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UNIVERSITY OF CAPE TOWN
IYUNIVESITHI YASEKAPA • UNIVERSITEIT VAN KAAPSTAD

FACULTY OF LAW
DEPARTMENT OF PUBLIC LAW

**A DESCRIPTION OF GACACA COURTS: DO THEY CONSTITUTE A CATEGORY
OF RETRIBUTIVE OR RESTORATIVE JUSTICE?**

Thesis for Master of Laws in Criminal Justice 2011

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DECLARATION

I hereby declare that I have read and understood the regulations governing the submission of Masters of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of the University, and that this dissertation conforms to those regulations.

Signature:

NKUSI AUGUSTIN

University of Cape Town

DEDICATION

To my dear wife Sehuku Elise Munganyende and to my children Guy Ndekwe Nkusi , Lewis Mfurakabiri , Aimee Cynthia Isimbi and Hugo Prayer Singiza; for your love and support.

May God bless you.

University of Cape Town

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Over all my thanks go to God who allowed everything to happen.

ABBREVIATIONS

BC	: Before Christ
CDR	: Coalition pour La défense de La République
FAR	: Forces Armées Rwandaises
FGC	: Family Group Conferencing
HRW	: Human Right Watch
IBID	: Ibidem
ICTR	: International Criminal Tribunal for Rwanda
JO	: Journal Officiel (official gazette)
MDR	: Mouvement Democratique Rwandais
MRND	: Mouvement Revolutionaire National pour le Developpement
PDC	: Parti Democratique Chretien
PDI	: Parti Democratique Islamique
PL	: Parti Liberal
PSD	: Parti Social
RPA	: Rwanda Patriotic Army
RPF	: Rwanda Patriotic Front
RTL	: Radio-Television des Mille Collines
SNJG	: Service National des Juridictions Gacaca
TIG	: Travaux d'Intérêt Général
UN	: United Nations
US	: United States
UK	: United Kingdom
VOM	: Victim Offender Mediation

TABLE OF CONTENTS

DECLARATION	ii
DEDICATION	iii
ACKNOWLEDGMENTS	iv
ABBREVIATIONS	v
TABLE OF CONTENTS.....	vi
ABSTRACT.....	viii
CHAPTER I	
GENERAL INTRODUCTION.....	1
Section 1 Briefing	1
Section 2 Statement of the Issue of this Study.....	1
Section 3 Research Methodology	3
Section 4 Structure of the study	4
Section 5 Aims and Objectives of the Study	4
Section 6 Scope of the Study	4
CHAPTER II	
HISTORICAL CONTEXT OF THE GACACA COURTS	5
Section 1 Introduction.....	5
A. From Colonialism to the Independence of Rwanda.....	6
B. The Hutu Regime from 1961-1994	10
Section 2 Genocide against Tutsi of 1994	12
A. The reaction of the Hutu government to the attack by RPF on 1 st October 1990.....	12
B. Preparation of the Genocide against Tutsi	13
Section 3 Ensuring justice for suspects of genocide after 1994 (Formal justice).....	18
Section 4 Backlog in the Formal Courts and the Gacaca Idea.....	20
A. The Backlog in the Courts	20
B. The idea of Gacaca.....	21

CHAPTER III

DESCRIPTION OF GACACA COURTS.....	24
Section 1 Traditional Gacaca	24
A. Etymology.....	24
B. Some principles of traditional Gacaca	24
C. Gacaca during colonisation	26
Section 2 Use of Gacaca Courts to Deal with Crimes Committed During the Genocide of Tutsi in 1994.	27
A. The Choice of Gacaca Courts in Lieu of a Truth and Reconciliation Commission.....	27
B. Gacaca courts become effective.....	29
C. The Gacaca courts process	31
D. The implementation of the sentence and the community service (TIG).....	43
E. Criticism of Gacaca courts and human rights issues	44

CHAPTER IV

DISCUSSION OF THE NATURE OF THE GACACA COURTS USING THE CONCEPTS OF RESTORATIVE AND RETRIBUTIVE JUSTICE.....	49
Section 1 Introduction.....	49
Section 2 Restorative Justice and Gacaca Courts	50
A. The Concept of Restorative Justice.....	50
A. Analysis of compatibility with the elements of restorative justice and Gacaca courts.	55
B. Global understanding of restorative justice theories.....	59
Section 3 Retributive Justice and Gacaca Courts	60
A. Concept of retributivism.....	60
B. Comparisons	62
Section 4 The Real Nature of Gacaca Courts	67

CHAPTER V

GENERAL CONCLUSION.....	69
1. An overview	69
2. Recommendations for further research.....	70
BIBLIOGRAPHY.....	72

ABSTRACT

The new Rwandan Government had a major challenge once the genocide against the Tutsi had been brought to an end. How would it be possible to bring justice to the millions of suspects due to the fact that the planners of the genocide tried to involve all Hutu in the murder of the Inyenzi (Tutsi and their moderate Hutu)? The instigators of the genocide assumed that no trials would be instituted because of the vast number of suspects and expected a blanket amnesty. Initially the classical justice system proved incapable of coping with trials within a reasonable time frame for the 130 000 suspects clogging the prisons in a country of 26 326 km² and 8 million inhabitants.

Although transitional justice specialists suggested a Truth and Reconciliation commission, the Rwandan Government preferred something more educative and punitive. By turning from classical courts to the traditional system of Gacaca with its elements of reconciliation, punishment and the involvement of the populace, the Government was able to give the population a role in uncovering the crimes that happened in their villages, by telling the community at the Gacaca courts what they saw. It was necessary for there to be punitive sanctions in order to eradicate the culture of impunity which reigned between 1959 and 1994.

This dissertation examined restorative and retributive justice systems in order to clarify and uncover the real nature of Gacaca courts which is a mixture of both with more elements of the retributive system.

The dissertation also traces the origin of Gacaca courts through a historical background of Rwanda, a description of the Gacaca courts and their procedures, outlines the principles of restorative and retributive justice and compares each to Gacaca courts, in the process revealing the real nature of Gacaca.

CHAPTER I

GENERAL INTRODUCTION

Section 1 Briefing

From October 1990 to 1994, genocide was carried out in Rwanda by a government which identified itself as Hutu and which set out to exterminate the whole Tutsi ethnic minority in retaliation for Rwanda Patriotic Front (RPF) attacks from Uganda on the 1st October 1990. Bagosora and other extremists of President Habyarimana Juvenal's regime organised what they called an "apocalypse", which eventually became concentrated into genocide against Tutsi and moderate Hutu. This resulted in the murder of more than a million Tutsi people. The RPF managed to stop the killings on 4th July 1994 by defeating the Government army and Interahamwe militiamen, who fled towards the DR Congo (Zaire), forcing three million civilians to go with them.

The RPF and moderate political parties then put in place a government called the Government of Transition to face all the challenges resulting from the aftermath of the genocide, including justice for the perpetrators and the survivors. Justice was carried out on three levels:

- a. an International Criminal Tribunal for Rwanda (ICTR)
- b. the domestic courts(Rwanda and elsewhere)
- c. the Gacaca courts.

This thesis concentrates on the nature of the Gacaca courts in order to determine whether their aim was to achieve retributive or restorative justice.

Section 2 Statement of the Issue of this Study

Because the Gacaca courts system is so different from the formal system of justice - Phil Clark calls them "Justice without Lawyers".¹ This is a justice system which succeeded in trying more than one million people, a result impossible given the time-consuming court processes found in formal criminal system.

¹ Phil Clark The Gacaca courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without lawyers (2010)

The Gacaca courts took their name from a traditional way of resolving conflicts which aimed at reconciling the disputing parties for the sake of maintaining a good relationship among the members of a village. It is noteworthy to recall here what Tom Bennett says: “the common-law system of criminal justice offends customary ideas of due process, which themselves may come closer to realising fundamental rights than the common law”². To bear out this statement, the Gacaca courts finished the trials of more than 1.2 millions of accused persons and thus gave an answer to the saying that “justice delayed is a justice denied”.

It must be recalled also that this new Gacaca took the official name ‘Gacaca courts’ in order to differentiate them from their traditional forebears. It should also be borne in mind that Gacaca courts were only created once the formal tribunals and the courts in Rwanda were found to be incapable of dealing with the vast number of genocide suspects, who had filled the prisons since 1996.

The idea of Gacaca courts came as a strong recommendation from what came to be known as the Urugwiro Village Presidential Reflection Meeting on different national issues. This reflection debate lasted from May 1998 to April 1999. The decision was finally taken that the best way to handle the problem of providing justice for the *genocidaires* would be to capitalise on grass roots participation. This was of importance because, unlike Nazi-Europe, where killings were carried out in secret in remote forest clearings or closely guarded camps, most of the killings in Rwanda were undertaken publicly in full view of the villagers. So it seemed reasonable to call upon the Rwandan population to bear witness to what they saw, and to give testimony to what happened during the genocide in 1994.

The Gacaca court system, which uses lay judges, is heavily dependent on the participation of local communities. Foreign observers, noting the differences between Gacaca and the formal courts, started to describe them as examples of restorative justice³ because they seemed to have a reconciliatory mission. Gacaca courts, however, were different from Truth and Reconciliation Commissions, such as that in South Africa, because of their power to pronounce a sentence on

² Tom W Bennett *Customary Criminal Law in the South African Legal System*” in J Fenrich, P Galizzi & T Higgins *The Future of African Customary Law* (2011) CUP 363-386.

³ Lars Waldolf “Rwanda’s failing experiment in restorative justice” (2008) 422-434 in *Handbook of Restorative Justice* (2008) edited by D Sullivan and Larry Tiff.

the convicted suspects. As a result, others said that the aim of Gacaca courts was retributive⁴, because they believed that that restorative justice did not punish the offender but required reparation and an apology.

The Gacaca courts tried the amazing number of **1,222,093** *genocidaires*⁵, who could be divided into the following categories:

- 1st Category: 15,263 (convicted 12,036 people; 3,227 acquittals)
- 2nd Category: 383,118 (convicted 267,404 people; 115,714 acquittals)
- 3rd Category: 838,975 (convicted 809,434 people; 29,541 acquittals)
- Total: **1,222,093** (convicted 1,088,874 people; 148, 482 acquittals)

Section 3 Research Methodology

Are Gacaca courts delivering retributive or restorative justice? As the writer of this thesis played a role in the establishment of the courts from the first conception of the idea that they should be used, he was naturally curious (partly because of his inside knowledge) about their real nature.

Until October 2006 this writer was the Director of the Legal Unit of the National Service of Gacaca Courts in Rwanda. He participated in the Presidential meeting which decided to create Gacaca courts to replace the formal justice system in 1999.⁶ He continued to follow the development of the courts after leaving the National Service of Gacaca Courts in the Western Province. For this thesis he has drawn on his experience in the setting up and organisation of the courts as well as on his experience as a judge in formal Rwanda courts to compare the theories of restorative and retributive justice and to discuss the real nature of Gacaca courts. The comparisons, principles and conclusions made in the study will be drawn from the theories of restorative justice and retributive justice applied to the specific situation of the Gacaca.

⁴ Allison Corey and Sandra F Joireman “Retributive Justice: the *Gacaca* Courts in Rwanda” (2004) 103 in *African Affairs* at 73–89.

⁵ Statistics of the National Service of Gacaca Courts in November 2011.

⁶ Republic of Rwanda President’s office *Report on the Reflection Meetings held in the office of the President of the Republic from May 1998 to March 1999* (1999) 87.

Section 4 Structure of the study

This thesis is divided into five chapters. The first gives a general introduction by providing an outline to the topic. The second chapter reviews the historical background of Rwanda from its emergence as a state in the 11th century through the colonial period, to the Hutu regime, which took power after the independence of the country in 1962 and ruled until it was overthrown after the genocide of Tutsi in 1994. The third chapter gives a description of the Gacaca courts and their functioning. The fourth chapter analyses the real nature of these courts through the concepts of restorative and retributive justice. The fifth chapter gives general conclusions to the study.

Section 5 Aims and Objectives of the Study

This study has two objectives. The first is to give readers and researchers a clearer analytical understanding of Gacaca courts; the second is to simplify the discussion on their nature. It has been noticed that researchers on Gacaca either start from the standpoint that they dispense restorative justice or that they dispense retributive justice or a combination of the two. By doing this, however, they raise unfounded and misleading issues, thereby interfering with the objectivity and usefulness of their findings.

It is hoped that this analysis will facilitate further research on Gacaca courts by providing a better understanding of the process that will inspire possible applications of these courts in solving conflicts in other areas⁷. It is also hoped that this study will be of help in implementing a similar regime elsewhere.

Section 6 Scope of the Study

This study provides a contextual background to the creation of the Gacaca courts and their functioning. It also makes a comparative study of these courts and restorative justice, on the one hand, and retributive justice, on the other. The study is made possible by a comprehensive review of the literature on the theories of those two concepts of justice.

⁷ Job Nguni *A proposal to establish a restorative Gacaca courts system in Kenya dialogue* (2011).

CHAPTER II

HISTORICAL CONTEXT OF THE GACACA COURTS

Section 1 Introduction

This chapter offers insight into the context out of which the Gacaca court system emerged as a solution to an overwhelmed justice system. It also explains how and why Rwandans turned away from the formal justice system (the so-called civil law, which was inherited from the Belgian era of colonization), and, for the trials of genocide, chose instead to adopt the Gacaca system. Chapter 1 explained the context from which Gacaca courts arose. This chapter seeks to elucidate the complicated history and social situation into which Gacaca was born.

After the genocide, which took place in 1994, Rwanda's court system could not manage the volume of cases, taking into consideration the barbarism with which the crimes were committed. Sixty-six different kinds of killing and torture methods have been identified and these had to be taken into consideration in the judgments. The court system had few options: amnesty for all; dealing with the cases in the formal manner or proposing an alternative system. The alternative was Gacaca. The backlog of cases had been noted as early as 1999. The Gacaca courts were introduced in June of 2002, after they had been presented to the international community. Few alternatives were offered to reduce the case-load in the formal justice system.

The Gacaca courts are noticeably different from traditional formal justice systems applied in Western states. There was little international precedent - or understanding - of such a radically different approach to dealing with a major international crime. As a result, lawyers and human rights activists became involved in extensive debate and scrutiny of the Gacaca system.⁸

During the early phases the Gacaca courts were resisted fiercely by the survivors of the genocide. It was difficult to convince them that the Gacaca courts should replace the formal justice system. This reluctance was primarily because the Gacaca courts apply comparatively mild punishments to what were sometimes atrocious and brutal crimes committed during the genocide. Indeed the penal code penalties were more severe, and they were still applied to ordinary crimes. Because

⁸ Alice Karekezi Urusaro 'African Universities and social reconstruction: What mission and what strategies? The case of conflict management in the National university of Rwanda' (2003) 7 2 *Africa sociological review* 95 at 108.

the Gacaca courts would only give mild punishment to the genocide accused, it is difficult to convince people why these sentences for the very grave crimes were ‘soft’ while, in the traditional court system, the punishment for ordinary crimes remained severe. Those standing trial for genocide were extremely suspicious of the light punishments. Many thought it was a ploy to trick them into pleading guilty, after which they would be sentenced to death.⁹

The Gacaca system was not perfect. It had its own weaknesses, including being unable to address all questions – such as the giving of reparations - which are discussed later in this thesis under the human rights section. Notwithstanding the criticisms, the Gacaca courts stood for a form of justice, which is something that the planners of the genocide were confident could be evaded because of the sheer quantity of criminals that had been involved. This is significant: if justice were not seen to be done in Rwanda, a bad precedent would have been set for future genocides.¹⁰

In this chapter I will develop four main points:

- the first relates to the short history of Rwanda as the roots of the genocide can be found in the history of the country.
- secondly, I will summarise how the Tutsi genocide happened, and how Gacaca came to be instituted as the means of judging the perpetrators suspected of being involved in this holocaust. This will help readers to understand why an amnesty was not appropriate.
- thirdly, this thesis will show how the trials of suspects started within the formal criminal justice system, and how that by its very nature hindered the process.
- finally, I will show how the idea of Gacaca came about and why.

