relative where someone lost the whole family? Should the amount be different depending on which relative you lost, e.g. your mother, your grandfather or your sister? Alternatively, should each person receive a fixed amount not dependent on the number of relatives lost? Questions such as these are difficult but require clear answers.

Rwanda has not presented a final solution to the problem of reparation. What does exist is the FARG, a fund for the most necessitous survivors, which has been functioning since 1998.<sup>264</sup> Additionally, the Gacaca legislation provides for compensation for damaged property.<sup>265</sup> A new law shall determine other forms of compensation.<sup>266</sup> The new legislation is currently under debate, as it has been since 2000, and it is unclear when the law will actually come into force.<sup>267</sup> The SNJG believes that the new draft can go through the parliament and the government before the end of this year.<sup>268</sup> If the current draft passes, the FARG would be merged with a new and bigger social assistance fund. The proposed law does not mention international responsibility. Consequently, international donors will not feel that contributing to the fund is equal to admit responsibility for the events in 1994.<sup>269</sup>

The ordinary courts have previously awarded compensation for moral and material damages in genocide cases.<sup>270</sup> As most perpetrators do not have the means to pay, the judgments remain unexecuted. This has been largely criticised. The result is that ordinary courts are no longer supposed to consider moral damages.<sup>271</sup> The reasons behind this bar are not legal, but rather political and economic reasons, which put the independence of the judiciary in doubt.<sup>272</sup> It is questionable whether a Gacaca judgment could serve as the basis of a civil claim for compensation before ordinary courts. The Gacaca legislation does not specifically rule out this possibility. Nevertheless, the meaning of article 96 of the Gacaca legislation, leaving moral damages to be determined by a new legislation, could be interpreted as blocking civil claims. As the ordinary courts should not award moral damages in the genocide cases they handle, it is doubtful that they would accept separate civil claims for compensation. Even if they did, the

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<sup>263</sup> Interview with Augustin Nkusi, director of legal support unit, SNJG, Kigali 3/8/2005

<sup>264</sup> Rwandan Law No 02/98 of 22/01/1998 establishing a national assistance fund for needy victims of genocide and massacres committed in Rwanda between October 1, 1990, and December 31, 1994.

<sup>265</sup> Rwandan Organic Law No 16/2004 of 19/6/2004, Chapter VII, Arts. 94-95

<sup>266</sup> *Ibid.* Art. 96

<sup>267</sup> Wolters, Stephanie, "The Gacaca Process: Eradicating the culture of impunity in Rwanda?", *Situation Report*, 5 August 2005, Institute for Security Studies, p. 16

<sup>268</sup> Interview with Domitilla Mukantaganzwa, executive secretary, SNJG, Kigali 8/7/2005

<sup>269</sup> *Ibid.*

<sup>270</sup> Interview with Denis Bikisha, legal officer, SNJG, Kigali 13/6/2005

<sup>271</sup> Interview with Augustin Nkusi, director of legal support unit, SNJG, Kigali 3/8/2005

<sup>272</sup> Interview with Irenée Bugingo, researcher, IRDP, Kigali 20/7/2005

execution of awards would be a big problem, as most perpetrators have no means to pay. Additionally, bringing such a civil law case is not realistic for most survivors. To be successful, they would need to pay for skilled legal representation and most likely travel to the appropriate court. Therefore, those in most need of compensation would not be able to engage in a civil law process.

This section will deal with the existing forms of compensation, which are reparation within Gacaca and reparation through the FARG.

#### **4.2.6.1 Reparation within Gacaca**

*“I can’t just come out of it with nothing.”<sup>273</sup>*

The Gacaca legislation provides for compensation of damaged property. The cell level is the one assigned to deal with cases concerning damaged property. If the defendant appears before the sector level, property related crimes become part of their jurisdiction.<sup>274</sup> Judgments concerning compensation of damaged property can never be subject of appeal.<sup>275</sup> The only sentence available for offences against property is the order of paying reparation.<sup>276</sup>

The reparation takes different forms depending on the circumstances.<sup>277</sup> One example would be a victim who lost her cow during the genocide and claims compensation before Gacaca. If the cow is still alive, the perpetrator should give it back, i.e. restitution. If the cow is dead or ill, the perpetrator should instead give monetary compensation for the cow. If, which is common, the perpetrator is not able to pay, he or she will have to carry out work for the victim. The work carried out should be worth as much as the cow itself.

In compensation cases, the Gacaca courts encourage amicable settlements.<sup>278</sup> Such a settlement is to be handed in to the court that will supervise the execution of it. If there is no settlement, it is up to the court to rule on the methods and period of payment in each individual case.<sup>279</sup> The legislation does not provide any guidelines on how to decide for example how many hours of work that would equal to a lost cow. This is left to the discretion of the court, as well as is the determination of the monetary value of lost property.

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<sup>273</sup> Woman in the audience, Gacaca observation at cell level, Ruhengeri 25/7/2005

<sup>274</sup> Rwandan Organic Law No 16/2004 of 19/6/2004, Art. 94

<sup>275</sup> Ibid.

<sup>276</sup> Ibid., Art. 74

<sup>277</sup> Ibid., Art. 95

<sup>278</sup> Interview with Denis Bikisha, legal officer, SNJG, Kigali 13/6/2005, and Gacaca observation at cell level, Ruhengeri 25/7/2005

<sup>279</sup> Rwandan Organic Law No 16/2004 of 19/6/2004, Art. 95

Even though Gacaca courts should not consider moral damages, some courts do ask for and include reparation claims in their judgments.<sup>280</sup> This practice could raise false hope among the victims. If the Gacaca courts accept compensation claims victims will expect something to come out of them. In other Gacaca courts, judges find it difficult when people ask for moral compensation, as they do not have any answers to give them.<sup>281</sup>

Perpetrators who have confessed their crimes, and belong to the second category, will serve half of their sentence outside of prison doing community service.<sup>282</sup> Community service is a sentence and not to be confused with compensation. Nevertheless, the government has promised that the community service projects will pay special attention to survivors.<sup>283</sup> As an example, the survivors' organisation AVEGA is involved in a discussion on a community service project that would construct houses for genocide widows.<sup>284</sup>

#### 4.2.6.2 The FARG

The FARG, Fonds National pour l'Assistance aux Rescapés du Génocide et des Massacres aux Rwanda, was established already in 1998. The fund's aim is to provide some social security for the most vulnerable victims. In establishing this fund, the Rwandan State acknowledged its obligation to help and assist those harmed by the old regime.<sup>285</sup> Although the FARG is not a complete compensation scheme, it is the only one that exists and therefore important to mention.

The FARG gets its funding from different sources. The state's ordinary budget should allocate 5 % to the fund. Additionally, every citizen has to contribute with at least 1 % of his or her annual salary.<sup>286</sup> In 2004, the total budget of the fund was approximately 10,5 million USD although it was supposed to be 13 million USD.<sup>287</sup> The fund as it stands is far from sufficient, and it is not able to cover even half of the existing needs.<sup>288</sup> The Rwandan state has not managed to live up to its 5 % contribution.<sup>289</sup>

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<sup>280</sup> Gacaca observation at sector level, Kigali Ville 23/7/2005. At the end of this session, the seat asked the victims to bring forward their compensation claims, for material and moral damages, and quite some time was spent discussing how to calculate such damages.

<sup>281</sup> Interview with Francois Mugabo, Gacaca programme coordinator, ASF, Kigali 12/7/2005

<sup>282</sup> Ibid., Art. 73

<sup>283</sup> Hirondelle News Agency, "Alternative penalties for genocide to begin soon", 07/09/2005, <http://www.hirondelle.org/arusha.nsf/English?OpenFrameSet>, last visited 30/10/2005

<sup>284</sup> Interview with Odette Kayirere, head of AVEGA Eastern Region, Rwamagana 5/8/2005

<sup>285</sup> Rwandan Law No 02/98 of 22/01/1998, preamble

<sup>286</sup> Ibid., Art. 12

<sup>287</sup> 5.843.866.395 Rwandan Francs and 7.328.194.000 Rwandan Francs. FARG, Republika y'u Rwanda, *Ikigega cya leta kigenewe gutera inkunga abacitse ku icumu ry'itsembabwoko n'itsembatsemba batishoboye FARG, Raporo y'ibikorwa by'umwaka w'i 2004*, (FARG 2004 report), p. 45, translated in parts from kinyarwanda.

<sup>288</sup> Interview with Domitilla Mukantaganzwa, executive secretary, SNJG, Kigali 8/7/2005

<sup>289</sup> Interview with Francois Mugabo, Gacaca programme coordinator, ASF, Kigali 12/7/2005



Whether this is due to lack of means or other priorities can be discussed.<sup>290</sup> Another reason could be that the government fear that once compensation is given to genocide survivors, it will likewise have to compensate those who have been innocently imprisoned.<sup>291</sup>

To be eligible as beneficiary, you have to fall into the concept of survivor. This means that you were persecuted because of your ethnicity (i.e. Tutsi), or because of your political opinion (i.e. moderate Hutu).<sup>292</sup> Consequently, no victims of RPF crimes are eligible for assistance from the FARG.

Due to the lack of means to assist everyone in need, the FARG prioritises orphans, widows and disabled persons.<sup>293</sup> Furthermore, assistance targets in particular health, education and housing.<sup>294</sup> Beneficiaries get special health cards, paid school fees (for secondary school), school uniforms and books, or sufficient material to construct a house.<sup>295</sup>

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<sup>290</sup> That the Rwandan state recently spent millions of dollars on a new headquarter for the Ministry of Defence and on the luxurious Hotel Intercontinental in Kigali, makes it difficult to refrain from questioning how priorities are made.