Section 2 Historical Background of Rwanda

A. From Colonialism to the Independence of Rwanda

Rwanda was a monarchy led by a King (Mwami), who since the 11th century A D was a Tutsi. Unlike many countries in Africa, Rwanda has one language, namely, Kinyarwanda, which is spoken by all Rwandan citizens, and all share the same culture although with some local variations. Nonetheless, Rwanda has three so-called ethnic groups, namely, Hutu, Tutsi and Twa,

⁹ Penal Reform International *Research report on Gacaca report VI* (2004) 20.

¹⁰ Rwandan syndrome would mean in this context where a majority decide to kill the minority like in Rwanda where the Hutu majority almost exterminated the Tutsi minority. This happened because the country was led by the ethnic Hutu majority and decided to kill the ethnic minority Tutsi after the invasion of RPF accused of containing Tutsi refugees.

all distributed in 18 clans. Within each clan all the three “ethnic”¹¹ groups are found. Every Rwandan falls into one of these clans¹². Technically Hutu, Tutsi and Twa are not ethnic groups but are rather socio-economic classes. As Ingelaere says:

Hutu and Tutsi were originally not racial categories, but socio-economic classes. Abatutsi (in the plural) was the name given to wealthier persons possessing cattle. Poorer families, with only little or no land, and no cattle, were referred to as the Abahutu”. Mobility was possible. A family obtaining cattle became “tutsified”; those losing status were degraded into a situation of “hutuness.”¹³

In traditional Rwanda there were both rich and poor Hutu and Tutsi and both communities had the same rights, which were less than the rights of the nobles and rich people. The only source of wealth was cattle. The cattle were available through working for the owner of the cattle after which the latter had a duty to give a cow to the workman. The umugaragu (worker) was paid a cow, which was an equivalent of a salary in a modern day contract of employment, by his shebuja (boss). This contract was called ubuhake is in many ways similar to a modern job contract. Once a worker was given a cow, it was known that that worker would get more cows. After getting more cows, a poor Hutu would then have the right of kwihutura, meaning changing his identity from Hutu to Tutsi.

In 1885, the Berlin Conference rendered Rwanda a German Colony. German remained in control until its defeat in 1916 during the First World War (1914-1918). After the War, in 1919, the League of Nations placed Rwanda under a Belgian mandate which eventually was replaced by the United Nations Trusteeship system in 1946. That system lasted until independence in 1962.

During this same period, Belgium was the colonial master of the Democratic Republic of the Congo (DRC). It treated Rwanda as a colony, and introduced extensive socio-political reforms. In 1931, Belgium introduced the ethnic identity card of Hutu, Tutsi or Twa. After Rwandan independence in 1962, this ethnic card allowed the Hutu government to discriminate against

¹¹ I should not use the term ethnic because Tutsi Hutu and Twa are actually not ethnic group but economic classes which are more permeable according to the wealth that one owns.

¹² M d’Hertefelt *Les clans du Rwanda ancien: elements d’ethnosociologie et d’ethnohistoire* (1971) M.R.A.C Tervuren; Tharcisse Gatwa *The churches and ethnic ideology in the Rwanda crises 1900-1994* (2005) 10-11.

¹³ Bert Ingelaere *Traditional justice and reconciliation after violent conflict: learning from African experiences. The Gacaca courts in Rwanda* (2008) International Institute for Democracy and Electoral Assistance (IDEA). See Clark op cit note 1 at 16.

Tutsi, which, during the genocide, played a critical role in enabling Hutu to identify Tutsi. (Indeed, the identity card system was similar to that of apartheid in South Africa.)¹⁴

Talking about those reforms Shongwe has this to say:

The period from 1926 to 1931 could be classified as the period of reforms brought about by the Belgians. For example, Rwanda became a centralized state, efficient, neo-traditionalist and a Catholic country. But it was also brutal. It was brutal because taxation and forced labour burdens were imposed on the native population. For example, people were forced to work in the construction of permanent structures, to grow compulsory crops and so on and so forth. It is argued that those who did not comply with the rules were brutally beaten.¹⁵

Also, in the traditional administrative organization in Rwanda, each village of the country was ruled through a division of labour, as there was a chief of cattle, a chief of land and an army chief in charge of security. The traditional authority was shared between Tutsi and Hutu except for the office of King, which was reserved for a Tutsi. A single chief could not have power over everything. In its reforms, Belgium abandoned the division of power between three chiefs and fused their positions into one. In addition, all Hutu chiefs were fired and replaced with Tutsi. The Belgian colonials installed the system of Tutsi rule, as they harboured an ideological misconception that the Tutsi were gifted leaders and rulers.¹⁶ The misconception of Tutsi superiority was later endorsed by the abolition of *kwihutura*.¹⁷ *Kwihutura* means the conversion of a Hutu into a Tutsi, when he, for example, became rich by having cattle. Conversely, a Tutsi who became poor became a Hutu. If a man had more than 10 cows, he was a Tutsi, if he had less than 10 cows he was Hutu, and if he was a ceramicist or a hunter, a Twa.

This ideological misconception of Tutsi superiority is one of the root causes of the Tutsi genocide in 1994. The Hutu community developed a kind of inferiority complex that the Tutsi were superior, and from this developed the idea that if the Tutsi perished, the Hutu would regain social and political power.

¹⁴ The discrimination was not only in law but everywhere. At school and in the work there was a quota system and it was strictly forbidden to give Tutsi more than 10% of the places and because of that instruction not even 10% was reached.

¹⁵ Shongwe *From genocide to Gacaca: historical and socio-political dynamics of identity in the late twentieth century in Rwanda (the perspective of Durban based Rwandese)* (2008) 185.

¹⁶ *Ibid* at 178.

¹⁷ *Ibid* at 179.

The colonial administrators created an education system that functioned in favour of the Tutsi and worked against the Hutu. The Belgians built a school exclusively for the children of Tutsi chiefs in order to groom them to become replacements for their fathers as chiefs. In 1910, a policy was established with the aim of turning the Tutsi into the rulers of Rwanda. Schools were established not for sons of ordinary Tutsi but only for sons of Tutsi chiefs. Colonial administrators so ardently followed this program that schools were sometimes moved from an area if it were predominantly Hutu. This resulted in the formation of what in 1929 was called by colonial authorities Groupe Scolaire d'Astrida [Complex School of Astrida].¹⁸

The Belgians also introduced a system of forced labour, called "ubuletwa."¹⁹ This system was detested by the Hutu, who were forced to labour under the supervision of Tutsi chiefs. Those who did not comply or perform were beaten. When the Tutsi chiefs were seen to have failed their duties, they were beaten publicly in front of the village. As the Belgian colonial rulers employed a process of indirect rule they were not seen as directly responsible for ubuletwa. Responsibility rested squarely on the shoulders of the Tutsi chiefs. A Rwandan elder, Kanamugire Joseph, who arguably understood ubuletwa, explained that it was in the interests of the people, as, for example, in the case of the famine of Gahoro (1940-1945), when the people were forced to cultivate crops and at the end of the day the entire harvest was given to the population.

Violence against the Tutsi people has occurred many times over in Rwanda. In 1959, a widely spread, though unverified, report claimed that one, Mbonyumutwa Dominique, one of the few Hutu chiefs, had been killed by a young Tutsi. This led the Hutus to begin killing Tutsi and burning their properties. This event was called the Hutu Revolution of 1959 in reference to the French Revolution of 1789. A hundred thousand Tutsi were killed, and many fled to the neighbouring countries. In a wave of events between 1959 and 1962, local Tutsi rulers were removed from their positions and replaced through elections by "Burgomasters", predominantly of Hutu origin.²⁰

¹⁸ Ibid at 179; René Lemarchand *Rwanda and Burundi* (1970)138.

¹⁹ Ibid at 182.

²⁰ Ingelaere op cit note 13 at 26

Between 1961 and 1966 a group of refugee Tutsi fighters, called Inyenzi, attacked Rwanda from bases in Burundi and Uganda. Then President Grégoire Kayibanda used these attacks to fuel hatred of Tutsi both within and without Rwanda. Rachel Yeld argues that:

[w]hile the question of repatriation of the 1960's Unarist refugees was still alive, and for the duration of the ten major inyenzi attacks into Rwanda between 1961 and 1966, Kayibanda's government could externalise ethnic antagonism onto the Tutsi enemy without, although each attack triggered retaliatory violence against Tutsi still living in Rwanda.²¹

A significant number of Batutsi were killed in reprisal attacks, and even more left the country as refugees. These attacks and the violent reactions of the Rwandan regime foreshadowed what was to happen 30 years later in the genocide. The descendants of these refugees would form the bulk and backbone of the Rwandan Patriotic Front (RPF) and its military wing, the Rwandan Patriotic Army (RPA) that attacked Rwanda in October 1990, seeking an armed return to their country.²²

B. The Hutu Regime from 1961-1994

On the 28th January 1961 at Gitarama, the King Kigeri V Ndahindurwa was dethroned and forced into exile in Burundi. He eventually settled in the USA. Grégoire Kayibanda, a Muhutu, became the first President of Rwanda.²³

After gaining independence in 1962, the government pursued a campaign that entrenched the Hutu supremacy over Tutsi. Helped by the colonial powers, the government abolished the Tutsi kingdom, which could be traced back to the 11th century. When the Rwanda was colonised in 1897, the Tutsi Kingdom remained but with greatly diminished powers, as, with the rest of Africa, the colonisers had the real power during the colonial period.

The Hutu people were taught in school that the 1959 Revolution freed the Hutu from the oppression of Tutsi. Since Independence and the installation of the Hutu leaders the idea that the Tutsi could return to power affronted the Hutu people. The Hutu acted very harshly against Tutsi

²¹ Rachel Yeld 'Repatriation of Rwandan refugees' available at <http://www.grandslacs.net> , accessed on December 2011.

²² Nicolas A Jones *The courts of Genocide politics and the rule of law in Rwanda and Arusha* (2010) 26; Larissa J Van den Herik *The contribution of the Rwanda tribunal to the development of international law* (2005)22.

²³ These events were accompanied by violence against the Tutsi rulers and their families, and a first wave of Batutsi sought refuge in neighbouring countries.

living inside the country, Tutsi were harassed and they faced unfair political and administrative discrimination.²⁴

The Rwandan refugees outside Rwanda, living in exile in neighbouring countries, were desperate to return home. Inside Rwanda, the Tutsi people had been relegated to the position of second class citizens; they were denied the right to education, the right to public work, freedom of expression, and many other basic human rights. They were permitted to vote, but were not permitted to stand for office. The discrimination against the Tutsi extended to civil society and to the youth, who frequently insulted and belittled their Tutsi counterparts²⁵.

During the Hutu regime, especially among the youth and intellectuals, great energy was spent convincing the Tutsi that they were inferior to Hutu, and did not deserve any right, not even the right to live. Unfortunately, some Tutsi became convinced that they did not even have the right to defend themselves. Several testimonies given during the mourning weeks in commemoration of genocide (between April and July of every year) reveal that many Tutsi were ready to be killed without any attempt to self-defence or to even buy quick death with a bullet.²⁶

Since coming to power the Hutu regime had cultivated a society where it was acceptable for civilians to kill Tutsi people in order to reduce their numbers. This was done without any legal consequences for those involved. The killers consisted of ordinary civilians, supervised by the army, who was there to assist in the event of any resistance by the Tutsi. The Hutu civilians came to believe that killing a Tutsi was not a crime, as they knew they would not receive any punishment, a situation that created great fear among Tutsi living inside Rwanda, which, in turn, facilitated the killing in 1994.²⁷

This series of events led the Rwandan Patriotic Front (RPF) to launch its attack against the Rwandese Army Forces (FAR) on 1st October 1990. The RPF was made up of Rwandan refugees who had been denied the right to return to Rwanda by the Hutu regime. The Hutu leaders

²⁴ Alexandre Kimenyi Trivialization of genocide: The case of Rwanda in Alexandre Kimenyi and Otis L. Scott, editors, *Anatomy of genocide: state-sponsored mass-killings in the twentieth century* (2001) 488.

²⁵ Jean- Pierre Chrétien *Les medias du genocide* (1995)11; 13 and 114 quoting Kangura no 26 of November 1991 also some unpublished testimonies of survivors who talked informally to the writer after the genocide in 1994.

²⁶ Gerard Prunier *The Rwanda crisis History of a genocide* (2001) 256

²⁷ Lee Ann Fujii *Killing neighbors Web of violence in Rwanda* (2009) 124-127 and 162-163.

claimed that the country was too small to receive more Rwandan people. This was the first time that the media talked about the RPF and its armed wing, Rwanda Patriotic Army (RPA).

Some have argued that the invasion by the RPF provoked the genocide, and it was, indeed, a clear tipping point, although Rwanda had been slowly moving towards this point since the late 1950s. The Tutsi in Rwanda had been harassed and killed by the Hutu regime since the Revolution of 1959.

Section 2 Genocide against Tutsi of 1994

A. The reaction of the Hutu government to the attack by RPF on 1st October 1990

From the 1st of October 1990, the Hutu regime of Rwanda started to show how risky it would be for Tutsi people - and for the Hutu people in the opposition - to live within Rwanda. On the 5th October 1990 the government arrested more than 5000 innocent people at Kigali, falsely accusing them of collaborating with the enemy (RPF) that was stationed 300 km from Kigali. Many Tutsi and a few Hutu from the opposition were brought to the stadium of Nyamirambo. Some of the people died during the ordeal because of the brutality with which they were handled, others were executed in the stadium by army.

Larissa Van den Herik wrote the following about this date:

[initially] the RPF invasion was quite successful. So much so, that the Rwandan government found it necessary to fake an attack on Kigali in the night of 04 October 1990. This manoeuvre served two purposes. Firstly, it was used as a pretext to arrest thousands of presumed opponents, and secondly it was aimed at acquiring foreign military aid. At Rwanda's request, France sent substantial military aid, some 600 troops Belgium and Zaire also offered some support.²⁸

President Habyarimana's government engaged in an extensive propaganda campaign.²⁹

It accused the RPF of aiming to restore the monarchy with its forced labour and servitude. It espoused a version of Rwandan history whereby the Tutsi people were seen as alien, foreigners, while Hutu were viewed as genuine Rwandans. The Hutu ideology was intended to mobilise all Hutu together around three main ideas about the Bahutu:

²⁸ Larissa Van den Herik op cit note 22 at 22.

²⁹ Ibid at 22.

1. they were numerically the majority;
2. they arrived in Rwanda before the Tutsi; and
3. they had been oppressed by the Tutsi monarchy during the past.

That the Bahutu were in the majority was true, the other two points were propaganda.

After the invasion of RPF the Rwandan government used this Hutu ideology to mobilise its citizens and the international community with the aim of getting military support. Inside the country, they cultivated hatred against Tutsi and, using the Interahamwe, conducted organised massacres in rural areas (such as Bugesera, Kibilira and Kibuye) where the Tutsi were in the majority.

B. Preparation of the Genocide against Tutsi

In 1991, after a meeting between France and certain African leaders, held in La Baule in France under the auspices of French Government, President Habyarimana Juvenal allowed the creation of many political parties. The following were the new parties created: the Movement Démocratique Rwandais (MDR), Parti Liberal (PL), Parti Social Démocratique (PSD), Parti Démocratique Chrétien (PDC) and Parti Démocratique Islamique (PDI). President Habyarimana was expecting to get allies against RPF from amongst these parties, but many allied themselves with the RPF instead with the aim of getting rid of President Habyarimana.³⁰

There were stirrings of democracy emerging in Rwanda. The RPF was gaining support not only from Tutsi, but also from a large number of Hutu. As criticism of the government grew, the regime's fear of both the Tutsi people and opposition parties was exacerbated as was the hatred against them. The Hutu leaders aimed to quell this opposition before it could gain further momentum. Anything that could reduce the power of the enemy was welcomed. The government used bribes as well as political assassinations: Mugenzi Justin, President of the Liberal Party, was bribed. Gatabazi, President of Parti Social Démocratique, and Gapyisi, a politician were murdered. Many others were threatened.³¹

³⁰ Jean Pierre Chretien *Rwanda: les medias du genocide* (1995) 224.