<sup>291</sup> Wolters, Stephanie, "The Gacaca Process: Eradicating the culture of impunity in Rwanda?", *Situation Report*, 5 August 2005, Institute for Security Studies.

<sup>292</sup> Rwandan Law No 02/98 of 22/01/1998, Art. 14

<sup>293</sup> Ibid.

<sup>294</sup> Ibid.

<sup>295</sup> Interview with Bernard Kayiranga, legal adviser at the FARG until December 2004 (not yet replaced), Kigali 14/6/2005

## 5 International Instruments

A human right without a corresponding obligation is not much of a right in practice. When a right is violated, a remedy has to be available. This connection between rights and remedies is recognised as fundamental.<sup>296</sup> An individual can only complain before an international human rights body when domestic remedies are exhausted. The reason behind this rule is that human rights shall be implemented at the domestic level. International bodies have a subsidiary role and serve as a last resort. Their admissibility criterion of exhaustion of domestic remedies mirrors this subsidiary role. The right to an effective remedy and the admissibility criterion of exhaustion of domestic remedies are interrelated. Together, they form a common requirement of effectiveness with regard to national remedies.<sup>297</sup> In the following, an analysis of the right to an effective remedy as laid down in various international instruments is included. Likewise, the right to an effective remedy in the context of exhaustion of domestic remedies is also covered. Additionally, an analysis of the standing of victims before international human rights bodies and international tribunals is included.

In considering the fulfilment of Rwanda's international obligations, a theoretical legal framework is required. Various instruments deal with the notion of effective remedy. My focus is on the international instruments ratified by Rwanda. Among them are the Covenant on Civil and Political Rights (hereinafter the ICCPR), the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the Genocide Convention) and the African Charter on Human and Peoples' Rights (hereinafter the ACHPR).

A key provision on the right to effective remedy is Article 2 (3) of the ICCPR. This is the most elaborate international provision on the right to an effective remedy. The Human Rights Committee, (hereinafter the HRC), in General Comment No. 29 reaffirms its importance where it is stated to be a non-derogable right and a treaty obligation inherent in the Covenant as a whole.<sup>298</sup> Additionally, I will discuss the impact of article 14 on victims' rights.

Articles of interest in the ACHPR include article 7 and article 26. Article 7.1 (a) states the right to appeal to competent national organs against acts of violating fundamental rights. Article 26 ensures the independence of the courts.

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<sup>296</sup> Møse, Erik, "Article 8", Alfredsson, Gudmundur and Eide, Asbjorn (eds.), *The Universal Declaration of Human Rights- A Common Standard of Achievement*, Martinus Nijhoff Publishers 1999, p. 187

<sup>297</sup> Nowak, Manfred, *U.N. Covenant on Civil and Political Rights- CCPR Commentary*, 2<sup>nd</sup> revised edition, N.P.Engel Verlag 2005, p. 63

<sup>298</sup> HRC, General Comment No 29, CCPR/C/21/Rev.1/Add.11, para. 14

The Genocide Convention aspires to end impunity for the crime of genocide and obliges States parties to punish the perpetrators of such crimes.<sup>299</sup> Although the Genocide Convention does not specifically deal with victims' rights, it is of great importance due to the strong legal standing it has achieved in international law.

It is necessary to include a section on non-legally binding sources, so called soft law, where the components of the right to an effective remedy are extensively dealt with. Even though the Universal Declaration on Human Rights (hereinafter the UDHR) is a non-legally binding instrument it is of great importance. The right to an effective remedy is governed by article 8 of the UDHR. The UN General Assembly has adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>300</sup> This declaration encompasses several important principles such as the right to access to justice, the right to restitution and compensation and the right to assistance. Under the auspices of the Commission on Human Rights, basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law have been elaborated.

Further, a short analysis of the statutes of the International Criminal Court (ICC) and the International Criminal Tribunal for Rwanda (ICTR) is included. Notable is that to this date Rwanda has not signed nor ratified the ICC Statute. The ICTR Statute includes a provision on the protection of victims and witnesses.<sup>301</sup> Beside that, victims' rights are not elaborated further. On the other hand, the ICC Statute takes a much more progressive stand by including the rights of victims to compensation and protection.<sup>302</sup>

Yet another question is whether the right to an effective remedy, with all its components or only some of them, has found its way into customary international law. This matter is dealt with in the last section.

## **5.1 International and Regional Human Rights Instruments**

### **5.1.1 The Genocide Convention**

The Genocide Convention, approved by the UN General Assembly in 1948, has 133 state parties. The Convention became widely accepted as an international human rights instrument and remains the central legal instrument in relation to genocide. It was drafted in the after-math of the Second World War with the aim of preventing the crime of genocide. The Convention sets out a careful definition of the crime of genocide, and

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<sup>299</sup> See in particular articles 4, 5 and 6 of the Genocide Convention

<sup>300</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly Resolution 40/34 of 29 November 1985

<sup>301</sup> ICTR Statute, Art. 21

<sup>302</sup> ICC Statute, Art. 68 and Art. 75

confirms that genocide is an international crime whether committed in war or in peace.<sup>303</sup> Furthermore, acts committed in connection with genocide are punishable.<sup>304</sup> All states parties undertake to enact appropriate legislation and to provide effective penalties for perpetrators of genocide.<sup>305</sup> Persons accused of genocide are to be tried by a competent tribunal of the state where the crime was committed, or by an international criminal tribunal with jurisdiction over the crime.<sup>306</sup> Consequently, states parties are obliged to prosecute and punish persons responsible for genocide. In reality, this has not always been the case. A major weakness of the Genocide Convention is the apparent lack of an efficient enforcement mechanism. A supervising body could have provided valuable recommendations and guidelines on interpretation of the Convention. In lack of another enforcement mechanism, a possible breach of the Genocide Convention can only lead to a case before the ICJ.<sup>307</sup> It is not likely that one state will bring a claim against another state, at least not unless the respondent state's eventual non-fulfilment of its obligations affects the claimant state's citizens.

The focus on prosecution and punishment reflects a very retributivist line of thinking, where victims are placed somewhere in the periphery. This is not very surprising, considering that the Convention was drafted at a time when victims' rights were not particularly discussed. In the context of victims' rights, it is of interest to look deeper into the phrases "effective penalties" in article 5, and "a competent tribunal" in article 6. What would constitute an effective penalty and which elements are required for a tribunal to be considered competent?

It is clear that states parties have an obligation to enact legislation making punishable all acts included in the Convention. The details of such national legislation appear to be left to the discretion of the states. The Convention does not seem to impose an obligation to enact uniform legislation.<sup>308</sup> This means that every state will decide what constitutes an effective penalty in each particular case. Nevertheless, the insertion of the word effective indicates that not any penalty would be acceptable. Granting amnesty to genocide perpetrators would likewise be unacceptable under the Convention.

It is difficult to know whether the drafters of the Genocide Convention by competent simply meant a tribunal with jurisdiction over the case. The word competent could also be interpreted to imply that only a tribunal reaching a certain standard of competence is acceptable. In assessing an adequate standard, components such as impartiality and independence could be taken into account.

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<sup>303</sup> The Genocide Convention, Arts. 1-2

<sup>304</sup> Ibid., Art. 3

<sup>305</sup> Ibid., Art. 5

<sup>306</sup> Ibid., Art. 6

<sup>307</sup> The Genocide Convention, Art. 9

<sup>308</sup> Robinson, Nehemiah, *The Genocide Convention- A Commentary*, The Institute of Jewish Affairs 1960, p. 77

The International Court of Justice has ruled that the obligations and rights enshrined in the Convention have a universal character and that they are binding upon all states, whether signatories or not, as rights and obligations erga omnes.<sup>309</sup> Erga omnes obligations are non-derogable obligations owed towards the international community as a whole, all states have a legal interest in their protection.<sup>310</sup> These universally applicable obligations include the duty to prosecute and punish, the non-applicability of immunities and universal jurisdiction.<sup>311</sup> This case law reinforces the view of genocide as one of the worst crimes, and makes the provisions on punishment and prosecution even stronger.

In 2004, 55 governments reaffirmed their commitment to the prevention of genocide by the issuance of the Stockholm Declaration on Genocide Prevention.<sup>312</sup> The non-binding Declaration underlines that perpetrators of genocidal acts shall be brought to justice, and that survivors of genocide should be supported to rebuild their communities and return to normal life.<sup>313</sup>

## 5.1.2 The International Covenant on Civil and Political Rights

The ICCPR includes the most elaborate provision on the obligation to provide an effective remedy. Under article 2 (3), each state party undertakes to ensure that any person, whose rights and freedoms under the Covenant are violated, shall have access to an effective remedy. Consequently, this legal obligation can only be invoked in connection with other rights in the Covenant, and does not have direct horizontal effect. The supervising body of the ICCPR, the HRC, recognises the right to a remedy as inherent to the Covenant as a whole and as such non-derogable.<sup>314</sup> In General Comment No. 31, the HRC further emphasises the importance of the right to an effective remedy. States parties must ensure accessible and effective remedies where individuals can vindicate their rights.<sup>315</sup> Beyond remedies for individuals, a state party is under an obligation to ensure non-repetition of the type of violation in question.<sup>316</sup>

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<sup>309</sup> International Court of Justice, Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), 11 July 1996, para. 30

<sup>310</sup> Shaw, Malcolm N., *International Law*, Fifth edition, Cambridge University press 2003, p. 116

<sup>311</sup> Bassiouni, Cherif M., "Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights", Bassiouni Cherif M. (ed.), *Post-Conflict Justice*, Transnational Publishers, New York 2002, pp. 14-17

<sup>312</sup> The Stockholm Declaration on Genocide Prevention, 28 January 2004, Stockholm International Forum

<sup>313</sup> *Ibid.*, para. 3

<sup>314</sup> HRC, General Comment No 29, CCPR/C/21/Rev.1/Add.11, para. 14

<sup>315</sup> HRC, General Comment No 31, CCPR/C/21/Rev.1/Add.13, para. 15

<sup>316</sup> *Ibid.*, para. 17

The right to an effective remedy entails the obligation to investigate alleged violations. Investigations should be conducted by independent and impartial bodies, and be thorough, prompt and effective. The state is bound to establish appropriate judicial and administrative mechanisms where claims of rights violations can be addressed.<sup>317</sup> When investigations reveal violations those responsible has to be brought to justice. This obligation arises in particular when the violation also constitutes a crime under domestic or international law.<sup>318</sup> Without reparation, the obligation to provide an effective remedy is not discharged. The HRC considers that the Covenant generally demands appropriate compensation. Reparation is said to include restitution as well as rehabilitation, different measures of satisfaction, and bringing perpetrators to justice.<sup>319</sup> The state is under an obligation to enforce granted remedies.<sup>320</sup> A remedy cannot be deemed effective if it is not fully implemented.

Article 14 of the ICCPR primarily safeguards the rights of accused. It is a key provision on the right to a fair trial including a series of individual rights. Nevertheless, this provision is interrelated to article 2 (3) as it sets certain standards for judicial remedies. Article 14 (1) stipulates that all persons shall be equal before courts and tribunals. Furthermore, in the determination of a criminal charge, or rights and obligations in a suit of law, everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The reference to a suit in law encompasses private law proceedings, and probably public law proceedings as well.<sup>321</sup> The right to a fair trial thus covers both the judicial procedure and the administration of justice.

What impact does article 14 have on the rights of victims? Judicial remedies under article 2 (3) would, by analogy, have to live up to the standards set by article 14 (1) to be acceptable. In the context of deciding whether a tribunal is competent, independent and impartial, the HRC mentions the manner in which judges are appointed, the qualifications for appointment and the independence of the judiciary from the executive branch and the legislative.<sup>322</sup> Furthermore, equal access to courts is to be ensured.<sup>323</sup> In this regard, article 14 (1) is closely related to the general prohibition of discrimination in article 2 (1). The establishment of different courts for the groups of persons listed in article 2 (1) is not compatible with article 14

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<sup>317</sup> Ibid., para. 15

<sup>318</sup> Ibid., para. 18

<sup>319</sup> Ibid., para. 16

<sup>320</sup> ICCPR, Art. 2 (3) (c)

<sup>321</sup> Lehtimaja, Lauri and Pellonpää, Matti, "Article 10", Alfredsson, Gudmundur and Eide, Asbjorn (eds.), *The Universal Declaration of Human Rights- A Common Standard of Achievement*, Martinus Nijhoff Publishers 1999, pp. 231-232. See also Casanovas v. France, HRC, Comm. No. 441/1990, 26/7/1994, para. 5.2, where the HRC held that a procedure regarding dismissal from employment constituted a determination of rights and obligations in a suit of law.

<sup>322</sup> Ibid.

<sup>323</sup> HRC, General Comment No. 13, 13/04/84, para. 3

(1).<sup>324</sup> In addition, the HRC expresses concern over the establishment of specialised courts that try civilians, as such courts could present problems for an equitable, impartial and independent administration of justice.<sup>325</sup> Equal access also signifies an obligation of the state to ensure that everybody is able to turn to the courts for adjudication of civil disputes.<sup>326</sup> If a victim brings a civil claim for compensation against his or her convicted perpetrator, he or she is entitled to a fair and public hearing by a competent, independent and impartial tribunal. The same would possibly be true if such a claim is directed against the state.

Finally, it is important to note that state obligations under the Covenant are immediate. A failure to comply cannot be justified by reference to political or economic considerations within the state.<sup>327</sup>

### 5.1.2.1 The Human Rights Committee

Beside individual communications to the HRC, states parties are obliged to submit periodical reports on the domestic implementation of the ICCPR.<sup>328</sup> A working group of the HRC draws up a list of questions arising from its analysis of the state report and other information from informal sources, such as NGOs. During a following public session, a state representative gets the opportunity to provide clarifications. Finally, the HRC adopts a view including both positive and negative aspects and further recommendations. Often, the HRC asks for follow-up reports.<sup>329</sup> The views of the HRC are not legally binding, but put some moral and political pressure on the state concerned.

In the context of individual communications, it is important to remember that the HRC is not a court. Hence, it cannot issue binding decisions. It can only receive individual complaints against states parties to the Optional Protocol.<sup>330</sup> Individual complaints are only admissible if all available domestic remedies are exhausted. This rule is discharged if the application of domestic remedies is unreasonably prolonged.<sup>331</sup> When the HRC gives a view on an individual communication it may include recommendations on appropriate remedies, including reparation. Even though these recommendations are not legally binding, many governments follow them and report measures taken.<sup>332</sup> In this context, it is worth noting that Rwanda is not a party to the Optional Protocol. Nevertheless, the case law of the HRC is important not only for states parties to the Protocol. The findings of

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<sup>324</sup> Nowak, p. 308

<sup>325</sup> Ibid., para. 4

<sup>326</sup> Nowak, p. 311

<sup>327</sup> HRC, General Comment No 31, CCPR/C/21/Rev.1/Add.13, para. 14

<sup>328</sup> ICCPR, Art. 40

<sup>329</sup> Rehman, Javid, *International Human Rights Law- A Practical Approach*, Pearson Education Ltd, 2003, pp. 84-86

<sup>330</sup> Optional Protocol to the International Covenant on Civil and Political Rights, adopted December 1966, entry into force March 1976, Art. 1

<sup>331</sup> Ibid., Art. 5 (2) (b)

<sup>332</sup> Nowak, p. 86

the HRC indicate how the provisions in the Covenant should be interpreted and are thus of importance for all states parties to the Covenant.

Whether a remedy is effective or not has to be assessed in each particular case. The HRC has not developed a standard solution to be applied in all cases. Instead, its case law has confirmed that different remedies are required depending on the type of violation. The effectiveness of a remedy depends on the nature of the violation.<sup>333</sup> In cases where political rights have been violated, for example during elections, the HRC has held the mere finding of a violation sufficient.<sup>334</sup> In cases regarding the right to life, it has found that remedies should include investigation, prosecution and punishment in case of violation, and compensation.<sup>335</sup> In *Vicente et al. v. Colombia*, the HRC concluded that purely disciplinary and administrative remedies are not sufficient in the event of particularly serious human rights violations, such as violations of the right to life.<sup>336</sup> In the same case, the HRC recalled, in the context of admissibility, that domestic remedies primarily refer to judicial remedies.<sup>337</sup> This case law underlines the priority of judicial remedies in cases of serious human rights violations.<sup>338</sup>

No individual has the right to require that a state criminally prosecute another person. Nevertheless, the HRC holds that the state is under an obligation to investigate alleged violations, and to prosecute criminally, try and punish those held responsible.<sup>339</sup> The underlying reason for the obligation to prosecute is that only prosecution may guarantee non-repetition of the violations.<sup>340</sup> This is representative of a development towards recognition of the right of victims of serious human rights violations to demand that states criminally prosecute the perpetrators.<sup>341</sup>

Investigations should be comprehensive and impartial to make the remedy effective.<sup>342</sup> The HRC has clearly held that amnesties for gross violations of human rights are incompatible with the Covenant.<sup>343</sup> Moreover, it has affirmed that states have an obligation to investigate crimes committed by previous regimes, in particular with regard to gross human rights violations.<sup>344</sup>

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<sup>333</sup> *Vicente et al. v. Colombia*, HRC, No. 612/1995, 19/8/1997, para. 5.2

<sup>334</sup> *Mátyus v. Slovakia*, HRC, No. 923/2000, 26/7/2002, para. 11

<sup>335</sup> See for example *Asdrúbal Jiménez Vaca v. Colombia*, HRC, No. 859/1999, 15/4/2002, para 9, and *Vicente et al. v. Colombia*, HRC, No. 612/1995, 19/8/1997, para. 10

<sup>336</sup> *Vicente et al. v. Colombia*, HRC, No. 612/1995, 19/8/1997, para. 8.2

<sup>337</sup> *Ibid.*, para. 5.2

<sup>338</sup> Nowak, p. 65

<sup>339</sup> *Bautista v. Colombia*, HRC, No. 563/93, 13/11/1995, para. 8.6, and, *Vicente et al. v. Colombia*, HRC, No. 612/1995, 19/8/1997, para. 8.8

<sup>340</sup> Aldana- Pindell, Raquel, "An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes", *Human Rights Quarterly*, 26 (2004), p. 645

<sup>341</sup> Nowak, pp. 66-67

<sup>342</sup> *Wilson v. Philippines*, HRC, No. 868/1999, 11/11/2003, para. 9

<sup>343</sup> *Rodríguez v. Uruguay*, HRC, No. 322/1988, 9/8/1994, para. 12.4

<sup>344</sup> *Ibid.*, para. 12.3



When a violation is found, the HRC normally refers to the state's obligation to ensure non-repetition of the violation. In *Bautista v. Colombia*, it went a step further while explicitly obliging the state to provide the victim's family with suitable protection from harassment. This obligation formed part of the concept of an appropriate remedy.<sup>345</sup>