³¹ A Walter Dorn and Jonathan Matloff 'Preventing the Bloodbath: Could the UN have Predicted and Prevented the Rwandan Genocide?' (2000) 20 1 *Journal of conflicts studies* 31-33.

The regime realised that many Bahutu were joining the opposition and almost all were allies of the RPF. Because of this they started to market to the Hutu an ideology based on Hutu unity against Tutsi. They introduced a newspaper called Kangura which published inflammatory articles by Hutu extremists such as Bagosora Theoneste³², Nindiliyimana Anatole Nsengiyumva Tharcisse Renzaho and others. This led to the publication of the “Hutu Ten Commandments”, as described by Mamdani.³³ These aimed to demonizing the best characteristics of the Tutsi, and warned the Hutu to avoid them (especially Tutsi women recognized to be beautiful where commandment no 1 says: “As a result we shall consider a traitor any Muhutu who marries a Mututsi woman, makes a Mututsi woman his concubine, employs a Mututsi woman as a secretary or makes her his dependant).

These Ten Hutu Commandments were published and repeated often, to ensure that every Hutu unequivocally accepted them. After that, the situation of Tutsi deteriorated considerably. Larissa J Van den Herik describes the situation as follows:

As a more general response to the RPF invasion, Habyarimana (President) resorted to the well-known tactics of retaliation against the Tutsi in Rwanda itself. In the media case, the expert witness Des Forges named 17 major attacks against Tutsi during the years preceding the genocide. As an expert witness in the case of Rutaganda, Reyntjens had also indicated that ethnic massacres had taken place as preludes to the genocide in the years: 1990-1994. In this respect, he referred to the speech of Leon Mugesera in March 1992 as a very clear and direct incitement to commit genocide. Relying in addition on the testimony of expert witness Des Forges, the Trial Chamber noted in its judgment in the media case that from 1991 there was a tendency to picture all Tutsi as the enemy, as evidenced, inter alia, by a secret military report on “ how to defeat the enemy in the military ,media and political domains. The Akayezu judgment had also pointed out that radio station Radio et Television Libres des Milles Collines (RTLM) played an important role in spreading anti-Tutsi propaganda.³⁴

Alongside the anti-Tutsi propaganda, preparations proceeded for mass killings. A large number of weapons, machetes, grenades, guns and axes, were purchased and distributed. The formation and training of Interahamwe units was part of this process. Interahamwe is a Kinyarwanda meaning "those who stand/work/fight/attack together". It was a Hutu paramilitary organization, which was trained at military facilities such as Gabiro, Gako, Bigogwe and Kanombe. According

³² Gerard Prunier *The Rwanda crisis 1959-1994 :History of a genocide* (1995)167.

³³Emelda Dimakatso Shongwe op cit note 12 at 198; Kangura n^o 6 (December 1993), available at <http://www.trumanwebdesign.com/~catalina/commandments.htm>, accessed on 7 July 2011.

³⁴ Larissa van Den Herik op cit note 22 at 22.

to reports, French commanders were amongst the instructors.³⁵ Some Interahamwe went for training in Zaire (now the DRC) and Israel.³⁶

Kangura and RTLM continued to broadcast hate speech and propaganda stating that Tutsi had to be exterminated, as well as any Hutu who supported the RPF or who criticized the regime and were therefore the accomplices of Inyenzi (the name given to RPF and Tutsi which means cockroaches). This hate speech was taught and produced by extremist Hutu who claimed that the RPF invasion aimed at restoring ‘slavery of the Hutu people’ and at ending the social benefits that were a result of the 1959 Social Revolution, through which the Hutu had taken power from the Tutsi King. The propagandists warned Hutu to stand and fight all enemies, and that the enemies were in their circles. Further, they stated that the enemy was not only the RPF, which was fighting in the North of the country between Rwanda and Uganda, but also the Tutsi people who were living among them. All Tutsi were assumed to be guilty of supporting the RPF, because almost the majority of refugees who had joined the RPF were Tutsi.³⁷

In August 1992 RPF and Rwandan Government Forces (RGF) engaged in peace talks at Arusha in Tanzania. The result was the Arusha Agreement, signed on 4th August 1993, to cease hostilities. This Peace accord included power sharing between MRND, RPF and seven opposition parties, together with respect for human rights and the rule of law.³⁸

A new extremist party emerged, called CDR (Coalition pour la Démocratie au Rwanda), created by the Hutu regime, which was excluded from the power sharing because of its Nazi-like hate speech. This party started to denigrate the Arusha Agreement, warning against its implementation. The CDR was in actual fact the mouthpiece of the ruling party MRND, its president Habyarimana Juvenal, his Akazu (Political Family core) and the notorious Colonel Bagosora Theoneste.³⁹

³⁵ Prunier op cit note 32 at 165.

³⁶ Linda Melvern *Conspiracy to murder, the Rwandan genocide* (ed) (2006) 95.

³⁷ Collette Braeckman *Rwanda: histoire d'un genocide* (1994).

³⁸ Peace agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front available at <http://www.ucd.ie/ibis/filestore/Arusha%20%28Rwanda%29%20.pdf>, accessed on 20 January 2012.

³⁹ Prunier op cit note 32 at 128.

The first step in the implementation of the Arusha Agreement was the swearing in of the Peace Government under the supervision of President of the Republic of Rwanda, Habyarimana, who in fact did not want to do it. His political family MRND and the Akazu agreed among to sabotage the Arusha Peace Agreement.⁴⁰ Habyarimana was however under divergent pressures: an internal pressure from his political family, forbidding him from implementing the Arusha Agreement, and an external pressure from the international community and from the internal opposition forcing him to implement it. Habyarimana did not know what to do. He had clearly lost power.⁴¹ Some analysts said that the extremists decided to kill him when he was about to implement the Arusha Agreement.⁴²

On the evening of his return from Arusha in Tanzania, his jet was fired on by a missile. The jet crashed, and all of the occupants were killed. Among them was President Cyprian Ntaryamira of Burundi. At 8h30 pm on 6th April 1994, RTLM declared that President Habyarimana had been killed. RTLM stated that this was done by Belgian peacekeepers to help the RPF.

On the same night, the Presidential guards started killing the opposition leaders and Batutsi in Kigali. The shooting down of the Presidential plane was the catalyst that started the genocide on a large scale, but the plan had been in existence since the 1992, after the RPF attack.⁴³ The Hutu extremist newspaper *Kangura* had predicted in January 1994 that the President was going to be killed by the end of March 1994,⁴⁴ And he was indeed killed, although a week later than the prediction. This is one of the reasons leading to the assumption that President Habyarimana was killed by members of his own political family to avoid the implementation of the Arusha agreement.

Bagosora told Dallaire: “For Rwanda to enjoy even one day of peace it was necessary “to exterminate the Tutsi”⁴⁵. After the crash of President Habyarimana’s plane, the presidential guard and the Interahamwe started killing Tutsi and RPF supporters. The civilian population did not

⁴⁰ Chretien op cit note 21 at 234.

⁴¹ Melvern note 36 at 108.

⁴² Prunier op cit note 31 at 219.

⁴³ Melvern op cit note 36 at 37.

⁴⁴ Ibid at 124.

⁴⁵ Ibid at 127.

react spontaneously: rather, the authorities encouraged Hutu people to avenge the President's death by killing Tutsi.⁴⁶

Four things played in favour of the genocide:

- 1) the 1959 revolution which placed Hutu in power and kept them in fear of losing it;
- 2) the attack by RPF which was vocal about its opposition to the dictatorship of the regime.
- 3) the Arusha Peace Agreement which reduced the power of the President and extremist Bahutu.
- 4) external help from France.

There is overwhelming evidence that the genocide was planned, and that the government prepared for it. The first factor was the training of Interahamwe. The second was the propaganda to create hatred of Tutsi using media such as the RTLM and *Kangura*. The third was the distribution of fire arms and machetes among militia and civil defence. The fourth was the creation of fear among the prospective victims, the Tutsi and opposition, by harassing and killing some and making frequent attacks in the areas where many Tutsi lived. The genocide was far from being a spontaneous reaction to the killing of the President. After training, Interahamwe had been deployed in areas known to have many Tutsi, and they started to kill the Tutsi with the assistance of the army as a way to practice the lessons learnt⁴⁷.

In fact, significant lessons were drawn from *Mein Kampf*, Adolf Hitler's infamous text. The book was translated into Kinyarwanda by a German Priest, Father Johan Pristil,⁴⁸ a lecturer at the Grand Seminary of Nyakibanda in Rwanda. The mass involvement of killers rather than a small group to make prosecution more difficult was an inference from Hitler's book, and the history of the aftermath of the Jewish Holocaust. Another lesson was to gather together all the Tutsi in one place to make it easier to kill them. Indeed, this happened at all points of killings and the modus operandi was the same throughout the country. Tutsi were told to go to church buildings, school

⁴⁶ Prunier op cit note 32 at 244.

⁴⁷ A Des Forges and Reyntjens Filip confirmed this prelude to the genocide where Des Forges talk about 17 majors attacks made against Tutsi during the years preceding the genocide, in Larissa Van den Herik op cit note 19 at 22-3

⁴⁸ Reporters Without Borders *The arrest of father Guy Theunis :an investigation of the charges ,the legal action and possible reasons* (November 2005) at 5.

buildings and stadia to “get protection from the gendarmerie”. After they had gathered, the gendarmerie would call in the Interahamwe who would then massacre them.

In the beginning killings were committed by the army, the gendarmerie and the Interahamwe. Soon, however, villagers became involved, killing Tutsi, in what was called the “civil defence”⁴⁹.

In 1994 the interim Government of Rwanda was operating on two fronts. It was engaged in genocide in the centre of the country, as well as a war against the RPF in the North. On the one hand, the political and administrative organisation inside the country oversaw and orchestrated the genocide; on the other hand, it conducted the war against the RPF.

The Rwandan Patriotic Front defeated the Rwandan Government Forces (RGF) and ended the genocide. The general systematic genocide, however, continued from the 6th of April 1994 until the 4th of July 1994. During this period, more than a million Tutsi were killed, infrastructure was destroyed and property was looted by the defeated government and Interahamwe officers. The country was left in a dysfunctional state, with no electricity, no water, no food, no hospitals and no people on the streets except the army of the RPF.⁵⁰

After two weeks, on 19th July 1994, a new government based on the Arusha Peace Agreement was installed. Its President was a Hutu, Pasteur Bizimungu, a member of RPF. The Vice-President was Major General Paul Kagame.

Section 3 Ensuring justice for suspects of genocide after 1994 (Formal justice)

The reason for ensuring justice for suspects of genocide has been particularly described in an article by Jeremy Sarkin:

[d]oes a society need an official account and acknowledgement of the wrongs of the past? How can the victims of human rights violations be assisted in some way and have their dignity restored? Knowing about the abuses of the past and acknowledging them seems to be the crucial issue in a transitional process. Ignoring history leads to collective amnesia, which is not only unhealthy for the body politic, but is essentially an illusion—an unresolved past will inevitably return to haunt the citizens. The

⁴⁹ Melvern op cit note 36 at 43-44, the Rwandese government trained citizens and gave them guns and machetes to kill Tutsi at the lowest cell of the country.

⁵⁰ Testimony of this author describing what he saw when he reached Kigali on 7th July 1994.

establishment of a full official account of the past is increasingly seen as an important element of a successful transition to democracy.⁵¹

To these questions the Government of Rwanda answered yes, and to its credit it decided to ensure that the crimes of the past would be brought into the open and the perpetrators punished. But it had serious problems in implementing such justice. All the courts lacked infrastructure and personnel. Before the genocide started on 6 April 1994, there were 850 judges but only 44 among them had a law degree. The Rwanda Prosecution had hired 70 prosecutors in total, only 22 of whom had a law degree.

After the genocide, court buildings had been destroyed by the *genocidaires*. Of the 850 judges, only 195 remained and, of the 70 prosecutors, only 12. The first task for the judicial system after the genocide was to train judges, prosecutors and supporting staff. The courts started with civil cases and common crimes. They could not deal with genocide-related cases with as there were no existing laws to deal with the matter.

Some jurists thought that the penal code could apply to genocide cases but that would have caused problems relating to prescription. Another issue was the principle of non-retroactivity of the criminal laws according to the principle of '*nullum crimen nulla poena sine lege*'.⁵² If parliament were to enact a new law to punish the genocide committed before in 1994, lawyers were agreed that it would have to be in accordance with Article 15(2) of the UN Convention on Civil and Political Rights⁵³ of 16 December 1966.⁵⁴

It was accepted, however, that in all cases of crimes against humanity, as in Rwanda, the law could bear a retroactive force, i.e., it could apply to crimes committed before it was enacted.⁵⁵

Thus, on the 30th August 1996, the Parliament of Rwanda enacted a law to punish the

⁵¹Jeremy Sarkin 'The tension between justice and reconciliation in Rwanda: politics, human rights, due process and the role of the Gacaca courts in dealing with the genocide' (2001) 45 2 *Journal of African Law* 143 at 159

⁵² Meaning 'No crime, no punishment without a previous penal law'.

⁵³ Article 15 Paragraph 2 states 'Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations'.

⁵⁴ Similarly, Article 7(2) of the European Convention on Human Rights (1950) provides that 'This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations'.

⁵⁵ Daniel de Beer and William Schabas cited in Olivier Dubois *Rwanda's national criminal courts and the International Tribunal International Review of the Red Cross* 321 (1997) 6.

perpetrators of the genocide committed in 1994. It appeared as an Organic Law no 08/96 of 30 August 1996, and provided for the prosecution of crimes of genocide and crimes of war and crimes against humanity committed between 1st October 1990 and 31st December 1994. This Organic Law referred to the penal code for the penalties and to the International Conventions that Rwanda had adopted.⁵⁶

The first genocide trial took place on 27 December 1996 at Kibungo, Eastern Province in the *Bizimana and Gatanazi Egide* case.⁵⁷ Since then the trials of *genocidaires* continued to be heard in the 13 tribunals of First Instance within Rwanda on a regular basis, but, compared to the large numbers of people awaiting trial, the outcome was minimal. The government held evaluative talks in the President's office from May 1998 to March 1999, and from this emerged a request to find an alternative system to speed up the trials and deal with the backlog of cases and the overcrowded prisons.⁵⁸

Section 4 Backlog in the Formal Courts and the Gacaca Idea

A. The Backlog in the Courts

In 1996 there were only 13 courts competent to genocide crimes in Rwanda, and there were 132 000 people awaiting trial in the prisons. The courts were only able to deliver about 1000 judgements per year. By 2001, in 5 years, all these tribunals had made rulings in cases for a mere 6 000 people. Therefore, as the total number of prisoners was 132 000, the caseload was 126 000 people awaiting judgment; among them some had been detained and awaiting trial for seven years. At that rate it would have taken 132 years to conclude the entire caseload, and more than 70% would have died in prison without trial. The figures above relate only to the number of people imprisoned for committing violence during the genocide. In fact, as shown during the Gacaca courts disclosures, the actual number of suspects was over one million people. Considering that figure, it would have taken more than one thousand years to finish the backlog of genocide cases using the formal court system.⁵⁹

⁵⁶ Article 1 of the Organic Law No. 08/96 of August 30, 1996 on the Organization of Prosecutions for Offences constituting the Crime of genocide or crimes against humanity committed since October 1, 1990.