In most cases where a violation is found, the HRC indicates the most appropriate remedies to bring relief to the victim. The type of reparation depends on the nature of the violated human right and on the facts of the case.<sup>346</sup> The HRC has held that compensation should take due account of both the seriousness of the violation and the resulting damage.<sup>347</sup> Restitution, i.e. restoring the victim to the original situation before the violation, seems to be recommended when possible.<sup>348</sup> Rehabilitation should include medical and psychological care, and has been recommended in for example cases concerning torture.<sup>349</sup> As mentioned above, in cases of gross human rights violations, the HRC normally requests a criminal investigation. Bringing perpetrators to justice is seen as one way of bringing relief to the victims.<sup>350</sup> The case law also includes recommendations to provide monetary compensation, both for material and moral damages.<sup>351</sup> When the victim is deceased, appropriate compensation is to be paid to the surviving family.<sup>352</sup>

The case law of the HRC has in a significant way contributed to the development of the right to an effective remedy. Its practice has evolved to include a set of state obligations, including the duty to investigate, to bring those responsible to justice and to pay compensation to the victims.<sup>353</sup>

### 5.1.3 The African System

The African system of human rights protection is a rather new system. The ACHPR entered into force in 1986. So far, the African Commission on Human and People's Rights, (hereinafter the Commission), has been responsible for the promotion and protection of the rights enshrined in the ACHPR. The Commission, a quasi-judicial body, has a mandate to examine state reports, interpret the ACHPR upon request, and consider communications alleging violations.<sup>354</sup> The Commission has no binding powers and critical voices contend that the Commission is a paper tiger

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<sup>345</sup> *Bautista v. Colombia*, HRC, No. 563/93, 13/11/1995, para. 10

<sup>346</sup> Nowak, p. 70

<sup>347</sup> *Wilson v. Philippines*, HRC, No. 868/1999, 11/11/2003, para. 9

<sup>348</sup> Nowak, pp. 70-71

<sup>349</sup> *R.S. v. Trinidad and Tobago*, HRC, No. 684/1996, 15/4/2002, para. 9

<sup>350</sup> Nowak, p. 71

<sup>351</sup> Nowak, p. 72

<sup>352</sup> See for example *Lantsova v. Russia*, HRC, No. 763/1997, 15/4/2002, para. 11, and, *Interights v. Trinidad and Tobago*, HRC, No. 580/1994, 19/4/2002, para. 12

<sup>353</sup> Bottiglierio, p. 123

<sup>354</sup> ACHPR, Art. 45

unable to protect human rights.<sup>355</sup> To improve the protection of human rights an African Court of Human and People's Rights (hereinafter the Court) is envisaged by a Protocol to the ACHPR.<sup>356</sup> The Court is not yet functioning.

In the following, the ACHPR will be discussed in light of the views given by the Commission. Further, I examine the standing of victims before the Commission and the future Court.

### **5.1.3.1 The African Charter on Human and People's Rights**

The ACHPR does not protect specifically victims' right to a remedy. Article 7 gives every individual a right to have his or her cause heard through an appeal to competent national organs. This can be construed as giving every individual a right to seek a judicial remedy as a first instance, or as a right to appeal a decision of a lower court. The Commission has included both rights as part of article 7.<sup>357</sup> The phrase competent national organ implies that such an organ does not necessarily have to be a tribunal. Nonetheless, it is argued that appropriate national organs presuppose at least quasi-judicial organs normally entitled to hear cases.<sup>358</sup> Article 26 further provides that the independence of courts shall be ensured. Interesting is that article 7 gives a right to appeal against acts violating fundamental rights as enshrined in conventions, laws, regulations and customs in force. This is a rather broad formulation, especially if compared to other international instruments. The only provision including a specific right to compensation is article 21 (2), referring to spoliation of natural resources. The lack of an explicit provision providing victims with a right to an effective remedy and redress limits the regional standards on victims' rights.<sup>359</sup>

The Commission's jurisprudence on article 7 has mainly concerned the rights of accused. With regard to the requirement of exhaustion of domestic remedies, the Commission has stated that such a remedy must operate impartially and make its decisions according to legal principles. A remedy that does not fulfil these criteria is neither adequate nor effective.<sup>360</sup> In determining the admissibility of a complaint, the Commission and the future Court are both bound by article 56 of the ACHPR.<sup>361</sup> Article 56 (3) requires

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<sup>355</sup> Pieter van Der Mei, Anne, "The New African Court on Human and People's Rights: Towards an Effective Human Rights Protection Mechanism for Africa?", *Leiden Journal of International Law*, 18 (2005), p. 117

<sup>356</sup> Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, June 1998, entered into force 25 January 2004. Rwanda has signed (9/6/1998) and ratified (5/5/2003) the Protocol.

<sup>357</sup> Orlu Nmehielle, Vincent O., *The African Human Rights System- Its Laws, Practice, and Institutions*, Martinus Nijhoff Publishers, The Hague 2001, pp. 95-96

<sup>358</sup> *Ibid.*, p. 96

<sup>359</sup> Bottigliero, p. 129

<sup>360</sup> Constitutional Rights Project v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 60/91 (1995), para. 10, and Constitutional Rights Project v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 87/93 (1995), para. 8

<sup>361</sup> *Ibid.*, Art. 6 (2)

that local remedies are exhausted before a complaint may be considered. If local procedures are unduly prolonged, a complaint can still be admissible.

### **5.1.3.2 Victims' rights before the Commission and the Court**

The Rules of Procedure of the Commission does not include any specific rights of victims.<sup>362</sup> The Commission can ask for provisional measures to avoid irreparable damage.<sup>363</sup> A final decision of a communication, including recommendations, is forwarded to the state party, the Secretary General and the Assembly. The Assembly can ask the Commission for an in-depth study of the situation leading to a factual report.<sup>364</sup> Inspired by the provisions on inter-State complaints, the Commission strives to solve human rights disputes presented by individual complaints through amicable resolution.<sup>365</sup> From the point of view of individual victims, this deprives them of a declaration by the Commission that the state's action was a violation of the ACHPR. The Commission has been very reluctant to order a state to pay compensation or provide any other form of reparation.<sup>366</sup> Where the Commission has found that the complainant was entitled to reparation, it has left for the state (i.e. the violator) to determine the amount.<sup>367</sup> Even if communications to the Commission are regarded as a form of remedy, there is no enforcement mechanism. The implementation of the Commission's findings depends on the good will of the state party concerned.<sup>368</sup> The hope is that the new Court will rectify some of these weaknesses.

The Protocol establishing the new Court implies a strengthening of the protection of human rights in Africa. One shortcoming is the restrictive approach to individual complaints. As a compromise, NGOs and individuals are only allowed direct access to the Court if the state concerned has made a declaration allowing such complainants.<sup>369</sup> If such a declaration is lacking, there is still a possibility to complain to the Commission, which may submit cases to the Court.<sup>370</sup> On a more positive note, the Protocol includes a provision whereby the Court, in case of violation, shall order the state to remedy the violation.<sup>371</sup> Article 27 expressly mentions payment of fair compensation and reparation. This signifies an improvement of the right to remedy for individual victims of human rights violations. The Court has a very broad material scope, as it is empowered to apply the provisions of the ACHPR as well as any other relevant human rights instrument ratified by

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<sup>362</sup> Rules of Procedure of the African Commission on Human and People's Rights, adopted on October 6, 1995

<sup>363</sup> *Ibid.*, Rule 111(1)

<sup>364</sup> *Ibid.*, Rule 120(2) and (3), and ACHPR Art. 58

<sup>365</sup> Orlu Nmehielle, p. 208

<sup>366</sup> Bottiglieri, p. 131, and Orlu Nmehielle, p. 238

<sup>367</sup> *Emgba Mekongo Louis v. Cameroon*, African Commission on Human and Peoples' Rights, Comm. No. 59/91 (1995), para. 2

<sup>368</sup> Orlu Nmehielle, p. 239

<sup>369</sup> Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, Art. 5 and Art. 34

<sup>370</sup> *Ibid.*, Art. 5

<sup>371</sup> *Ibid.*, Art. 27

the states concerned.<sup>372</sup> This could give rise to distinctive jurisprudence in the future. As an example, the Court could be used as revenue for violations of articles in the ICCPR even though the same rights are not included in the ACHPR. For states parties, such as Rwanda, which are not parties to the complaint mechanism before the HRC, this is a rather revolutionary development. It will be interesting to see how far the Court will go in this regard. As the Court is not yet operational, rules of procedure are still to be decided upon. These rules may further clarify the standing of individual victims in future proceedings.

## **5.2 Non-legally binding instruments**

The most elaborate provisions on victims' rights are found in non-legally binding instruments. These instruments are nevertheless of importance as they indicate the development of international human rights standards. Some of the rights in non-binding instruments may have reached the status of customary international law, and others may serve as a starting point for subsequent binding instruments.

The right to an effective remedy for human rights violations was introduced already in 1948 when the UN General Assembly adopted the UDHR. Article 8 gives everyone, whose fundamental rights have been violated, a right to an effective remedy by a competent national tribunal. Many of the rights in the UDHR have today reached the status of customary international law and have served as the basis for binding instruments. The UDHR was the first step towards an International Bill of Rights (today also including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights).

Since 1948, the UN has further elaborated the right to an effective remedy. Steps have been taken through the adoption of binding instruments, through the adoption of declarations, and by the appointment of Special Rapporteurs and Independent Experts. In the following my focus will be on the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, and on the work done by appointed Special Rapporteurs and Independent Experts.

### **5.2.1 The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power**

The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the UN General Assembly in 1985, is one of

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<sup>372</sup> Ibid., Art. 7

the earlier UN efforts to deal with rights of victims.<sup>373</sup> The Declaration establishes a framework of principles.