⁵⁷ RMP 84335/53/ND – RP 0002/EX/R1/96.

⁵⁸ Republic of Rwanda President office op cit note 6 at 6-8.

⁵⁹ In one year almost only 1 000 persons were tried whereas the total of criminals were more than a millions as seen on note 5.

Even with the highest levels of energy, passion and dedication the courts could not handle the enormous backlog. Ordinary procedures were incapable of handling the volume and nature of the cases. It must be borne in mind that the genocide master plan had intended to involve a large number of Hutu in order to paralyse the capacity of the prosecution. This led to the use of a saying: ‘if all are guilty, it means that all are innocent’. Killers were sure that justice was not possible.⁶⁰

The prisons were overcrowded to such an extent that people accused of theft or petty crimes were released after arrest, because of a lack of space. This overcrowding led to an escalation of criminal acts, because the threat of prison was no longer a deterrent. The overcrowded prisons and the overburdened justice system led to concerns about justice and human rights, such as delayed justice, the impunity given to petty criminals, mistreatment of prisoners and lack of basic living standards due to overcrowding, etc.⁶¹

Early in 1999, the Gacaca courts system was suggested as an option to deal with the case backlog. First it was discussed in an ad hoc commission, then at a ministerial meeting and later at provincial, district and international levels. The idea was debated publicly in every district of the country, as well as at an international colloquium, with the aim of getting new ideas to resolve the issues of justice and reconciliation.⁶²

B. The idea of Gacaca

The government held a series of talks in the President’s office. Present at these meetings were the Rwandan elite, including the President, Pasteur Bizimungu, and the Vice-President, Paul Kagame, as well as senior ministers, the President of Commission in Parliament, the presidents of various political parties, retired political leaders, politicians who served before independence who were still alive, politicians of the former regime who were still alive, the prefect of prefectures, as well as the Presidents of the various Courts in Rwanda. The Presidents of the Tribunals of First Instance were present when the discussion was on justice and the prosecutors

⁶⁰ OUA ‘Rapport sur le genocide’ (2000) available at http://www.africaunion.org/official_documents/reports/OUARapport%20sur%20le%20genocide%20au%20Rwanda.pdf, accessed on 22 January 2012.

⁶¹ Testimony of the author as he was working in the judiciary system .

⁶² Idem.

in chief at all levels. As the writer of this thesis was the president of one of the 13 tribunals, he was also in attendance. They were held on Saturdays.⁶³

The three main expectations of any solution were:

- acceleration of the trials
- eradication of impunity, i.e. the meting out of justice, and
- the aiding of reconciliation through truth and justice.⁶⁴

There appeared to be no easy solution to the genocide trials. The 13 tribunals were clearly too few to try all 126 000 cases in a reasonable time. Creating separate tribunals was not an option as this would have been resource intensive, requiring judges and personnel to serve. The idea of inviting international foreign judges was proposed, but that would have required translators and legal fees far beyond the capacity of the Rwanda or its donor funders.

Because of the atrocities and cruelty that had been perpetrated over the three-month period – not to mention that had occurred previously in 1959, 1963, 1973 and 1994 - the idea of amnesty was considered inappropriate. Furthermore, although the law provided for a death penalty, the country was not prepared to put several hundred thousand people to death.

The people who supported the idea of Gacaca wanted the participation of every Rwandan who had witnessed the killings and other crimes so that the truth could be exposed. The exposure of the truth was very important. If the courts could involve many people to bear witness to the truth of what they saw, this would accelerate the process of determining criminal responsibility rather than confining that task to one court with many rules and time consuming procedures.⁶⁵

To summarise this chapter: we have considered the history of Rwanda, as it led up to the genocide in 1994, the reason for the introduction of Gacaca, primarily the need to address the large number of suspects accused of genocide and the incapacity of the formal courts to process these cases at an acceptable speed. The next chapter will give a detailed description of the

⁶³ Republic of Rwanda President office op cit note 6 at 4.

⁶⁴ Clark op cit note 1 at 345; Report on the Reflection Meetings held in the office of the President of the Republic from May 1998 to March 1999(1999)5-7.

⁶⁵ Ingelaere op cit note 13 at 15.

Gacaca to illustrate the difference between them and the ordinary courts, showing their strengths and pointing out their weaknesses, together with the human rights issues that they created.

CHAPTER III

DESCRIPTION OF GACACA COURTS

Section 1 Traditional Gacaca

A. Etymology

In Kinyarwanda, the word *Gacaca* is the name of a short thick grass. Rwandans would traditionally sit on mats made of this grass, protected from sand and dirt, when talking or handling disagreements between neighbours. These disagreements could take the form of family disputes, fighting, theft or adultery, but not serious issues like murder. The tribunal was composed of a small group of men, usually close neighbours. Women and teenagers were entitled to sit in the audience and give comments or testimonies. The objective of the Gacaca meeting was to reconcile the two parties in conflict. Failure to co-operate with the meeting would lead to being ostracised from the community.

Alain Erin Tiemessen believes that:

[i]n its pre-colonial form, Gacaca was used to moderate disputes concerning land use and rights, cattle, marriage, inheritance rights, loans, damage to properties caused by one of the parties or animals, and petty theft. Additionally, compensation could be awarded to the injured party. Gacaca occurred at a meeting that was convened by elders whenever there was a dispute between individuals or families in a community and was settled only with the agreement of all parties. The Government of Rwanda does not pretend that Gacaca today strictly adheres to its indigenous form. Officials argue that its reinvention takes the form that it does to better accommodate for the severity of the crimes in its mandate and the volume of cases to be tried.⁶⁶

B. Some principles of traditional Gacaca

Gacaca settled issues using customary law. Because these tribunals were voluntary, no one was forced to respond to an invitation to attend, but there was a moral obligation to comply. The underlying principle was to maintain the social cohesion required in a small, close community by ensuring that behaviour conformed to the accepted standards of social norms. From a study done

⁶⁶ Alain Erin Tiemessen *After Arusha: Gacaca justice in post-genocide Rwanda* Africa studies quarterly (8) 2004.

on the Trobriand Islanders, Malinowski describes this kind of attitude in close communities where “each member was bound to others in a complex of reciprocal economic obligations in such a way that persistent failure to honour any particular one could lead to the total collapse of his livelihood”.⁶⁷

Based on this concept any neutral observer can see in the traditional Gacaca the following eight principles:

1. In Rwanda, people had to accept for themselves and for their family the social norms required to live peaceably together with others in the community. One who could not behave normally was criticised and could become the subject of stories (village gossip about his behaviour). The fear of being subject to gossip also existed in other traditional African societies and acted as a social sanction encouraging people to adopt more acceptable ways of behaving, as described by Simon Robert: ‘each will know that the attitude of others towards him will depend on his reputation, and fear of adverse report and gossip will encourage him to adjust his conduct accordingly’.⁶⁸
2. Secondly, maintaining harmony in the community was very important because neighbours relied on each other in times of need, and particularly for life-cycle events, like marriage, initiation of children and funeral rites, and for keeping a watchful eye over one another’s wealth and kin.
3. Thirdly, reconciliation between the parties in conflict was necessary to ensure that harmony and good neighbourliness prevailed in the community.
4. The witnesses had to state the truth in order to avoid undermining the process of reconciliation. Lying and bias were strongly discouraged because this could jeopardise relationships, reflected by the Kinyarwanda expression “*gushaka guteranya*”, literally meaning “wanting to divide”.

⁶⁷ Quoted by Simon Roberts *Order and dispute an introduction to legal anthropology* (1979)38.

⁶⁸ *Ibid* at 43.

5. To achieve such reconciliation the judicial process and its sentence needed be seen to be fair. Fairness of the Gacaca trial involved providing reparation to the victim by the offending party.
6. In addition to reparation, the offending party also had to pay a fine to the court.
7. As the aim of Gacaca was to rebuild a good relationship between parties involved in the conflict it was the duty of everybody to help them reconcile. Where the offending party was unable to pay the total reparation ordered, the others villagers helped him/her to fulfil the Gacaca ruling.
8. Reconciliation was the cornerstone and the main objective of Gacaca.

One Rwandan proverb provides that *ahari abagabo ntihapfa abandi* [where there are men no others can be sacrificed]. This proverb was the driving force behind convincing people to participate in the process of reconciliation so that witnesses would be invited to play a positive role in telling the truth so that the final trial could be fair.

The enormity of the genocide meant that harsh prison sentences were less important than truth and reconciliation. In fact, these two principles - truth and the underlying need for reconciliation - were what attracted Rwandans to the idea of the Gacaca system. Traditional Gacaca combined litigation and reconciliation processes, and were different from other forms of dispute resolution process, such as mediation, arbitration or negotiation, which are voluntarily decided between parties. Unlike these processes the traditional Gacaca summoned the offender to appear before it and other members of the community. The procedure was not led by a chosen mediator, facilitator or arbitrator. It was a group of elders of the community and its members who convened to hear the case and to participate in adjudicating and reconciling the parties.⁶⁹

C. Gacaca during colonisation

Before the colonial period traditional Gacaca was used for all matters of justice, but during the colonial period it was replaced in some areas with formal courts, established by the Belgian

⁶⁹ For mediation, negotiation and arbitration see Simon Roberts (1979), Jean Cruyplants et al (2008); City University Inn of Court School of Law (2002), Amazu A Asouzu (2001), and Andreas F.Lowenfeld (2002).

government and gradually imposed upon Rwandans. During this time there was a dualism of justice: Gacaca were allowed in rural areas and modern courts for what were called *les évolués*⁷⁰ or “civilized Rwandese people”, white people and others foreigners living in Rwanda (such as Arabs and Indians). Major crimes were dealt with by colonial prosecutors and Gacaca only applied to civil matters or minor delicts in rural areas.⁷¹

After independence on 1st July 1962, customary law was down-played and only modern courts were considered competent to deliver justice. Nevertheless, Gacaca survived informally and Rwandans continued to use it to settle conflicts among neighbours. Rather than going to the courts, they tried to sort the problem out between themselves, helped by their friends and elders. In contemporary Rwanda, this remains true. Rwandans first consider using Gacaca to settle their problems before turning to modern courts.

Section 2 Use of Gacaca Courts to Deal with Crimes Committed During the Genocide of Tutsi in 1994.

A. The Choice of Gacaca Courts in Lieu of a Truth and Reconciliation Commission

After the genocide, once the new Government of Rwanda was established on the 19 July 1994, it had many problems to deal with, primarily, providing justice for the survivors and dealing justly with the many suspects in prison.

Was justice possible, and if so, what kind of justice was needed to handle the enormous number of suspects and injured survivors?

The first trial in the formal justice system was held in Kibungo on 27th December 1996 after almost three years of preparation. It has already been explained that this formal justice process was too slow and cumbersome to handle the genocide cases within an acceptable timeframe. As a result, the Government organised talks at the Presidential office in 1998. Four years had elapsed since the genocide of the Tutsi and it was necessary to obtain a common understanding

⁷⁰ Les “évolués” means developed people living in town and having some modern education .They were given a card to confirm that and the bearer of this card were like proud of being “évolué” ; For ancient Gacaca see Clark op cit note 1at 52-54.

⁷¹ This is the consequence of the civil law which considers the public order as an element of state prerogative of security and sovereignty that cannot be exerted by private people.

of its aftermath. A Truth and Reconciliation Commission (TRC), as had been established in South Africa, was not mentioned in public or in government circles, probably because of the gravity, inhumanity and repetition of the acts of genocide (that had become a “modus vivendi” of the Hutu regime from 1959 till 1994). Indeed, innocent Tutsi people had been killed in 1959, 1963, 1964, 1973 and 1994 without anyone being tried. All the killers were set free without punishment; some were even thanked for the zeal they had demonstrated in killing Tutsi and were rewarded with a promotion or a good position. The only steps the government had taken after those killings had been the initiation of amnesty laws for the perpetrators⁷². In 1993, Bagosora, the mastermind of the genocide, had even promised at the Arusha peace talks in Tanzania that there would be an end of the Tutsi in what he called an “apocalypse.”⁷³

In fact, in the three months of 1994 from 6th April to July, the *Interahamwe*, the army and the population did try to bring about an end to the Tutsi by hunting and killing them. Because of the already existing climate of accepting and even rewarding the murderers, a commission of truth and reconciliation would not provide the killers with an understanding of the wrongfulness of their deeds. Nevertheless, some researchers suggested a Commission of Truth and Reconciliation in Rwanda rather than Gacaca⁷⁴. But, it was necessary to change the culture and the belief that it was acceptable to kill Tutsi. For instance, killers who had as children witnessed their fathers killing Tutsi without any consequences would not expect to be punished when they were old enough to do the same. If no justice was seen to be done after the horrors of 1994, it would have been difficult for future generations of Hutu to understand that killing Tutsi was punishable.

The genocide was deliberately perpetrated by the government, and, after the event many criminals were still living in the country alongside survivors. Sometimes the killers continued to kill as they were scared that the survivors would testify against them. There were also survivors who wanted to avenge the killing of their families but they could not do so because the government had guaranteed everybody’s security. Most survivors believed that they should wait

⁷²Amnesty laws of 20 May 1963 (Article 1 de la Loi du 20 Mai 1963 portant amnistie générale des infractions politiques entre le 1er Octobre 1959 et le 1er Juillet 1962 in JO No 11 du 1er Juin 1963) and of 30 November 1974 (Article 1 du Décret-Loi du 30 Novembre 1974 portant amnistie de certaines infractions politiques in JO No 23 du 1er Décembre 1974).Therefore all pogroms of Tutsi from 1959 to 1973 were unpunished .

⁷³ Andrew Wallis *Silent accomplice The untold story of France `s role in the Rwanda Genocide* (2007)103

⁷⁴ Sarkin op cit note 51 at 167.

for justice as one side, whereas the other side of the Rwandans some suggested amnesty as it had been the case in the past with the other pogroms of Tutsi.⁷⁵

In December 1996 the Government instituted its first case against a Genocide suspect. In 1998, the Butare First Instance Tribunal in its ‘specialised chamber in charge of genocide trials’ decided to hold an itinerant session in a town called Gikonko in Butare. The author of this thesis was the President of the Butare First Instance Tribunal. Once the court had started hearing witnesses, the villagers who were following the case expressed their desire to testify in the case. The judges allowed them to do so. They disclosed how the killings had been committed. Their testimony contradicted the evidence in the dossier provided by some of the officially called witnesses. This encouraged the Tribunal to allow the audience to say what they had witnessed. Because the genocide had taken place during the day, the villagers had watched. As nothing was hidden, almost all civilians had witnessed the event.⁷⁶

A large number of witnesses provided extensive evidence. The result was a strengthened case, and a more effective delivery of justice to the perpetrators of the genocide. It was clear that the memory and concepts of ancient Gacaca had not vanished from the minds of Rwandans.

Members at the Presidential talks held between 1998 and 1999 were attracted to this ancient institution as a way of allowing the population to give evidence so that they would then have the opportunity to testify to what they had witnessed. Eventually, an ad hoc commission was set up to study whether it would be possible to use the Gacaca and how it would be possible to give it competence to try the genocide suspects.⁷⁷

B. Gacaca courts become effective.

No law degree is needed to qualify to be a Gacaca judge. Even an illiterate person who fills the preconditions of integrity may be elected to a Gacaca court. Only the Presidents and Vice-Presidents of the Gacaca courts and their secretaries are required to be literate⁷⁸. Gacaca courts

⁷⁵ See Amnesty laws at note 72 of this thesis. The writer recalls that in many of the seminars on reconciliation he attended many participants were suggesting that reconciliation be favored over justice.

⁷⁶ Prunier op cit note 32 at 234 and 236.

⁷⁷ Republic of Rwanda President office op cit note 6 at 57

⁷⁸ Article 17 of organic law n° 40/2000 of 26/01/2001 which became art 11 of organic law n°16/2004 of 19/6/2004.

are led by judges who have been elected by the population because they are seen to have integrity and wisdom.

Often the judges are unaware of who the witnesses will be before a case starts; people choose to give evidence during gatherings and stand up to do so. There are no prosecutors or investigators. That role is fulfilled by the audience during the work of the courts. The public plays a pivotal role, being the prosecution and the witnesses in accusing or discharging the suspects using the testimonies given. In Gacaca the words “prosecutors”, “investigators” and the “lawyers” are unknown. There are only judges, victims, suspects, witnesses and the public.

The characteristics of the Gacaca courts as described above emanate from organic law No 40/2000 of 26/01/2001, which describes the setting up “Gacaca jurisdictions” and organising prosecutions for offences constituting the crime of genocide or crimes against humanity committed between October 1, 1990 and December 31, 1994

The preamble of the above law states as follows:

[t]he preamble of the above law states as follows: considering that such offences were publicly committed before the very eyes of the population, which thus must recount the facts, disclose the truth and participate in prosecuting and trying the alleged perpetrators; Considering that the duty to testify is a moral obligation, nobody having the right to get out of it for whatever reason it may be.

The “Gacaca Jurisdictions” Department of the Supreme Court is in charge of control, inspection and Coordination of “Gacaca Jurisdictions” activities at the national level. This department has played a major role in designing a Gacaca court procedure, and has been helped by the *Avocats sans Frontières Belgique* [Lawyers Without Borders of Belgium].

With the constitution of 4 June 2003, this department of Gacaca jurisdictions was given autonomy and took the name of National Service of Gacaca Jurisdictions. It had oversight of the bulk of Gacaca courts amounting to 12 103.⁷⁹

⁷⁹ This national service is provided by article 50 of the Organic law No. 16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994.

The Gacaca judges were educated on the above law, and were taught the procedures necessary to uphold the process.⁸⁰

The Gacaca can deliver indictments to arrest suspects where it seems to be relevant to do so and this can be done before or after judgment.⁸¹

Article 85 of Gacaca organic law, voted in 2004, provided for appeal from the Gacaca court of the sector.

Suspects who pleaded guilty could expect substantial reductions in sentence. Even after the punishment as reduced it was converted into imprisonment for half of the sentence and community work for the rest. This leniency helped to reveal truth.⁸²

C. The Gacaca courts process

This chapter develops five points, namely: (i) the replacement of formal criminal justice by the Gacaca court process, (ii) the internal organisation of Gacaca courts, (iii) their procedure, (iv) the penalties and TIG (*Travaux d'Intérêt Général*) and (v) the reconciliation achieved by the Gacaca courts. Following these five points, there is a discussion of criticisms of Gacaca.

i. The replacement of formal criminal justice by the Gacaca courts process

Organic Law No 08/96 of August 30, 1996 on the Organisation of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990 was the first time Rwanda had enacted a law to punish the genocide. According to this law the suspects of genocide or crimes against humanity were to be prosecuted if the crimes they committed were punished by the penal code of Rwanda of 1977.

This law put suspects into four categories according to the role they had played in the crimes.

⁸⁰ *Manuel Explicatif sur la Loi organique portant création des juridictions Gacaca* available at <http://www.crimeshumanite.be/data/documents/ManuelGacaca.pdf>, accessed on 09 February 2012.

⁸¹ Article 39 of Gacaca organic law no 16/2004 of 19/6/2004.

⁸² An example of information revealed by two accused in Kigali city about several children that they murdered and dumped the bodies in a mass grave. See Clark .op. cit note 1 at 85.

Category 1 was for planners, supervisors, instigators, sexual violence and the notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed;

Category 2 was for persons whose criminal acts or whose acts of criminal participation placed them among perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death;

Category 3 was for persons whose criminal acts or whose acts of criminal participation made them guilty of other serious assaults against the person;

Category 4 was for persons who committed offences against property. For this category the suspects were condemned to pay compensation only. They were amnestied for penalties.

The law provided a special chamber in each tribunal amongst the 13 tribunals of first instance in the country. In each case, the procedure was the same: the suspects had the right to be assisted by lawyers of their choice at their own cost. Fortunately one NGO, *ASF Belgique* [Lawyers without Borders]) offered to pay for their lawyers.

The first genocide trial started in December 1996⁸³, and it continued in other prefectures of Rwanda. In 2001, when Gacaca courts were created, all the tribunals together had managed to try only 6 000 suspects in five years. That meant that in five years only about 4% of the prisoners had been tried.

On the 15 March 2001 the Gacaca law was published. It provided for a department in charge of supervision, inspection and co-ordination of the Gacaca courts. With this law Gacaca became a chamber of the Supreme Court. That department was called the 6th Chamber of the Supreme Court. A Presidential decree provided instructions for the election of Gacaca judges. The elections of Gacaca judges took place between the 4th and the 7th of October 2001. A total of 258 000 judges were elected.⁸⁴

⁸³ The first trial of génocidaires took place on 27 December 1996 at Kibungo (Eastern Province) in Bizimana and Gatanazi Egide case (RMP84335/53/ND – RP 0002/EX/R1/96).

⁸⁴ Clark op cit note 1 at 68.

ii. The Gacaca courts and the National Service of Gacaca Jurisdictions (SNJG)

It took time, from 2001 to 2002, for the Department of Gacaca jurisdictions, which eventually became the National Service of Gacaca jurisdictions (SNJG), to decide on the specifics of the procedures of these courts. The organic law was brief and did not offer sufficient guidance. As this law was difficult to implement, the Department of Gacaca jurisdictions needed to be inventive in order to provide the courts with understandable procedures.

With the implementation of the new Constitution in 2003, the Department of Gacaca became autonomous, and was separated from the Supreme Court. This new department, consisting of all the Gacaca Courts was called ‘Service National des Jurisdictions Gacaca’ in French (SNJG) or National Service of Gacaca Courts (NSGC).⁸⁵ Since then, there have been more changes to the Gacaca courts system, because procedures needed to adapt to the requirements of the population. A dynamic and flexible system, the law has been changed more than five times⁸⁶.

According to the Ministry of Justice, Gacaca courts are to come to an end in June 2012.

iii. Analysis of Gacaca jurisdictions according the Organic Law No. 40/2000 of 26/01/2001

At the start of Gacaca there were four levels of tribunal that were organised according to the category of criminals and the level of appeal. These were:

- 1) a court of the cell
- 2) a court of the sector
- 3) a court of the district
- 4) a court of the province.

Each Gacaca court had three organs:

- 1) the bench
- 2) the co-ordination committee
- 3) the general assembly.

⁸⁵ Article 152 of the Constitution of Rwanda of 4 June 2003.

⁸⁶ Clark op cit note 1 at 64.

This structure almost did not work, as it started only at the cell level. It was repealed by the Gacaca Organic Law revision of 2004 (referred to as Organic Law No 16/2004 of 19/6/2004). This law established the organisation, competence and functioning of Gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide of the Tutsi in 1994. The four levels of Gacaca were reduced to three levels, bringing them closer to the populace than the district and the provincial levels, and thus make it easier to search for evidence.

The restructured Gacaca Courts were arranged as follows:

- 1) the court of the cell
- 2) the court of the sector
- 3) the court of appeal at sector level.

At the beginning of the Gacaca system, Organic Law No 40/2000 of 26/01/2001 aimed at simplifying the work of judges by putting suspects into one of four categories according to the role they had played during the genocide. This law was not used, as it was repealed in 2004 before judgments started.

The categories under the revised Gacaca law in 2004 were as follows:

- **First Category**

1. The person, together with his or her accomplices, whose criminal acts or criminal participation placed them among the planners, organisers, instigators, supervisors and ringleaders of the genocide or crimes against humanity.
2. The person who, at that time he committed these offences or encouraged other people to commit them, together with his or her accomplices, was in the organs of leadership, at the national level, at the level of Prefecture, Sub-prefecture, Commune, in political parties, army, gendarmerie, communal police, religious denominations or in the militia.
3. The well-known murderer, together with his or her accomplices, who distinguished him or herself in the location where he or she lived or wherever he or she passed, because of the zeal which characterised him or her in the killings or the excessive wickedness with which they were carried out.

4. The person, together with his or her accomplices, who committed acts of torture against others, even though they did not result in death.
5. The person, together with his or her accomplices, who committed acts of rape or acts of torture against sexual organs.
6. The person, together with his or her accomplices, who committed dehumanising acts on the dead bodies.

- **Second Category**

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

- **Third Category**

The person who committed only offences against property.

iv. The participation of the inhabitants in Gacaca Courts and the General Assembly

The Gacaca Court of the Cell is comprised of

- 1) A General Assembly made up of the residents of that cell who are 18 years old and above. The quorum required is 100 people. It is an open floor to residents and non-residents of the cell and foreigners, and is a public meeting unless the Gacaca decides the doors should be closed.
- 2) A Seat for the Court.
- 3) A Co-ordinating Committee made up of the President of the court, two vice-presidents and two secretaries.

The Court of the Sector, as well as the Gacaca Court of Appeal, is comprised of

- 1) A Sector General Assembly
- 2) A Seat for the Gacaca Court
- 3) A Co-ordinating Committee.

At the beginning of Gacaca in 2001, the number of judges was set at 19 with five deputies, but the Gacaca law of 2004 reduced that number to nine judges and five deputies, and eventually, after the reform of Gacaca law of 2004, to seven judges and two deputies.

The General Assembly is the cornerstone of the Gacaca system because it provides all the information publicly and democratically. Whoever has something to say is allowed the floor to speak. Articles 29 and 30 of the Gacaca law provide punishment of three months imprisonment for anyone who knowingly withholds information about what happened in 1994. If a judge wants to testify in a case he will request to be replaced by a deputy judge for that specific case.

A witness or a survivor who does not live in the cell may be summoned to appear before the court if needed to provide information.

v. The procedure before Gacaca

The procedure within a Gacaca court has four stages

1. The collection of information and the process of reconciliation through the Gacaca system

The genocide was carried out primarily in the open and in broad daylight. Hence many people were witnesses to what happened. The planners of the genocide had tried to exterminate all the Tutsi, so that there would be none to tell the story⁸⁷. Accordingly, when justice was later sought, only survivors and some moderate Hutu were willing to testify. At first it was not easy to get

⁸⁷ Alison Des Forges *Leave none to tell the truth: genocide in Rwanda* (1999) Human Right Watch.

information because the Hutu had been told that, if no one said anything, justice would be impossible and they could not be sentenced.⁸⁸

The first obstacle faced by the Gacaca was silence, an unwillingness to testify. Gacaca tried to solve this problem by insisting that everybody in the process had to say who his neighbour was and what had happened to him or her. A certain procedure had to be respected because asking directly might not have produced reliable answers.

First, people who were living in the cell at the start of the genocide were listed, then lists of the names of those who had died were compiled and details of the destruction of their properties. After those lists had been compiled, it was necessary to provide information as to how each victim was killed, by whom, when and where. The neighbours did not respond immediately; almost all claimed that they were sick when the genocide happened. But slowly the truth emerged at different Gacaca meetings.⁸⁹

The writer remembers a meeting of a Gacaca Court in Rukara, Eastern Province, when everybody kept silent. After a while, the judge said that the compensation for that murdered Tutsi must be paid by the suspect who was already in prison for the murder of a neighbour, and that it had to be taken from the property of the suspect's family. At that stage, the suspect's sister put up her hand to speak and said that she could not accept that only her brother should be held responsible for the compensation. Then she started to denounce others who had participated in the killing.

One lesson from that Gacaca was that the meeting helped to uncover many things because of the participation of all the residents of a certain area.

After a time the public discussions of the events in 1994 resulted in much information being obtained about who had been killed, when and how and where the body had been put or thrown. The names of the perpetrators were thus revealed, not by means of forcing unwilling suspects to

⁸⁸ A French colonel called Sartre Patrice in the Mucyo report on the role of the France in 1994 Rwanda genocide at <http://www.assatashakur.org/forum/breaking-down-understanding-our-enemies/35471-mucyo-report-role-france-1994-rwandan-genocide.html> Accessed on 8th August 2011.

⁸⁹ Clark op cit note 1 at 85-86. Gacaca helped the writer to know the truth about the murder of his brother and to organize the burial in dignity.

talk, but as part of the logical development of a public narrative. This was not revealed as the result of gossip between small groups but in the open in an audience of many hundreds, sometimes thousands. People were held to a high standard of honesty by the community. After the first account of one event, others followed to clarify or to add to the story and subsequently the whole story would slowly be uncovered.⁹⁰

The reconciliation of the survivors with other people started when a Hutu was able to dissociate himself from the perpetrators to tell the story of how some Hutu had killed Tutsi and to show where the bodies had been placed, or when a Hutu decided to plead guilty and to tell the truth about the Tutsi he had killed. As a result many survivors managed to obtain information about the fate of their loved ones, and, after the resting place of the corpses had been identified, they could give them a dignified burial and obtain some closure and a healing of their trauma.⁹¹

Through this process the Tutsi survivors were able to accept that not all Hutu were killers. They could then start to communicate sincerely about Hutu and Tutsi issues and the genocide. But it was not an easy thing to do. Many Tutsi were unwilling to talk with Hutu people, the perception being that all Hutu were perpetrators. Through the Gacaca courts, people were able to see who among the general public was a killer and who was not. The Tutsi could start to talk to the innocent with an open heart. Tutsi also could feel a certain amount of sympathy for someone who pleaded guilty and repented, in part because from the killer he was able to obtain information he needed.

Gacaca has been a bridge to the unity of the survivors. One of them stated: “Gacaca is important for us survivors because it helps us to live and work in the community again ...All the survivors come together and talk about what happened. We realise that we are in the same situation, that we have all had family who were killed. We understand each other and we realise that we are not alone.”⁹²

2. The writing up of the indictment against the accused person

⁹⁰ Clark op cit note 1 at 90.

⁹¹ Clark op cit Note 1at 85-86.

⁹² Ibid at 194.

The information obtained during the collection phase provided facts and evidence sufficient to issue an indictment against suspects who had been named. A list of accused was compiled in this way, and a file or a dossier prepared with each person on that list placed in one of the three categories. At the end of the categorisation, the files were sent to the formal court and to the Gacaca court of sector respectively for those in categories one and two.

According to the Gacaca Organic Law of 2004, those of the first category were sent to the prosecutor who had to prosecute them before the formal courts. The Gacaca cell had to send the indictments of criminals of category two to the President of the Gacaca Court of sector. As the category three was tried by the Gacaca Court of the cell, the indictments were to remain in the cell.

In 2008 it was decided that all persons suspected of being involved in the genocide would be tried in a Gacaca court (except those who had planned the genocide, of whom there were only a few hundred) because the formal tribunal would not finish trying all the Category One cases within a reasonable time.⁹³

As of November 2010, the number of *genocidaires* who were judged by Gacaca courts was over 1.2 million people according to the National Service of the Gacaca jurisdictions.

3. The judgment of the accused person and the penalties imposed

a. Judgment

The Gacaca trial starts when a citation is issued to all parties concerned, providing them with a date that allows them a minimum of eight days preparation for the trial. Everything is organised to ensure that the accused is well aware of the date so that he is prepared. During that time the accused can call his witnesses.

In the search of information in 2003, the Gahini Gacaca court received an e-mailed testimony from England. An Englishman, who had been the Director of the Gahini Anglican Hospital in the Eastern Province of Rwanda until the 1994 genocide, submitted his testimony electronically. He

⁹³ Gacaca organic law No 13/2008 of 19/05/2008 articles 2 and 9 compared to the previous competence of ordinary courts on category one.

testified about his deputy, who was accused before the Gacaca of having called in killers to murder Tutsi who were hidden in the hospital.