Victims of crimes are entitled to access to justice and prompt redress through expeditious, fair, inexpensive and accessible procedures.<sup>374</sup> Furthermore, the needs of victims of crime should be met by assisting victims throughout the legal process and the implementation of measures to ensure their safety from intimidation and retaliation.<sup>375</sup> Where appropriate, offenders should make fair restitution to victims of crime or their families and dependants.<sup>376</sup> When a public official or another official agent caused the harm, the state, or the state or government successor, is responsible for restitution.<sup>377</sup> If the offender is not able to compensate the victim, the state should make an effort to provide financial compensation. In this regard, national funds for compensation of victims are encouraged.<sup>378</sup> Victims should receive necessary assistance, including psychological and material assistance, through governmental or other means.<sup>379</sup>

The Declaration does not specifically mention victims of international crimes, and its focus is more on domestic criminal law. The section on victims of abuse of power partly remedies this. Victims of abuse of power are persons who have suffered harm through acts not yet criminalised in national legislation, but that are in violation of internationally recognised human rights norms.<sup>380</sup> These victims should have access to remedies including compensation and assistance.<sup>381</sup>

A handbook on justice for victims (hereinafter the handbook) further elaborates the use and application of the Declaration.<sup>382</sup> Additionally, a guide for policymakers on the implementation of the Declaration (hereinafter the guide) clarifies its provisions.<sup>383</sup> It underlines the importance of responding to victims' needs through counselling, compensation and accompaniment to court. All stages of the criminal proceedings should take into account the interests of victims. The handbook highlights the role of judges in ensuring respectful and fair treatment of victims.<sup>384</sup> Victims should be notified of the release of the defendant, at

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<sup>373</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by UN General Assembly Res. 40/34 of 29 November 1985

<sup>374</sup> *Ibid.*, Principles 4 and 5

<sup>375</sup> *Ibid.*, Principle 6 (c) and (d)

<sup>376</sup> *Ibid.*, Principle 8

<sup>377</sup> *Ibid.*, Principle 11

<sup>378</sup> *Ibid.*, Principles 12 and 13

<sup>379</sup> *Ibid.*, Principle 14

<sup>380</sup> *Ibid.*, Principle 18

<sup>381</sup> *Ibid.*, Principle 19

<sup>382</sup> UN Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims- On the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Centre for International Crime Prevention, New York 1999

<sup>383</sup> UN Office for Drug Control and Crime Prevention, *Guide for Policymakers- On the Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Centre for International Crime Prevention, New York 1999

<sup>384</sup> *Ibid.*, p. 69

least when possible.<sup>385</sup> Further, judges should use their authority to protect victims and witnesses from harassment and threats.<sup>386</sup> The guide acknowledges the Declaration as a reflection of the will of the international community to restore the balance between the rights of victims and the rights of offenders and suspects.<sup>387</sup> It entails comparative studies of implementation measures in connection to each provision of the Declaration.

Although the Declaration is a non-legally binding instrument, it has had a positive effect on national legislation. Many countries have endeavoured to improve their legislation with respect to victims' compensation, protection and assistance.<sup>388</sup> The number of jurisdictions allowing for state compensation is growing, and governments have started to recognise their responsibility to develop and support programmes combating victimisation.<sup>389</sup>

## 5.2.2 Special Rapporteurs and Independent Experts of the UN Commission on Human Rights

The UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities has addressed the question of victims' rights in case of human rights violations. Studies prepared by special rapporteurs and independent experts have largely contributed to the discussion on victims' legal rights.

The van Boven basic principles and guidelines, prepared by the special rapporteur Professor van Boven, stress the right to a remedy and the right to reparation for victims of violations of human rights and humanitarian law.<sup>390</sup> Duties imposed on states include to prosecute and punish the perpetrators, and to provide access to national and international remedies.<sup>391</sup> National legal systems shall ensure accessible and adequate redress as well as protection from intimidation.<sup>392</sup> Each state is under a duty to permit expeditious and effective reparations proportionate to the gravity of the

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<sup>385</sup> Ibid., p. 70

<sup>386</sup> Ibid., p. 71

<sup>387</sup> UN Office for Drug Control and Crime Prevention, *Guide for Policymakers- On the Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Centre for International Crime Prevention, New York 1999, p. 8

<sup>388</sup> Bottigliero, p. 169

<sup>389</sup> UN Office for Drug Control and Crime Prevention, *Guide for Policymakers- On the Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Centre for International Crime Prevention, New York 1999, p. 33 and p. 8

<sup>390</sup> "Basic Principles and Guidelines on the Right to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law", annex to E/CN.4/1997/104

<sup>391</sup> Ibid., Principles 2 and 5

<sup>392</sup> Ibid., Principle 5

violation and the harm caused by the violation.<sup>393</sup> In determining the reparations, states have the flexibility to choose one or more forms of reparations. A non-exhaustive list includes reparation in the form of restitution, rehabilitation, satisfaction and guarantees of non-repetition.<sup>394</sup> This list of reparations shows that reparation does not have to be monetary, but could also involve psychological care, disclosure of the truth and sanctions against those responsible for the violations.

The revised van Boven principles, submitted by the independent expert Professor Bassiouni, further elaborate the victims' right to a remedy and reparation.<sup>395</sup> It is added that victims should be treated with compassion and respect, that their and their families' safety should be ensured and that measures should be taken to avoid retraumatisation.<sup>396</sup> Remedies include the victim's right to access to justice, reparation and access to the information concerning the violations.<sup>397</sup> The state's duty to provide reparation to victims for its acts or omissions constituting violations is acknowledged as an existing international obligation.<sup>398</sup> Professor Bassiouni concludes that although a successor government is liable for violations committed by previous regimes, this can create an unfair burden that the international community may need to address. In this context, Rwanda is used as an example.<sup>399</sup> This view is reflected in the principles where the duty of successor governments to provide reparation is not acknowledged as a clear international obligation.<sup>400</sup> The same is true for the state's responsibility with regard to violations committed by third parties.<sup>401</sup> In November 2005, the Third Committee of the UN General Assembly adopted The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, almost identical to the draft elaborated by Professor Bassiouni.<sup>402</sup>

Mr. Joinet's study on the question of impunity of perpetrators of human rights violations focuses on three components of victims' legal rights, the

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<sup>393</sup> Ibid., Principle 7

<sup>394</sup> Ibid., Principles 12-15

<sup>395</sup> "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law", annex to E/CN.4/2000/62

<sup>396</sup> Ibid., Principle 10

<sup>397</sup> Ibid., Principle 11

<sup>398</sup> Ibid., Principle 16 in combination with paragraph 8 in E/CN.4/2000/62

<sup>399</sup> Bassiouni Cherif M., *Report of the independent expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms*, E/CN.4/1999/65, paragraph 87

<sup>400</sup> "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law", annex to E/CN.4/2000/62, principle 20 in combination with paragraph 8 in E/CN.4/2000/62

<sup>401</sup> Ibid., principle 17 in combination with paragraph 8 in E/CN.4/2000/62

<sup>402</sup> "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law", A/C.3/60/L.24, adopted by the Third Committee without vote at the 39<sup>th</sup> Meeting on 10 November 2005.

right to know, the right to justice and the right to reparation.<sup>403</sup> The right to know is described as an inalienable right to know the truth about past events and the circumstances that led to the perpetration of atrocious crimes. To avoid recurrence of violations, the right to know is not only for the victims but also for the population as a whole.<sup>404</sup> The principles recommend the establishment of independent and impartial extrajudicial commissions to ascertain the truth.<sup>405</sup> The right to justice entails the State's duty to prosecute and punish, and the victims' right to an effective and fair remedy.<sup>406</sup> Victims' right to reparation implies a duty on behalf of the State to make reparation, and the possibility for victims to seek reparation from the perpetrator.<sup>407</sup>

Taken together, the three studies all include the victim's right to access to effective and fair remedies. The state's duty to investigate, prosecute and punish is emphasised. Acceptable reparations do not have to be of one specific form but can take several different forms. Non-repetition is included in the concept of reparation. Furthermore, victims should be protected from intimidation, and have access to all information concerning their cases.

## 5.3 International Criminal Tribunals

The legal framework of international criminal tribunals helps us to understand the perception of victims' rights in international law. It is likely to influence the future development of victims' rights and their standing as customary international law. This is the main reason for including the statutes of the ICC and the Ad Hoc Tribunals in this thesis. While the UN Security Council established the Ad Hoc Tribunals, the ICC is created by a treaty open for states to sign, ratify and accede. Rwanda is so far not a state party to the ICC.

### 5.3.1. The Ad Hoc Tribunals<sup>408</sup>

*“He will be all healthy and she is dying of AIDS. What justice does she get?”<sup>409</sup>*

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<sup>403</sup> Joinet, Louis, *Question of the impunity of perpetrators of human rights violations (civil and political)*, Revised final report by Mr. Joinet, “Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity”, annex II, E/CN.4/Sub.2/1997/20/Rev.1

<sup>404</sup> Ibid., principles 1-3

<sup>405</sup> Ibid., principles 5-6

<sup>406</sup> Ibid., principles 18 and 34

<sup>407</sup> Ibid., principle 33

<sup>408</sup> The ICTR and the ICTY have almost similar Statutes, and deal with victims and witnesses in the same way. My references to the ICTR Statute are therefore often equally valid for the ICTY.

<sup>409</sup> On the problems facing rape survivors testifying at the ICTR. Interview with Elizabeth Onyango, programme coordinator, African Rights, Kigali 26/7/2005



The ICTR and the ICTY have been heavily criticised for their way of handling victims and witnesses.<sup>410</sup> The Tribunals' statutes have no provisions on victim participation during trial. Included are provisions on the protection of victims and witnesses, as well as on restitution as part of penalties.<sup>411</sup>

A Victims and Witnesses Unit has been set up under the Registry.<sup>412</sup> Its main tasks are to recommend protective measures for victims and witnesses, and to provide them with support and counselling.<sup>413</sup> The role of this unit does not seem to extend beyond protecting victims in their role as witnesses.<sup>414</sup> A judge or a chamber can order appropriate measures for victims and witnesses and can prevent the disclosure of the identity and whereabouts of a victim or a witness.<sup>415</sup> The chamber shall control the manner of questioning to avoid intimidation of victims and witnesses.<sup>416</sup> Despite this provision, some rape victims have been harassed and intimidated in the proceedings.<sup>417</sup>

The approach to compensation taken by the ICTR is an indirect one. The rules of procedure and evidence include a provision on compensation to victims.<sup>418</sup> This provision states that judgments finding an accused guilty of a crime, which has caused injury to a victim, shall be transmitted to the competent authorities of the State concerned.<sup>419</sup> From that moment on, national legislation governs the possibilities for victims to bring action in national courts to obtain compensation.<sup>420</sup> Consequently, the ICTR does only have the role of deciding the criminal responsibility for such an injury. Unlawfully taken property, associated with a crime under the statute and object of a finding in the judgment, shall be restored to its rightful owner.<sup>421</sup> This requires that investigations include sufficient information as to determine the rightful owner.<sup>422</sup> To this date, the ICTR has not issued any restitution orders nor forwarded any compensation matters to national courts.<sup>423</sup> Although the success of such a compensation claim in Rwandan

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<sup>410</sup> See for example Bottiglieri, pp. 196-211

<sup>411</sup> ICTR Statute, Art. 21 and Art. 23(3)

<sup>412</sup> ICTR Rules of procedure and evidence, Rule 34. During my time in Rwanda, I tried to get an interview with a representative of the Victims and Witnesses Unit in Kigali. Unfortunately, the head of the unit in Arusha never got back to me with the necessary permission without which the staff would not speak to me.

<sup>413</sup> Ibid.

<sup>414</sup> Bottiglieri, p. 210

<sup>415</sup> ICTR Rules of procedure and evidence, Rule 75

<sup>416</sup> Ibid.

<sup>417</sup> Interview with Elizabeth Onyango, programme coordinator, African Rights, Kigali 26/7/2005

<sup>418</sup> ICTR Rules of procedures and evidence, Rule 106

<sup>419</sup> Ibid.

<sup>420</sup> Ibid.

<sup>421</sup> ICTR Statute, Art. 23 (3), and ICTR Rules of procedure and evidence, Rule 88 (B) and Rule 105

<sup>422</sup> Bottiglieri, p. 202

<sup>423</sup> Ibid.

courts could be doubted, a forwarded compensation matter would at least be of symbolic value for the victims concerned.

### 5.3.2 The International Criminal Court

The Statute of the ICC represents a trend towards a more victim-oriented approach inspired by restorative justice ideas.<sup>424</sup> Victims are transformed from merely witnesses to participants in their own right, signifying a move towards a model of international criminal law encompassing restorative justice and social welfare.<sup>425</sup> This is a change of direction since the establishment of the ad hoc Tribunals, perhaps influenced by the criticism against their way of handling victims and witnesses.

In future cases before the ICC, victims and their families will be able to participate at different stages of the proceedings. Victims may submit information to the prosecutor to initiate an investigation, they shall get information during an investigation, they can communicate their observations on all stages, and they may participate in hearings as parties.<sup>426</sup>

Further, the ICC Statute establishes a far-reaching reparation scheme. The Court is to establish principles regarding reparation to victims, including restitution, compensation and rehabilitation.<sup>427</sup> Judgments may order appropriate reparations to be made by the convicted person, or order that the Trust Fund shall pay compensation.<sup>428</sup> A Trust Fund is established to enable the implementation of victims' right to redress.<sup>429</sup> An interesting question is the determination of who should qualify as a victim for the purposes of the fund. The ICC Statute states that the fund shall benefit victims, including their families, of crimes within the jurisdiction of the Court. Whether this means that the fund also covers victims without connection to ICC proceedings is open to debate.<sup>430</sup>

The ICC is complementary to national criminal jurisdictions. A case will not be admissible before the ICC if it is under consideration by a state that has jurisdiction over the crime. Only if that state is unwilling or unable to investigate and prosecute the case will it be admissible.<sup>431</sup> In determining unwillingness, the ICC will consider unjustified delays in the national

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<sup>424</sup> Schabas, William A., *An Introduction to the International Criminal Court*, Second edition, Cambridge University Press 2004, p. 172

<sup>425</sup> Haslam, Emily, "Victim Participation at the International Criminal Court: A Triumph of Hope over Experience?", McGoldrick, Dominic, Rowe, Peter and Donnelly, Eric (eds.), *The Permanent International Criminal Court, Legal and Policy Issues*, Hart Publishing 2004, p. 315

<sup>426</sup> ICC Statute, Art. 15, Art. 19, Art. 53 and Art. 68. See also ICC Rules of procedure and evidence, Rules 89-99, where the participation of victims in the proceedings are pronounced in detail.

<sup>427</sup> *Ibid.*, Art. 75 and ICC Rules of procedure and evidence, Rule 97

<sup>428</sup> ICC Statute, Art. 75

<sup>429</sup> *Ibid.*, Art. 79

<sup>430</sup> Bottiglierio, pp. 230-233

<sup>431</sup> ICC Statute, Art. 17 (1) (a)

proceedings, whether the proceedings are independent and impartial and if the proceedings are undertaken with the aim of shielding the accused from criminal responsibility.<sup>432</sup> A state will be considered unable to handle a case where the national judicial system is unavailable or collapsed, and therefore unable to carry out the proceedings.<sup>433</sup>

It is clear that the ICC Statute has introduced a new way of looking at the role of victims in international criminal proceedings. How this will work out in practice remains to be seen. Nevertheless, the high number of state parties to the ICC Statute shows a broad support for the victims' rights codified therein. Of importance is that the ICC Statute influences domestic law, as each state party has to amend its legislation to reach the standards set by the ICC Statute.<sup>434</sup>

## 5.4 Customary international law

Victims' rights receive much more attention today than previously. International, regional and national levels all contribute to the on-going development of victims' legal rights. The various instruments and case law dealt with above all include different norms on the rights of victims. Some norms are consequently included, others are only incorporated in some instruments. Although there are different interpretations and emphasises on the components of the right to a remedy, there seems to be a universal acceptance of the existence of such a right.

An interesting question is whether any of these rights have reached the standard of customary international law. For a norm to become part of customary international law, state practice needs to be uniform and extensive, and the rationale underlying the states' practice must be that they consider the norm legally binding.<sup>435</sup> The state's obligation to provide a domestic legal remedy to victims of violations of human rights and international humanitarian law is well founded in international law.<sup>436</sup> Bassiouni argues that contemporary state practice reinforces the norm of effective remedy, as contained in international instruments, as a norm of customary international law.<sup>437</sup> The domestic implementation of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power may indicate that states regard some norms as legally binding. Furthermore, Bassiouni contends that the state's obligation to provide reparation for its own breaches may be part of customary international law.<sup>438</sup> Bottigliero includes reparation (for material and moral damages),

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<sup>432</sup> Ibid., Art. 17 (2)

<sup>433</sup> Ibid., Art. 17 (3)

<sup>434</sup> Bottigliero, p. 242

<sup>435</sup> Shaw, pp. 70-71

<sup>436</sup> Bassiouni, Cherif M., "Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights", Bassiouni, Cherif M. (ed.), *Post-Conflict Justice*, Transnational Publishers 2002, p. 43

<sup>437</sup> Ibid., p. 46

<sup>438</sup> Ibid., pp. 48-49

guarantees of non-repetition and a duty of states to prevent, investigate, punish and prosecute those responsible, as minimum basic elements of the right to redress for victims of crimes under international law.<sup>439</sup> The development of the victims' role in international criminal tribunals is indicative of a development towards a more comprehensive regime of redress.

To conclude, victims' of serious human rights violations seem to have a universal procedural right to an effective remedy. Likewise, they seem to have a substantive right to reparation, at least when the wrongful act is attributable to the state. Still lacking are comprehensible norms on the gradation of the different modalities of reparation.

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<sup>439</sup> Bottigliero, p. 250

# 6 Analysis and Conclusions

This chapter analyses the Gacaca system in light of Rwanda's legal obligations with regard to victims' rights. In the following, I will go through the areas of concern for victims as identified in chapter four and connect them to possible legal obligations. I will then try to answer the question whether Rwanda is in breach with its obligations or not.

It is easy to have opinions about the Gacaca system. There are of course both weaknesses and strong points within this experiment of large-scale justice. What should be questioned is whether there is a better alternative. Much critique has been raised, but very few critics have actually suggested another possible alternative. Instead of only presenting the weak points, this chapter ends with some recommendations on possible improvements.

## 6.1 Rwanda's legal obligations

By ratifying or acceding human rights instruments, states undertake legally binding obligations. These obligations are commonly referred to as obligations to respect, protect and fulfil human rights. The obligation to respect means that the state should not engage in any action that would be in violation of a human right. The obligation to protect implies a responsibility to protect individuals from violations not only stemming from the state but also from third parties. The obligation to fulfil goes further in obliging the state to take active measures to fulfil and implement human rights. Hence, obligations are both positive and negative in their character. Closely connected to these obligations is the right to an effective remedy. An effective implementation is required at the domestic level to ensure human rights not only in law but also in fact. Rwanda, as a state party to the Genocide Convention, the ICCPR and the ACHPR, has undertaken to comply with legally binding obligations.