Traditional legal principles were well respected by Gacaca judges, for example, the right of defence and the proof needed to substantiate charges against a defendant. The judges were also obliged to search for evidence, and not to rely only on the accusations for a verdict. The judges were also advised to conduct their own investigation in order to ascertain the truth.

The judges knew that it is forbidden to try someone on charges for which he had already been tried; that the accused has the right to keep silent; that even convicted a suspect may benefit of light punishment if there are attenuating circumstances; that the accused has to be reminded of the advantages of pleading guilty⁹⁴.

During the trial, security and the freedom of speech were ensured to everybody. Lawyers did not wear their legal robes or gowns; anybody could request the opportunity to speak, including the defendant's lawyer. The Gacaca judges only employed Gacaca law. Anybody who made claims that did not conform to the Gacaca law was asked to stop. On the day of the trial, the court reminded the accused of the provision given by article 62 of Gacaca Organic Law No 16/2004 of 16/6/2004 which provides that:

Any person who committed the offence of genocide and other crimes against humanity committed between October 1, 1990 and December 31, 1994, may confess, plead guilty, repent and ask for forgiveness before a duly constituted competent bench.

If the accused did not plead guilty, the Gacaca court judges then read out the accusation and gave the floor to those who could provide testimonies supporting the charges. After that, the suspect was given the opportunity to defend him or herself and provide evidence or witnesses to his version.

Then the floor was given to the assembly who could express their opinions on the trial. At this stage new witnesses were brought in. Some gave their views about the case and debate continued

⁹⁴ Article 58 Gacaca organic law No 16/2004 of 19/6/2004 as it has been amended to date.

until things were clear. The case ran from morning to evening and, if it had not finished then, it would continue on a day decided by the court, until the case was closed.

Once the court found that enough information had been gathered, the President asked the secretaries, who were also judges, to read what they had written during the day. If there was a complaint about clarity or omitted information, the secretary made a suitable correction, and asked parties and witnesses to sign what they had said. Everything said and done during the Gacaca session was entered into a *Cahier d'activités* (Book of Activities). Before the President closed the court, he announced the next session and what cases would be heard at that session. Sometimes the court adjourned and pronounced its sentence the same day, but usually the sentence given over the next few days.

b. Penalties

Category 1 offenders included planners, organisers and officials at national or prefectural levels. These individuals were tried by ordinary courts which were the Intermediate courts, while others (inciters, supervisors, and ringleaders of the genocide, any leader from the sub-prefecture to commune levels suspected of genocide or crime against humanity; rapists and suspects of sexual assault) were tried by Gacaca courts.⁹⁵

Category 1

Category 1	Pled guilty before the denunciation	Pled guilty after the denunciation	Refused to plead guilty
Before ordinary court or before Gacaca (planners, organisers, supervisors etc)	20-24 years	25-30 years	Life imprisonment

Category 2

Sub-categories	Pled guilty before the denunciation	Pled guilty after the denunciation	Refused to plead guilty
Notorious zealous	6-7 years	6 yrs 6 moths – 7	10-15 years

⁹⁵ Article 7 of Gacaca organic law no 16/2004 of 19/6/2004 as it has been amended to date.

murderer and accomplices	A sixth is served in custody. A third of sentence suspended, half commuted into community service (called TIG or Travaux d'Intérêt Général)	years 6 months, half commuted in community into service while a third is served in custody, a sixth of the sentence is suspended.	
Torturer and accomplices	Idem	Idem	idem
Dehumanizing act on a dead body and accomplices	Idem	Idem	Idem
Killings and attacks resulting in death and accomplices	2yrs 6 months - 3yrs 6 months A third of sentence suspended ,a sixth of sentence served in custody and half commuted into community service	4-5yrs a third of sentence in Custody; A sixth of sentence suspended Half of sentence commuted into community service.	4 yrs and 6 months - 5 yrs and 6 months
Attacker aiming to kill though the death did not occur and accomplices.	Idem	idem	Idem
Attack with no aim to kill and accomplices	6 months- 18 months 1/6 of sentence served in custody, a third of sentence suspended Half of sentence commuted into community service	18 months -2 yrs 6 months A third of sentence served in custody, 1/6 suspended; half commuted into community service	2 yrs 6 months-3 yrs 6 months Third of sentence served in custody; 1/6 of sentence suspended Half commuted into community service

D. The implementation of the sentence and the community service (TIG)

Rwandan prisons are able to hold no more than 18 000 people.⁹⁶ After the genocide in 1994, the country had more than 130 000 suspects. This number continued to grow as the Gacaca courts operated, but it decreased from 2003 when many prisoners were released by a Presidential communiqué.

One solution to the shortage of prison space was non-custodial sentencing. So it was decided to implement community service (referred to in French as *Travaux d'Intérêt Général* TIG), as a form of punishment for people who pleaded guilty, told the truth and repented for the deeds they had committed. These people had half of their prison time commuted to community work. TIG was also possible for some smaller crimes committed during the genocide. TIG was performed during the day allowing the criminal to return home in the evening. This was an attractive option that persuaded many criminals to plead guilty. By 30 June 2006, 153 034 genocide suspects had pleaded guilty.⁹⁷

After the Gacaca courts had started to operate, the Executive Secretariat of TIG was created to plan its implementation.

Thus Gacaca sentences could be carried out both in prisons and/or in TIG service. At the time this thesis was being written, the 2011 TIG's Executive Secretariat report stated that 45 806 out of 84 888 criminals had completed their community service.

The value of the community service for one year (2010-2011) amounted to Rwanda Francs 7 138 031 562, the equivalent to almost US \$12 million according to the TIG report. The community service was a useful tool that helped with disclosure of the truth and reconciliation, and, of course, it was preferable to full-term imprisonment.

Article 80 of Gacaca Organic Law No. 16/2004 of 19/6/2004 as amended in 2008 reads:

⁹⁶ Amnesty International section Française 'Les Gacaca en prison' available at http://www.aidh.org/rwand/10_amn-02.htm accessed on 19 August 2011.

⁹⁷ National service of Gacaca jurisdictions, 'Achievements, problems and future prospects', available at <http://www.inkiko-Gacaca.gov.rw/En/EnGacaca.htm> accessed on 19 August 2011.

A person sentenced to both a custodial sentence and to serve community service shall first serve community service and if it is proved that the work was exemplary executed, then, the custodial sentence shall be commuted into community service.

Gacaca law has been criticised for being too lenient on criminals who showed good behaviour while on their community service. This meant that someone who had been a serial killer of Tutsi people during the genocide, who had pleaded guilty and received a sentence of community service, could actually avoid serving any time in prison.⁹⁸

E. Criticism of Gacaca courts and human rights issues

Some observers of the Gacaca process have expressed positive views on Gacaca. However, Human Right Watch and Amnesty International have not viewed them favourably.⁹⁹ The Gacaca trials resulted in the sentencing of number of suspects who had not expected their deeds to be uncovered, and helped to heal trauma by giving the survivors and suspects a space for dialogue.¹⁰⁰ Once the involvement of hidden *genocidaires* had been disclosed by Gacaca, their relatives were unhappy and began to criticise the whole process of Gacaca.

The following, however, are some views of observers who had taken time to visit many Gacaca courts and interview participants:

⁹⁸ Article 21 of Organic Law N° 13/2008 Of 19/05/2008 modifying and complementing Organic Law N° 16/2004 of 19/06/2004 establishing the organization competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994 as modified and complemented to date.

⁹⁹ Human Right Watch report on Rwanda (May2011) 36-80; See Amnesty International Public Statement of 26 November (2010) 8.

¹⁰⁰ Fanie du Toit *Reconciliation and transitional justice: the case of Rwanda's Gacaca courts* in Institute for Justice and Reconciliation (2011)23. For dialogue Nicolas A Jones *The courts of genocide: politics and the rule of law in Rwanda and Arusha* (2010) 69.

Many Rwandans view Gacaca as a forum in which all members of the community, suspects, survivors and the general population can debate and discuss legal and non-legal issues related to genocide.¹⁰¹

....In particular, Gacaca shows how a cliché of transitional societies can work in practice, namely, that there can be no reconciliation without justice. The key to understand how it deliberately shapes justice toward reconciliatory ends, in ways that human rights critics fail to recognise.¹⁰²

Boniface a survivor of genocide living in Kigali described the importance of Gacaca in this way:

At Gacaca the truth frees us from the weight we have carried around since the genocide. Gacaca is important because it allows us to be together and to hear the truth and to learn to live together againI will go to Gacaca and ask the prisoners who come from the jail to speak the truth about what they did... There are many lies at Gacaca. But the community will refute them and the judges will get to the truth and make a record of the prisoners` crimes. Then I will feel as if all these things have finished and life will start again.¹⁰³

Earlier in this chapter it was shown how, before the use of Gacaca, communication between Hutu and Tutsi was impossible. Gacaca have been able to engage those two peoples in a dialogue.

Very harsh violations of human rights had taken place on a large scale in the genocide which had taken the lives of 1 050 000 Tutsi and moderate Hutu. Common sense would thus dictate a severe punishment for the perpetrators; the light punishment actually given to them was far from the ideals of retributive justice. The issue of compensation for victims of Tutsi genocide in Rwanda neither interested the Gacaca courts nor the International Criminal Tribunal of Rwanda ICTR.¹⁰⁴ It was surprising that none of the Human Rights organisations mentioned this issue until it was raised in 2010 by Human Right Watch.

¹⁰¹ Phil Clark and Zachary D Kaufman *After genocide transitional justice, post-conflict reconstruction and reconciliation in Rwanda and beyond* (2008) 312.

¹⁰² *Idem* at 313.

¹⁰³ Clark and Zachary *op cit* note 101 at 316.

¹⁰⁴ Human Right Watch *op cit* note 99 at 80.

Gacaca has been criticised for not having dealt with the crimes committed against Hutu during the genocide of Tutsi between April and July 1994 when the genocide was taking place. During the fighting RPF soldiers shot and killed Hutu, whether soldiers, Interahamwe and civilians, with machetes and arms to stop them killing Tutsi. The RPF soldiers were fighting to stop the genocide during a period of inaction from the international community, which stood aside.

The Hutu wanted those killings to be perpetrated at the same level as the genocide so that they would be given amnesty. In this way they hoped to claim for those deaths a moral equivalent to the genocide killings. If the Hutu and Tutsi killed one another, they argued, then why should the killing of Tutsi be labelled genocide, and not the other way round? However, the RPF did not set out to kill Hutu because they were Hutu. In fact, there were some isolated killings of Hutu by RPF soldiers, who took revenge for their family members, who had been wiped out during the genocide, and were tried before Rwanda military courts¹⁰⁵. The said killings were not sufficiently systematic and widespread to be qualified as crimes against humanity. Below are figures of those trials:

Year	1994	1996	1997	1998	2000	2001	2003	2004	2005	2006	2008	Total
Accused	2	1	14	12	4	1	1	5	1	1	4	46

One wonders why such criticism arose, seeing that these crimes were tried by the formal courts before the creation of Gacaca. People had been told to bring to the prosecutor all complaints about crimes committed by RPF soldiers to enable him to file cases against them and over a thousand files of cases were tried before the ordinary courts.¹⁰⁶

Gacaca has also been criticized for not allowing lawyers to defend the genocide suspects during the hearings.¹⁰⁷ This is a misunderstanding of how Gacaca works. One must remember that Gacaca operated on a very large scale, with 12 103 courts working on the same day in a country that only had 300 lawyers. How would a legal defence be possible for all suspects with so few

¹⁰⁵ Statistics provided by the Military Auditor General Office on 30th January 2012 (Kananga Albert and others RMP 0461/S1/AM/KGLKS/94).

¹⁰⁶ This was always explained into different meeting of populace on Gacaca courts.

¹⁰⁷ Human Right Watch op cit note 99 at 36.

lawyers? Another reason was that, in Gacaca, there were no prosecutors - and even the judges were not lawyers. It would have created an imbalance if defence lawyers were allowed.

In Gacaca courts everybody had the right to speak when given the floor, even lawyers, who happened to be present, were not forbidden to come into the Gacaca court and could give their ideas about how the trial was being carried out. They did not, however, have the monopoly of speaking on behalf of the accused, as it is the case in the formal justice system, and their role had to comply with the Gacaca law. Regarding the exclusion of the lawyers, Dr Phil Clark, a political researcher, wrote that it: “is meant to maximise the community’s sense of ownership over the process and consequently its personnel and interpersonal effects”. In addition articles 2, 64, 65 and 66 of Gacaca organic law No 16/2004 of 19/6/2004 concerning the procedure of hearings, implicitly provides for the exclusion of lawyers even if this is not explicitly mentioned.

It has also been previously stated that in the Gacaca courts the public served as lawyers for everyone, especially when somebody took the floor to prove a point in the defence or prosecution of a suspect. Gacaca differs from ordinary courts because it allows a debate to take place among the residents of a given area, allowing any of them to talk about what happened. Whoever is present can discuss or testify about the role played (or not) by an accused, given that the genocidal attacks were mostly committed during the day in full public view.

It is alleged that people were reluctant to testify in Gacaca because of fear of being ostracised or intimidated by government officials or influential people.¹⁰⁸ This is irrelevant, for the same could be said anywhere in the world. Lawyers for the defence are only happy with the sentence when the accused is acquitted. And, it is very difficult to be impartial when one knows that in Rwanda the perpetrators and the survivors of genocide are still living together side by side.

In conclusion, many critics like Human Rights Watch have not participated objectively in Gacaca session or have done so rarely. Generally, one finds little truth in the reports of some NGO and do not give a correct account of the general situation.¹⁰⁹

¹⁰⁸ Human Right Watch op cit note 99 at 4.

¹⁰⁹ For instance, Human Right Watch in their report on Gacaca “*Justice compromised*” (2011)² revealed that their report is based on findings read from others.

Some HRW criticisms come from the perpetrators or their relatives. Some of the criticism relies on an analysis of the statutes establishing the Gacaca, and thereby misses the dynamic nature of these courts on a daily running basis.¹¹⁰

Gacaca has been criticised by HRW on the grounds that it fails to protect innocent suspects, but this criticism lacks substance because the Gacaca law provides for a bench of seven independent judges to decide by majority of the bench. The law also provides for a level of appeal at the Gacaca sector and also for a revision¹¹¹ of the appeal sentence if there are obvious mistakes. All those mechanisms protect innocent suspects, and, with the co-ordination of the National Service of Gacaca Jurisdictions, suspects have a reasonable guarantee of a fair judgment.

Gacaca courts, however, made it possible for justice to be done without too long a delay. They secured the accused's right to have access to justice within a reasonable time. Analysing the criminal competence of African traditional courts Professor Tom Bennett thinks that: "the advantages of these courts clearly outweighed their disadvantages: they were simple, informal, cheap, accessible and familiar with the laws and affairs of their community".¹¹²

In less than ten years Gacaca have been able to deliver justice to more than one million suspects of genocide in Rwanda. No other form of justice would have been able to do this. This fact alone should be sufficient to counter any criticism of possible Gacaca shortcomings. To quote Professor Tom Bennett again: "[a]nother point frequently overlooked is the fact that proceedings in Western style courts may well offend African views of fairness, and, in certain respects, traditional courts may come closer to realising human rights than formal state courts".¹¹³

¹¹⁰ Clark op cit note 1 at 438.

¹¹¹ Article 93 of Gacaca organic law no 16/ 2004 of 19th June 2004 as modified and completed to date.

¹¹² Tom W Bennett *Customary criminal law in the South African legal system* in J Fenrich, P Galizzi & T Higgins *The future of African customary law* (2011) CUP 363-386.

¹¹³ Tom W Bennett *Access to justice and human rights in the traditional courts of Sub-Saharan Africa* "work in press" in *The role of traditional justice in donor aid for African states* edited by Evan Brems et al (2011) Intersentia Brussels.