The state obligation to provide victims of human rights violations with an effective remedy is clear under article 2 (3) ICCPR. Article 2 (3) does not provide victims with an independent right, but can only be invoked in connection with the alleged violation of a substantive right included in the Covenant. In the case of Rwanda, there is no doubt that most of the crimes committed during the war and the genocide also constituted violations of substantive rights as enshrined in the ICCPR, for example the right to life in article 6 and the prohibition of torture in article 7. The notion of an effective remedy enshrines a state duty to provide accessible, prompt and impartial remedies, to investigate alleged violations, to prosecute and punish those responsible and to provide reparation. Judicial remedies under article 2 (3) would most likely have to live up to the standards of article 14 (1) to be deemed effective. The case law of the HRC also emphasises the obligation to ensure non-repetition of the violations. This is in line with the general state obligations with regard to human rights, to protect, respect and fulfil.

The more serious the human rights violations, the stronger are the duties and the expectations on the state.

Under the ACHPR, an individual alleging a human rights violation has a right to have his or her cause heard by a competent national organ. Such an organ has to be impartial and independent. Unduly prolonged domestic procedures are not acceptable. The ACHPR does not confer any right of reparation on victims of human rights violations in general, and the African Commission has been hesitant in awarding reparations. However, the new African Court shows a development towards a more comprehensive regime of reparation within the African system.

Although the Genocide Convention does not include any rights of victims, it does include an important provision on the state's duty to punish and prosecute. This duty is further underlined by the erga omnes obligations of all states in connection to the crime of genocide.

The non-binding instruments on victims' rights are much in line with the ICCPR and the case law of the HRC. Further, they urge the victims' right to protection, the right to all necessary assistance and honourable treatment. In particular, the right to assistance is not found in binding instruments. The value added by these instruments lies in their clarifications of concepts such as reparation, and in their indications of emerging norms within this field of law. For Rwanda, they do not really add any legally binding obligations, instead they emphasise already existing obligations.

A comparison between the statutes of the ICTR, the ICTY and the ICC shows the changing approach towards victims in international criminal law. Unfortunately, Rwanda is not yet a party to the ICC. Consequently, this development has no impact on Rwanda except for indicating emerging norms of international customary law.

## **6.2 Is Rwanda in breach of its obligations?**

With the Gacaca system, victims of genocide and crimes against humanity are given a remedy, at least in theory. In practice, this remedy is equipped with some serious problems, which could effect Rwanda's fulfilment of its legal obligation to provide victims of human rights violations with an effective remedy.

### **6.2.1 Investigate, prosecute and punish**

The reliance on active public participation is both a strong point and a weakness. The legitimacy of Gacaca will improve with high participation, thus signifying a general confidence in the proceedings. With high participation, Gacaca will be a process by the people and not one simply imposed by the state. Consequently, if the level of participation is high, Gacaca could achieve its aims of truth, justice and reconciliation. The success of investigations and prosecutions heavily relies on a cooperative

and truth-telling audience. The public plays the role of both the police investigator and the prosecutor. This implies that victims will not get to know the truth about what happened if witnesses and accused remain silent. From the point of view of Rwanda's legal obligations, this scenario is problematic. Can investigations conducted solely by the people, i.e. the perpetrators, the victims, their families, friends and neighbours, be effective and impartial? On the other hand, would an investigation conducted by the police be effective, especially in consideration of the caseload and the time that has passed since the crimes were committed? The most problematic scenarios arise in areas with few or no survivors left. It is doubtful whether investigations in these areas will fulfil the standards laid down by for example the HRC. Above all, the behaviour of the judges is of outmost importance. In getting the truth, judges play a crucial role where their ability to ask pertinent questions and lead the procedure often determine the success of the proceedings.

According to the Genocide Convention and the case law of the HRC, Rwanda is under a clear duty to prosecute and punish those responsible for the genocide. The same duty applies to all violations of international human rights law. In Gacaca, persons accused of the crime of genocide are prosecuted. As long as prosecution takes place, it should not be that problematic that the people themselves play the role of prosecutor. The problem rather lies on the earlier investigation stage. Investigations need to be effective, otherwise the case will be much weaker once it reaches prosecution stage.

The HRC does not provide any guidelines on punishment in its case law, nor does the Genocide Convention beside the notion of "effective penalty" in article 5. The assessment of appropriate sentences seems to be left to the discretion of each state. For crimes of international law, the most important state obligation is to combat impunity. The underlying rationale of this obligation is the view that prosecution and punishment work as a deterrent for future violations. Some victims regard the guilty plea system in Gacaca as a form of partial amnesty. Although this opinion may be understandable, it is difficult to agree with it. A perpetrator who pleads guilty is still punished, and the system of guilty pleas may be very helpful to find out the whole truth about the genocide. As long as perpetrators are prosecuted and punished, Rwanda is probably not in breach of its obligations.

## **6.2.2 Competent, impartial and independent organs**

Another pressing question is whether the Gacaca tribunals are competent, independent and impartial. The ICCPR, article 2(3) in combination with article 14 (1), and the ACHPR, article 7 in combination with article 26, oblige Rwanda to provide victims with a remedy before competent, impartial and independent organs. The Gacaca courts are composed by elected lay judges, most of them without any previous education and some without sufficient skills in reading and writing. Considering the many

reports of faults made by these judges, one has to question if the education given to them is sufficient. Consequently, the overall competence of the Gacaca judges is highly doubtful.

An even more pressing point is the issue of impartiality. So far, one out of ten judges has been replaced due to accusations of involvement in the genocide. On a positive note, the removals do indeed show that the system deals with the problem. The negative aspect is that it is impossible to know if all judges involved in the genocide have been replaced. It is likely that more cases will occur, and that some judges are not removed although they should have been. In particular, this can be the case in areas with few survivors. The removals are further likely to have a negative effect on the credibility of the system. With judges elected from within the communities, the seat often have close connections to the parties. For Gacaca to be perceived as impartial, it is central that judges do not sit on any cases where their impartiality is in doubt. Unfortunately, a common error during the proceedings is the seat's omission to inform about the rules on impartiality as laid down in the Gacaca legislation. When the parties do not know about the right to claim the replacement of a judge, they will not be able to use it effectively.

The independence of the Gacaca courts is hard to assess. Although the judges themselves take all the decisions in closed deliberations, the impact of the authorities seems to be rather big. First, the legal education of judges takes place under the auspices of the SNJG. This means that the judges are from the beginning taught a politically correct interpretation of the legislation. This would in particular be true with regard to crimes against humanity and the alleged crimes of the RPF. The SNJG is also closely supervising the function of the courts, especially through its Gacaca coordinators. One worrying example is the role played by the njumbakumbi, the head of ten households. All jurisdictions accept the role of the njumbakumbi although the law is silent about it. Consequently, something that the authorities instruct as correct is likely to be accepted by the courts, even if it is not supported by any legal provision.

To sum up, the competence, independence and impartiality of the Gacaca courts are not likely reach sufficient standards as laid down by binding legal instruments, at least not in all instances.

### **6.2.3 Accessibility and time**

For a remedy to be effective, it has to be accessible. In practice, not all victims have access to Gacaca. The lack of means to pay for transport and other expenses is a problem. Victims without access to Gacaca lose their possibility to get their voices heard in the process, they do not get a chance to ask for clarifications of facts, and they miss the opportunity to ask for reparation of material damages. Although there is a possibility to submit written testimonies, this can not equal to actual participation. Due to the lack of accurate statistics, it is not possible to assess the number of victims



affected by this problem. Nevertheless, information from various interviewees shows that the problem could be rather big. If nothing is done to enhance the possibilities for all victims to have practical access to Gacaca, Rwanda could be in breach of its obligations to provide an effective remedy.

Additionally, an acceptable effective remedy has to be prompt. The admissibility criteria of the HRC and the African Commission, where unduly prolonged remedies are a valid excuse for not exhausting domestic remedies, underline the importance of time. In the case of Rwanda, most victims have waited for justice for 11 years. Without doubt, this is a very long time and the time-span can have some implications on the possibility to get accurate testimonies. Still, it is difficult to criticise Rwanda on this point as the problems facing the country after 1994 were enormous. What could perhaps be criticised is that it took so many years to implement Gacaca once it was launched as the solution. On the other hand, the Gacaca system is so complex that a too hasty implementation could have undermined the system. Considering the specific situation of Rwanda, it is doubtful that the country is in breach of its obligations on this point.

#### **6.2.4 Assistance, non-repetition and protection**

Due to different reasons, not all persons want to participate in Gacaca. Obviously, the solution is not to force all people to attend Gacaca. If they do not want to be a part of the process, they are not likely to contribute with anything. However, it is important to look into the reasons for non-attendance. If the reason is misinformation, sensitisation should be improved. When the reason is traumatism, it is important to provide assistance and help. In cases of torture, the HRC has included medical and psychological assistance as a form of reparation. Non-binding instruments show an emerging emphasis on assistance to victims. Nevertheless, Rwanda does not seem to be under a legally binding obligation, but rather a moral obligation, to provide accurate assistance to all victims. A counter argument is that Rwanda will have to provide victims with assistance to fulfil its other legally binding obligations.

One common reason for non-participation among victims and witnesses seems to be security concerns. This is especially problematic as Rwanda is under an obligation to ensure non-repetition of the violations. Furthermore, as urged by the HRC in its case law, victims and their families should receive protection from harassment and intimidation. The cases of threats and violence against victims, witnesses and confessing perpetrators are worrying. Of concern is also the attitude of the Ministry of Internal Security, which argues that victims have to realise that they primarily need to protect themselves. Picturing a genocide survivor in a small community, with the majority being either accused of genocide or family members of accused, it is very difficult to see how this self-protection would have any effect. Rwanda is under an obligation to protect all persons in its territory from human rights violations, not only from violations stemming from the state

itself. Of course, it is impossible for a state to hinder all human rights violations committed by third parties. Nonetheless, when the state knows about a problem it should take action before it is too late. This is in particular true when the right to life is at stake. The nature of Gacaca, with more than 10 000 different jurisdictions, makes it extremely difficult to ensure safety everywhere. However, it has to be questioned whether Rwanda is doing what it can to ensure safety before, during and after sessions. It is positive that perpetrators of threats and violence against victims and witnesses are prosecuted and punished. On the other hand, Gacaca sessions often take place without the presence of any security personnel although at least one person belonging to the local defence forces should be present. The access to telephones to alert the police in case of emergency is uncertain in rural areas. For Rwanda, to comply with its legal human rights obligations, it is important to use the existing police force and local defence forces to increase the safety of victims as well as witnesses and confessing perpetrators.