CHAPTER IV

DISCUSSION OF THE NATURE OF THE GACACA COURTS USING THE CONCEPTS OF RESTORATIVE AND RETRIBUTIVE JUSTICE

Section 1 Introduction

Researchers have shown interest in the nature of Gacaca courts for many reasons. One is the serious and horrific nature of the crimes they were used to try. These are the crimes of genocide and crimes against humanity committed by civilians and soldiers. Typically, these are crimes that are reserved for the High Courts under domestic laws or for the International Criminal Courts.

Gacaca courts were created in 2001. Before that, the genocide crimes were tried in the regular Rwandan courts. In 1998 the Government of Rwanda made the decision to hand these cases over to lay judges using the traditional means of resolving conflicts: Gacaca. This was done to speed up the process of trying the suspects of genocide, who were filling prisons across the country. This writer recalls having to answer people with an international reputation who wanted to know whether the Gacaca courts were really being launched by the Government to clear the prisons as there were 130 000 awaiting trial prisoners, some who had been there for eight years since 1994. The decision to use Gacaca courts surprised many people. Many observers were curious to see how that kind of court could be used to try someone of the most heinous crimes in the world. It took four years, from 1999 to 2002, before the system effectively started.

Government needed to convince stakeholders both within and outside the country that this exceptional system of justice, which was unfamiliar to the critics, was relevant, applicable and viable.

The officials explained that the Gacaca courts had four main objectives.¹¹⁴ These were:

1. to reveal the truth about what happened in 1994;
2. to speed up the trials of suspects;
3. to eradicate the perceived culture of impunity;
4. to effect reconciliation.

¹¹⁴ Official website of Gacaca courts available at <http://www.inkiko-gacaca.gov.rw> accessed on 13 December 2011. Sarkin op cit note 51 and Barbara Oomen *Rwanda's Gacaca: objectives, merits and their relation to supranational criminal law* (2006) 12-16.

When the people understood those objectives and, especially, given that Gacaca was grass-roots based, the process of reconciliation became apparent and some started to describe it as a restorative justice system. That name was not yet used by Government officials because they did not want to confuse Rwandans who were familiar with Gacaca as a system used to assist villagers with conflicts between themselves.

Since then many writers have produced articles and books on Gacaca labelling it restorative justice or retributive justice, some, like Nicolas A Jones saying that “The Gacaca combines elements of both restorative and retributive justice”¹¹⁵. There is much interest in analyzing the real nature of Gacaca mainly because writers are far from obtaining a consensus on the issue.¹¹⁶

According to Lars Waldolf, Gacaca is a failed experiment in restorative justice¹¹⁷. He believes that “Restorative justice is impossible without reparations for survivors of mass atrocities”¹¹⁸. Of course, according to advocates of pure restorative justice, reparation is a very important element. Hence, they do not consider Gacaca restorative justice, as in most Gacaca trials no reparation was made, except for money paid for restitution of property by some criminals of category III. Lars missed the point that the Government of Rwanda never had claimed or intended that Gacaca should be a restorative justice program.

In this chapter, Section One will explore the concept of restorative justice and try to compare its elements with those of Gacaca. Section Two analyses to what extent Gacaca remains retributive justice, given that it tried cases using the processes it inherited from the formal courts, which began the prosecutions with retributive justice in mind. By using the concepts of restorative and retributive justice, Section Three will compare the findings in the first two sections in order to situate Gacaca courts and define their real nature.

Section 2 Restorative Justice and Gacaca Courts

A. The Concept of Restorative Justice

Restorative justice defers punishment of the offender and prioritises reparation and restoration to the victim by the offender. It “rejects, at least in principle, the retributive logic of punishing harm

¹¹⁵ Nicolas A Jones op cit note 22 at 68.

¹¹⁶ A Erin Tiemessen op cit note 66 at 1; Allison Corey and Sandra F Joireman op cit note 4.

¹¹⁷ Lars Waldolf op cit note 3 at 422.

¹¹⁸ Ibid at 430.

with harm”¹¹⁹. This is most often achieved through mediation between victim and offender with the assistance of a facilitator, or through a conference in the presence of the families and friends of both victims and offenders. Restorative justice can also be considered in terms of a framework of sentencing circles¹²⁰.

Circle sentencing is more extensive than mediation and conference; it gathers:

[Victims, offenders, their families and supporters, any other interested member of the community (whether or not they have knowledge of the parties or the crime), and criminal justice personnel participating as equal members]... Participants are given uninterrupted time, in turn, to say whatever they wish that is related to the purpose of the circle in which they hold the talking piece. Circles are used for purposes other than sentencing. They may be used to solve a community problem, to provide support and care for victims or offenders (sometimes to prepare them for a sentencing circle) and to consider how to receive offenders who have been imprisoned back into community. There can be considerable overlap in the approaches taken by VOM (victim-offender mediation), conferencing and circles.¹²¹

For restorative justice a punishment is simply another harm inflicted on a member of the community, subsequent to the harm caused by the offender’s wrongdoing.

Therefore, a key characteristic of restorative justice is a move away from punishing the offender (retributive justice) in favour of healing the victim, with the offender offering the victim reparation and an apology.

Even if researchers have not yet fully agreed on a definition of restorative justice, Yvon Dandurand et al have managed to encompass the general idea both in its encounter process and reparative conceptions:

[a] Restorative process is any process in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.¹²²

From this it is evident that restorative justice is not simply a court trial; rather it is an encounter between offender and victim that aims to change the traditional way of dealing with a crime (punishment) towards restoration of the wrong by the offender who has to take on responsibility

¹¹⁹ Jan Froestad and Clifford Shearing ‘Conflict Resolution in South Africa: a case study’ in Johnstone Gerry and Daniel W Van Ness (eds) (2007) *Handbook of Restorative justice* 534-555.

¹²⁰ Barbara E Raye and Ann Warner Roberts ‘Restorative processes case study’ (2007) 211-227 in Johnstone Gerry and Daniel W Van Ness (eds) *Handbook of Restorative justice*.

¹²¹ Ibid at 215.

¹²² Yvon Dandurand and Curt T.Griffiths *Handbook of Restorative Justice* (2006)6.

for the consequences of his wrongdoing vis-à-vis the victim. Restorative justice, in the Western World, started in Canada in 1974 (in the *Elmira case*) in the form of VOM (victim - offender - mediation) in minor crimes, but more recently it has been used to deal with violent crimes. This form of restorative justice was further developed in the form of family group conferencing (FGC) in 1989, under provisions of the Children, Young Persons and Families Act in New Zealand and it continues to expand and grow as an alternative to retributive punishment¹²³. Restorative Justice is well developed in North America (USA and Canada), the UK, New Zealand and Australia, and it is beginning to be considered in Africa and other parts of the world.

Restorative justice takes many different forms. Gerry Johnstone and Daniel W. Van Ness have drawn up a list of criteria to characterise any alternative to the formal justice system that could be called restorative justice. According to these standards, for such an alternative to be called restorative justice, one or more of the following must be present:

- a. a relatively informal process which aims to involve victims, offenders and others closely connected to them or to the crime in a discussion of matters, such as what happened, what harm resulted and what should be done to repair that harm, and, perhaps, how to prevent further wrongdoing or conflict.
- b. an emphasis on empowering (in a number of senses) ordinary people whose lives are affected by a crime or other wrongful act.
- c. some effort by decision-makers or those facilitating decision-making processes to promote a response which is geared less towards stigmatizing and punishing the wrongdoer and more towards ensuring that wrongdoers recognize and meet a responsibility to make amends for the harm they have caused in manner which directly benefits those harmed, as a first step towards their reintegration into the community of law-abiding citizens.
- d. decision-makers or those facilitating decision-making ensuring that the decision making process and its outcome will be guided by certain principles or values which, in contemporary society, are widely regarded as desirable in any interaction between people, such as: respect for others; avoidance of violence and coercion if possible, and minimised if not; and inclusion in preference to exclusion.

¹²³ Barbara E Raye and Ann Warner Roberts op.cit note 120 at 212 -213.

- e. decision-makers or those facilitating decision-making devoting significant attention to the injury done to the victims and to the needs that result from that, and to tangible ways in which those needs can be addressed.
- f. some emphasis on strengthening or repairing relationships between people, using the power of healthy relationships to resolve difficult situations.¹²⁴

Restorative justice may also be understood as a voluntary encounter between the victim and the offender in which the latter agrees to: listen respectfully to the former, answer any questions he/she may have, and to apologize and agree to reasonable reparative actions which may be suggested.¹²⁵ The advocates of restorative justice hold that in this process both parties (victim and offender) must be treated with respect, as persons with dignity, worth and wisdom¹²⁶.

The proponents of restorative justice assign to it another goal, one which does not capture the attention of retributive justice: the “collateral” of the incident, for example, the family of the offender, which has done nothing wrong but suffers the consequences of the harm¹²⁷. Hence, the aim of restorative justice is to attend to the full impact of the crime on victims, the offenders and the community.¹²⁸

1. Restorative justice and Gacaca courts

To recapitulate, the core principles of restorative justice can be globally characterized as containing the three following elements as described by Yvon Dandurand and Curt T. Griffiths: Encounter, Reparation and Transformation.¹²⁹

I. Elements which characterize restorative justice

¹²⁴ Gerry Johnstone and Daniel W Van Ness ‘The meaning of restorative justice’ (2007) in *Handbook of Restorative Justice* 7.

¹²⁵ Ibid at 13.

¹²⁶ Ibid at 19.

¹²⁷ Judith Brink ‘The other victims –the families of those punished by the state in Dennis Sullivan and Larry Tiftt’ (2008) *Handbook of restorative justice* 261-268; James R Acker *Handbook of restorative justice* (2008)255 and Ingle 1990:206-9; Vandiver 2003:624-9 quoted by James R Acker *Handbook of restorative justice* (2008) 255.

¹²⁸ James R Acker ‘Healing the victim’s voice amidst the cry for capital punishment in Dennis Sullivan and Larry Tiftt’ (2008) *Handbook of Restorative justice* 246-260.

¹²⁹ Those three conceptions are encounter conception, reparative conception and transformative conception in Yvon Dandurand and Curt T Griffiths *Handbook of Restorative Justice* (2006)103.

- i. Encounter between the victim and the offender in which the offender answers the questions of the victim¹³⁰. This encounter will be held in the case of offenders who admit responsibility for the offence before they undergo the process of restorative justice. If they claim innocence, then they will appear before a traditional retributive court.
- ii. The reparation and apology by the offender¹³¹. The offender must make reparation for the wrong committed to the victim and apologize with remorse.
- iii. The move away from punishment¹³². In this process, the offender is not penalised, as this is viewed as creating additional harm over and above that suffered by the victim.
- iv. Healing and reconciliation¹³³. The offender's apology assists the victims in their healing after the offence, thereby easing their fear and hatred and preparing them for the reconciliation process.
- v. Respecting all parties during the process¹³⁴. The advocates of restorative justice recommend proceeding with the process in a climate of respect for all parties. This may however not be easy when the offender has perpetrated a crime of grave violence.
- vi. Good management of all the consequences of the crime. It may seem too ambitious an objective, but restorative justice processes aim to consider and solve holistically all the issues generated by the crime.

Having described, broadly, the aspects of restorative justice, is it now possible to test Gacaca courts to see whether they qualify as a restorative justice system.

¹³⁰ Kathleen Daly 'The limits of restorative justice in Dennis Sullivan and Larry Tiff' (2008) *Handbook of restorative justice* 135; Christa Pelikan and Tom Trenczek 'Victim offender mediation and restorative justice: the European landscape' (2008) in *Dennis Sullivan and Larry Tiff* 80; Gerry Johnstone and Daniel W Van Ness *Handbook of Restorative justice* (2007) 13.

¹³¹ Gerry Johnstone and Daniel W Van Ness op cit note 124 at 13.

¹³² Some Scholars suggest that what makes processes more or less 'restorative' is the intent with which they are imposed, seeking reparative outcomes instead of the uses of punishment as a deliberate infliction of "pain" to balance the harm (Bazemore and Walgrave 1999a:48-9).

¹³³ Gerry Johnstone and Daniel W Van Ness op cit note 124 at 13, considering that if the offender apologizes sincerely and repair this can help to bring healing and reconciliation with the victim.

¹³⁴ Gerry Johnstone and Daniel W Van Ness op cit note 124 at 19.

A. Analysis of compatibility with the elements of restorative justice and Gacaca courts

i. Encounter between victim and offender.

The VOM (victim -offender - mediation) process is more appropriate and easier to apply for isolated crimes between a given victim and an offender than it is instances of collective crimes, like genocide which is committed on a large scale by many offenders against thousands of victims. Many people were involved in the killings in Rwanda; the Gacaca courts deal with such situations because in each cell of the country there could be hundreds of people accused of participating, in different ways, in the genocide. Many families were also exterminated, so no member is left to participate in these processes. Therefore one survivor may perceive him or herself to represent all those who perished. It is therefore difficult to create an encounter between victims and offenders as in normal situation. As a result, Gacaca uses collective encounters where survivors are few. But any survivor who has any information about a suspect is allowed to denounce him or her. It is also the same for accused who are absent during the hearings because of flight since 1994.¹³⁵

In the Gacaca courts four types of stakeholders gather: a) offenders, b) survivors (few or absent)¹³⁶, c) judges and d) community members. Each group plays its role in the process, which differentiates Gacaca from formal courts, where there are two opposing sides – the offender and the victim - leaving no place for the community. To a certain extent Gacaca is similar to a sentencing circle because of the plurality of stakeholders involved¹³⁷.

The offenders do not come voluntarily to the Gacaca nor do they necessarily admit their criminal role in the genocide. They are summoned to the court, as is the case in the formal court, whether they plead guilty or not. Often the accused plead not guilty and defend themselves by claiming innocence, while the survivors, who know very well the wrongs they have suffered, accuse them. As this is the case in Gacaca, it is a legal battle unlike the peaceful encounter of restorative justice unless the accused pleads guilty.¹³⁸

¹³⁵ Article 98 of gacaca organic law No 16/2004 of 19 June 2004

¹³⁶ The author remember to have attended a Gacaca session in Kayove Western Province in Rwanda where there was no survivor but the process went well.

¹³⁷ In Gacaca courts there is no place for professionals during the process while in sentencing circles there are some.

¹³⁸ Clark op cit note 1 at 213.

However, something beneficial takes place in this encounter. The survivors are given a space to tell their stories, to be heard as they relate quietly their suffering and the losses they suffered during the hundred days of genocide. This space for healing and disclosure is not an opportunity provided in formal court hearings. Furthermore, the Gacaca courts provide an audience (the community) who give the victims enough of their time to hear them properly. This is in itself therapeutic.

The Gacaca courts provide official acknowledgement of the suffering of the victims during the genocide. It is greatly beneficial in the healing of post-traumatic stress syndrome for victims to get the opportunity to tell their story.¹³⁹ The processes of the Gacaca courts are restorative for the victims, as well as the offenders, who are made aware of the personal suffering they have caused and are given an opportunity to express their apology in public. Comparatively, the impact of a VOM restorative justice process and a Gacaca court is very similar. The Gacaca are restorative in the encounter that they facilitate between victim and offender. Therefore they pass test of encounter of offenders and victims.

ii. The test of reparation and apology by the offender.

Whereas, in pure restorative justice, reparation and apology are given by the relatively willing offender after an encounter in VOM, in Gacaca courts there is no discussion of reparation except for the restitution of belongings destroyed or pillaged. No reparation is paid for the killings and other harm suffered by victims.

There have been criticisms that in many cases offenders who admit guilt do not offer very sincere apologies¹⁴⁰. According to Article 54 of Gacaca organic Law (No 16/2004 of 19th June 2004), he who pleads guilty has to repent and apologize to victims and to the Rwandan Society. In Gacaca courts, there are “collective encounters” which are not of voluntary offenders and victims; there is no reparation and not every offender pleads guilty. Article 96 of the Gacaca organic law does not prescribe reparation to be given by the offender. Therefore Gacaca courts **fail** in the test of reparation and apology because the reparation must be complete and the apology sincere.