### **6.2.5 Reparation**

The duty to provide victims of human rights violations with reparation is firmly established by the case law of the HRC. The reparation has to be proportionate to the seriousness of the violation as well as to the harm caused by the violation. Subsequently, for a serious human rights violation not any kind of reparation is acceptable. The notion of reparation includes restitution, compensation, rehabilitation and satisfaction. These modalities of reparation are not mutually exclusive. Genocide and crimes against humanity being recognised as two of the most heinous crimes, proportionate reparation would arguably include compensation for both material and moral damages. Gacaca deals with material damages and awards reparation in the form of restitution, compensation or hours of work. Although this is better than nothing, the inability of the state to address the question of moral damages creates great dissatisfaction.

Even if the current government is not responsible for the genocide, as a successor it is still responsible for the crimes committed by the previous regime. The genocide was state-sanctioned to the highest degree. However, according to international law principles, a state is responsible for the acts or omissions of its agents or organs, and normally not for the acts of private parties. Acts of genocide committed in Rwanda by private parties under the direct command of state controlled organs, such as the army, are likely to entail state responsibility. As not only persons under the direct control of the state carried out the genocide, the current Rwandan government may not be responsible to provide reparation to all victims. One counter-argument to this line of reasoning would be that the state is nevertheless responsible for all acts as it failed to protect individuals from human rights violations, and instead instigated and supported all acts of genocide and crimes against humanity.

The primary responsibility to provide reparation has to lie with the individual perpetrator. In Rwanda, the problem is the apparent lack of means of most perpetrators. For this reason, and in light of the non-inclusion of moral damages in genocide cases before ordinary courts, civil claims for compensation are not likely to succeed. This non-inclusion policy is highly questionable and puts the independence of the ordinary courts in doubt. It is debatable whether this practice is compatible with article 14 (1) of the ICCPR, as this provision gives individuals the right to turn to the courts for adjudication of civil disputes. The absence of recognition of the perpetrator's individual responsibility to compensate his or her victims, in the Gacaca system as well as in the ordinary courts, is worrying. Even when the perpetrator is not able to pay, an inclusion of awards for moral damages would be of symbolic value.

As the situation is today, the majority of victims will be left without any reparation if it is not given to them by the state. There seems to be an emerging trend to establish funds compensating victims when the perpetrator is not able to. The ICC has established a trust fund for victims, and the Basic Principles of Justice for Victims of Crime and Abuse of Power recommend states to establish funds providing for compensation. However, even if this trend shows an emerging recognition of this practice, it does not create legally binding state obligations. Arguably, Rwanda is still responsible to provide reparation as the responsibility of the genocide and the other crimes committed lies with the previous state, whether as perpetrator, inciter or abetter.

## 6.3 Conclusions and recommendations

*“Ça [Gacaca] va mieux que rien.”<sup>440</sup>*

*“It is still better to do justice, albeit unsatisfactorily, than not do justice at all.”<sup>441</sup>*

The Gacaca system is not perfect, it comes with both positive and negative sides. Still, it is hard to not agree upon the conclusion that it is far better than nothing. That Gacaca, unlike the ICTR, is a system of justice within Rwanda, created by and for Rwandans is likely to increase the public's confidence in the system. Another positive aspect of Gacaca is that it is a big step towards recognising individual criminal responsibility. This is of great importance in a country where impunity has long prevailed for state-sanctioned crimes. People need to understand that they are responsible for their acts even when the authorities sanction them. For the victims, prosecution and punishment are important elements of redress.

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<sup>440</sup> In English: “It [Gacaca] is better than nothing”. Interview with Auréa Kayiganwa, executive secretary, AVEGA, Kigali 21/7/2005

<sup>441</sup> Fierens, Jacques, “Gacaca Courts: Between Fantasy and Reality”, *Journal of International Criminal Justice*, 3 (2005) 896-919, p. 919

A meaningful criminal process, where the truth comes out, necessitates a thorough investigation and a competent, independent and impartial forum. In particular, the competence and impartiality of the Gacaca judges is doubtful. This is one of the main problems of Gacaca, and one that cannot be entirely solved as the system is founded on principles of community-made justice. Further problems are access to justice and the matter of security. However, these issues are not impossible to handle. Of more concern is the seemingly never-ending debate about reparation. For victims, justice will not be complete unless some, at least symbolic, compensation is awarded. It is hoped that a new legislation will provide a more all-encompassing scheme of reparation. With regard to Rwanda's prospects of a peaceful future, it is extremely distressing that there is no remedy for all victims, thus including victims of genocide, war crimes and crimes against humanity. The aims of Gacaca, to achieve truth, justice and reconciliation, make big promises and create great expectations. In the end, the non-inclusion of RPF crimes may well hinder the achievement of these goals.

In the following, I make some suggestions on improvements that could be done. With creative and innovative solutions, changes do not necessarily need to be too costly for the state.

- For Gacaca to succeed, the judges have to receive better training in the law and the process. It should not be possible to be eligible without sufficient reading and writing skills. Additionally, a system where the background of elected judges is checked would help to avoid future replacements. For judges to keep up the hard work in the years to come, they should receive better remuneration, this would also make some of them less prone to accept bribes.
- If Gacaca is to be an effective remedy, it has to be accessible for all victims and witnesses. A programme providing free transport is recommended. In practice, this could be worked out in cooperation with victims' organisations, or by a system where each victim or witness is refunded either by the court during the session or by the local authorities where they reside. For those who, for one reason or another, do not want to return to their old villages, it is important to receive information on how to submit written testimonies.
- Security for victims, witnesses and confessing perpetrators is crucial. It is problematic that the general opinion is that each citizen is responsible for his or her own security and safety. Rwanda should continue to prosecute and punish those responsible for intimidations and violence against victims, witnesses and confessing perpetrators. During the actual sessions, someone from the local defence force should always be present. Additionally, it is important that the judges are firm on this point and do not allow any bad behaviour during the sessions. In connection to eventual mass releases of prisoners in the future, victims should get better, and accessible, information on the prisoners who are being released.

- The difficult issue of reparation has to be solved. Although the state is poor, budget priorities should give precedence to the needs of victims. Compensation does not necessarily have to be monetary. As an example, the state could give one goat to each household. When the lack of means is the problem, an innovative solution like that could be helpful. A new legislation on reparation should likewise compensate all victims and not exclusively victims of genocide. With due regard to the fact that not all perpetrators will be brought to justice, e.g. those who reside in neighbouring countries, and the unlikely success of any civil claims, beneficiaries of a new reparation scheme should not have to present a judgment to be eligible. To further underline the individual criminal responsibility of perpetrators, Gacaca judgments could award at least symbolic reparation for moral damages. An award equalling to as little as one dollar would be better than nothing, and of significant symbolic value for the victims.
- Finally, Rwanda needs to let the crimes committed by the RPF out in the open. The failure to address these crimes is a major weakness of the Rwandan justice system. The political climate in Rwanda does not allow the voices of victims of these crimes. Labelling all voices of opposition as promoters of divisionism is not compatible with civil and political rights. A sincere combat against impunity cannot be partial, instead it has to stress that all individuals are responsible for their acts or omissions. Judicial rules and principles have to apply equally to all, otherwise the building of a democratic society for all groups will fail. With regard to Rwanda's legal obligation to ensure non-discrimination ( ICCPR, article 2(1), and ACHPR, article 2), the practice of excluding one group of victims from redress is very serious. Victims of RPF crimes need to be taken seriously, only then can Rwanda achieve real reconciliation. As Gacaca does not adjudicate these cases, another accessible and realistic forum has to be established. If Hutus start to see Gacaca as victor's justice, they are not likely to participate and tell the truth. In this respect, it is difficult to see how Gacaca can succeed if victims of RPF crimes are not remedied at all.

For Rwanda to live up to its international human rights obligations, improvements are necessary. As the situation stands today, Gacaca is likely to provide some victims with an acceptable remedy. However, that is far from sufficient to discharge Rwanda's legal obligations.



# Supplement A

## **ICCPR, Article 2 (3)**

Each State Party to the present Covenant undertakes:

- a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- b) To ensure that any person claiming such a remedy shall have his right determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- c) To ensure that the competent authorities shall enforce such remedies when granted.

## **ICCPR, Article 14 (1)**

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

## **ACHPR, Article 7 (1)(a)**

Every individual shall have the right to have his cause heard. This comprises:

- a) the right to appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force

## **ACHPR, Article 26**

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

## **The Genocide Convention, Article 4**

Persons committing genocide or any of the other acts enumerated in article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

### **The Genocide Convention, Article 5**

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect of the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other enumerated acts in article 3.

### **The Genocide Convention, Article 6**

Persons charged with genocide or any of the other enumerated acts 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.



## Supplement B



*“Let’s tell what we witnessed, confess what we did and we will be healed”*  
Gacaca sensitisation signpost in Gikongoro.



Gacaca courthouse in the outskirts of Kigali.



Gacaca sensitisation theatre, with actors playing Gacaca judges and witness, takes place in Rusagara.



People gather for a Gacaca session on the grass in Ruhengeri.

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