¹³⁹ Ibid at 194.

¹⁴⁰ Lars Waldorf op.cit note 3 at 428.

iii. The test of the move away from punishment

Here the difference between Gacaca courts and the pure restorative justice which rejects punishment is noteworthy. Indeed, article 72 of Gacaca organic law (No 16/2004 of 19/6/2004) prescribes penalties of imprisonment from life to a number of years. For example, “The Gacaca court of Ntyazo, in Nyanza district, meted out life imprisonment to Juvénal Masabo Nyangezi. This singer, who was tried in absentia, was found guilty of "incitement to commit genocide in the prefectures of Butare and Gikongoro", in the south of Rwanda”¹⁴¹. Also, “Gacaca court in Nyakabanda (Kigali) found Valerie Bemeriki, guilty of "planning of genocide, incitement to commit genocide, complicity in murder of several people and families.”¹⁴² Therefore the Gacaca **fails** the test of moving away the punishment.

iv. The test of healing and the reconciliation

It was explained above the ways in which the Gacaca encounters are beneficial both for survivors and offenders: because the process of reconciliation is accelerated as the survivor is heard and healed. Reconciliation is nonetheless a gradual process that occurs when the victims are satisfied that their sufferings have been acknowledged. The time that it takes depends on the gravity of the crime. Thus the length of time is proportional to the suffering, the sincerity of the apology and the peaceful future behaviour of the offender. Gacaca courts have helped victims (survivors) to obtain information about what happened to their loved ones and where their bodies were deposited. This has enabled burial ceremonies to be carried out, and closure to be obtained. Such important evidence of admission of guilt was unlikely to be obtained in the formal justice system. Furthermore, the encounter between survivors and accused assists the peaceful co-existence of perpetrators and victims who live alongside one another as villagers. In this way Gacaca courts **succeed in** the test of healing and reconciliation.

v. The test of respect of all parties during the process

Gacaca courts deal with accused persons who were either in prison or still free. Both are treated similar to the way in which they would be treated by a formal court. No particular consideration

¹⁴¹ Hirondelle News Agency International justice reporting available at <http://www.hirondellenews.com/content/view/13057/1192/> accessed on 9th December 2011.

¹⁴² Idem.

of friendship or special treatment is offered to those who have been accused of genocidal atrocities. The proponents of restorative justice suggest a particular treatment especially that which somewhat makes it different to how the offender is treated in the formal justice system: “[t]he process is characterized by respectful treatment of all parties. It is also one that promotes the participation and, to a varying extent, the empowerment of all parties concerned”¹⁴³. Therefore Gacaca courts **fail** in the test of this respect mainly, because, if prima facie evidence is available, the court may decide to arrest the offender provisionally.

vi. The test of holistic management of all consequences of the crime

The mission of the Gacaca courts is to reveal the truth of what happened in the genocide. Many survivors were in hiding and could not see or to hear everything which happened, unlike Hutu who were not hunted. With that truth exposed, the Gacaca courts have to determine responsibilities and pass judgments of guilt or innocence. By doing this they are able to dismiss the general suspicion which was laid on all Hutu as having been killers.¹⁴⁴ Gacaca courts have accelerated trials and eased the process of reconciliation through the participatory discussions of what happened during the genocide, and some good initiatives of encounter process developed between survivors and sentenced *genocidaires*, who finished their TIG penalty.¹⁴⁵

The context in which Gacaca courts have been working, especially in the limited time available, has not provided an opportunity for people to become aware of all the effects of the crime of genocide, for example, the suffering of families of the accused as a result of the imprisonment of a father or mother or both. Therefore Gacaca courts **fail** this test.

In conclusion Gacaca courts fail to be restorative in four out of six of the items while succeeding in two so that Gacaca courts **fail** at 66, 6 per cent to be restorative while succeed to be restorative at **33.4**per cent.

¹⁴³ Yvon Dandurand *Handbook on restorative justice programmes* UN on Drugs and Crime (2006)9; Gerry Johnstone and Daniel W Van Ness op cit note 124 at 14.

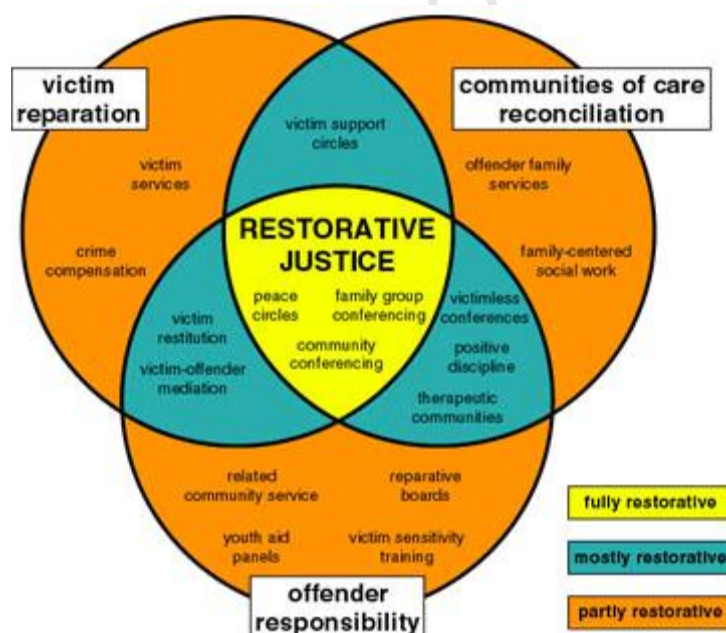
¹⁴⁴ According to the survivors perspective that were hunted by a crowd of Hutu they could not after genocide know who was killing and who was not because generally none of them has even tried to defended them during that bad period.

¹⁴⁵ They have created associations to construct houses of widows of genocide in need; a hundred were constructed in Bugesera district see Karegye Kamili *Living together after genocide: a case study of reconciliation efforts in Bugesera district after 1994* (2008)49 UKZN Law, Master’s Thesis.

B. Global understanding of restorative justice theories

Writers about restorative justice appear to fall into two categories. One group holds a strict conception, also called pure restorative justice, and puts great emphasis on the encounter between victim and offender, reparation, reconciliation, healing and integration. This group tends to move away from punishment and focus on reparation and the needs of victims, offenders and the community. The other group discusses restorative justice from a larger more holistic perspective. This involves many practices, and will often try to address all of the effects of the crime. Both conceptions of restorative justice are broader than the formal justice, which deals with a very narrow project in its pursuit of justice.

Paul McCold and Ted Wachtel¹⁴⁶ classify the practices of restorative justice into three types: fully restorative, mostly restorative and partly restorative, as these involve victim reparation mechanisms, offender responsibility and the communities of care and reconciliation. They have represented these by means of the following diagram.



The previous analysis based on tests 1-5 addresses the pure restorative justice and, to borrow the terms of McCold and Wachtel, those tests cover the fully restorative justice and mostly

¹⁴⁶ Paul McCold and Ted Wachtel *A theory of restorative justice paper presented at the XIII World Congress of Criminology* 10-15 August 2003, Rio de Janeiro.

restorative justice while test 6 emphasises the larger conception of restorative justice, which they call partly restorative justice. This is because it is an intervention occurring after there has been formal justice sentencing. It therefore focuses on the management of all the effects of that particular crime. Thus, taken alone, it is only partly restorative because it appears to complement retributive justice.

Section 3 Retributive Justice and Gacaca Courts

A. Concept of retributivism

Retributive justice refers to punishment which is seen as a repayment of a wrong done by the offender. Retributivism is defined by *Black's Law Dictionary*¹⁴⁷ as “[the] legal theory by which criminal punishment is justified, as long as the offender is morally accountable, regardless of whether deterrence or other good consequences would result”. According to the retributivism proponents “a criminal is thought to have a debt to pay to society, which is paid by punishment”¹⁴⁸. The punishment is also sometimes said to be society’s act of paying back the criminal for the wrong done. Opponents of retributivism see it as “vindictive theory”.

Maximalist retributivism proponents, such as Emmanuel Kant, submit that the society “has the duty not just a right to punish a criminal who is guilty and culpable”¹⁴⁹. Proponents of minimalist retributivism, for their part, maintain that the judge may absolve the offender from punishment, wholly or partially, when doing so would further societal goals such as rehabilitation or deterrence.¹⁵⁰

Jeremy Sarkin notes that “knowing that there is a good chance of being prosecuted will deter many who may be tempted to commit human rights abuses.”¹⁵¹

1. Theories of retributive justice

Four theories underpin the formal traditional criminal justice system: deterrence, incapacitation, rehabilitation and retribution¹⁵².

¹⁴⁷ Bryan A Garner *Black's law dictionary* 7ed (1999)1318.

¹⁴⁸ Garner op cit note 147 at 1318.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Jeremy Sarkin op cit note 51 at 148.

¹⁵² Crump Cohen ‘et al’ *Criminal law: cases, materials and lawyering strategies* 2ed (2010).

- 1) *Deterrence* refers to the deterrent effect that is created by the possibility of being punished for committing a particular crime¹⁵³.
- 2) *Incapacitation* is the process whereby an offender is rendered incapable of committing that offence or any offence again, this is done primarily through incarceration in prisons. An offender who is removed from society is unable, for that period of time, to harm the community or commit further criminal acts.
- 3) *Rehabilitation* is the process through which an offender's attitudes and behaviours are changed to prevent them from re-offending. This includes among other techniques treatment for drug addiction, alcoholism, therapy, life-skills.¹⁵⁴
- 4) *Retribution* is a theory with ancient roots dating back as far as Hammurabi's code in Babylon, about 1780 BC, containing 282 laws¹⁵⁵, with scaled punishments, adjusting "an eye for an eye, a tooth for a tooth" to try to ensure that the punishment of the offender is equivalent to the harm inflicted on the victim. According to this theory the punishment must be proportionate to the crime.¹⁵⁶

Scholars of retributive justice say that the goal of punishment is twofold: utilitarian¹⁵⁷ (deterrence, incapacitation and rehabilitation) and retributive¹⁵⁸. The 19th century, philosopher Immanuel Kant opposed utilitarianism and defended retributivism. He regarded punishment as a matter of justice. He stated that if the guilty were not punished, justice was not done¹⁵⁹. In *The Metaphysical Elements of Justice* Kant wrote of retribution as a legal principle: "Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime".

The Kantian approach to justice is the opposite of restorative justice, which proposes a move away from punishment. Nonetheless, retributive justice is still the most common approach in formal criminal justice systems, globally. Restorative justice is a new response to crime – at least in the Western world. Presently, no country has adopted restorative justice to the exclusion of

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Charles F Horne *Code of Hammurabi* (1780) Fordham University.

¹⁵⁶ F Horne op cit note 155.

¹⁵⁷ Bagaric Mirko *Punishment and sentencing :a rational approach* (2001)41.

¹⁵⁸ Ibid at 38.

¹⁵⁹ Joachim Molander 'Atonement retributivism studia theologica' (2009) 63 2 *Nordic Journal of Theology*.

retributive justice. Common punishments still include imprisonment, the death penalty, fines and the curtailing of freedom rights.

The four elements of Crump, Cohen 'et al' may be used as elements to compare retributive justice and the Gacaca courts to see how far the latter constitutes a category of retributive justice.

B. Comparisons

a. Table of comparison of retributive justice and Gacaca courts (GC) using those four elements of Crump, Cohen, et al.

Elements of comparison	Retributive justice of Crump Cohen 'et al'.	Gacaca courts(GC)
1. Deterrence	Yes	Yes, GC arrests and punishes genocidaires like other formal tribunals.
2. Incapacitation	Yes	Yes, GC imprisons convicted people for up 30 years or life imprisonment.
3. Rehabilitation	Yes	Not directly in GC's business; Prison life may change the behaviour of inmate positively or negatively. There is not a clear rehabilitation programme in Gacaca although integration is done in the Gacaca process after imprisonment.
4. Retribution	Yes	Yes, GC gives punishment according to the seriousness of the accused's behaviour during the crime.

If we look at the above table we may state that Gacaca courts incline more to retributive justice (at a range of 75 per cent) than they do to restorative justice. (The difference is 25 per cent.)

There are other ways of comparing the differences between the Gacaca system with the retributive or restorative systems. The stakeholders (victims-offenders-community) differ¹⁶⁰. Retributive or formal criminal justice signifies courts and tribunals, unlike the restorative system,

¹⁶⁰ Paul McCold 'The recent history of restorative justice mediation, circles, and conferencing in Dennis Sullivan and Larry) Tiffit' (2008Handbook of Restorative Justice 23-34.

and both work with different stakeholders. In the restorative justice system stakeholders are the victims (mainly), the offender and the facilitator who sometimes is joined by another facilitator or community members. The retributive justice system, on the other hand, has as stakeholders the state prosecution, the offender and the judges. Sometime witnesses and the victim can join as well as secondary and less important stakeholders. In general, the strong role played by the state prosecution and the adjudication of the professional judges which characterize retributive justice system is absent in restorative justice. The role of the victim is not relevant in retributive justice because all his interests are said to be represented by the state prosecution. To the contrary, in restorative justice the victims themselves express their interests and needs.

Punishment could be an element of comparison as well, as researchers like Clifford Shearing (2007), Gerry Johnstone and Daniel Van Ness (2007) regard the emphasis on whether or not to punishment is a characteristic of retributive justice.

Below are three more tables of comparison, the first of the retributive and restorative justice systems using the aforementioned elements, the second a comparison of the retributive justice system and Gacaca courts and the third a comparison of restorative justice and Gacaca courts.

b. Table of comparison of restorative and retributive justice. This table is designed to provide a clear understanding of the differences between the two systems of justice.

Elements of comparison	Retributive justice	Restorative justice
1. Main stakeholders	1. Prosecutor - offender-judge	1. Victim-offender-facilitator
2. Punishment	2. Imprisonment, fines, death penalty etc. - it might be proportionate to the offence.	2. Only Reparation and apology instead of punishment (which is harm), it has no place; the reparation, healing and reconciliation replace it.
3. Role of victim	Minor or absent. Generally represented by the prosecutor sometimes as witness.	Major, initially to discuss his needs.
4. Role of offender	Shameful party, presumed innocent, right to keep silence. Not compelled to apologize to the victim or	Respectable stakeholder, he should admit his offence but is not compelled to do so as this is voluntary. Needs to apologize to

	to admit the offence.	the victim.
5. Adjudication	Sentencing by the judge.	No adjudication agent, the decision is made by consensus of the victim and offender through mediation.
6. Reconciliation	Reconciliation is not an aim or the business of the court.	Reconciliation is a target.
7. Healing	Healing is not an aim, nor the business of the court.	Healing is an aim targeted by the restorative justice.
8. Role of Government officials	None. Independence of the judiciary.	None but secondary in some areas (role of diversion)
9. Role of the community	None ,no participation	Major through participation.
10. Role of defence lawyers	Very important and constitutes the right of defence.	Not important

c. Table of comparison of retributive justice and Gacaca courts using the 10 elements as criteria of comparison.

Elements of comparison	Retributive justice	Gacaca courts
1. Main stakeholders	1. Prosecutors-offender-judge	No prosecutors. Offender –the community –the victims -judges. Anybody can accuse criminals if he /she has evidence.
2. Punishment	2 Imprisonment, fines. death penalty etc, it might be proportionate to the offence.	Life imprisonment or sentences of some years (article 72 of Gacaca organic law of 2004 .
3. Role of victim	Smaller or absent. Generally represented by the prosecutor sometime plays the role of the witness.	The victims play a very important role when accusing their offender and when they need to speak.
4. Role of offender	Shameful party, presumed innocent, right to keep silence. Not compelled to apologize to the victim or to admit offence.	The offenders have a large role in defending themselves and in calling for their own witnesses and in testifying especially those who plead guilty.
5. Adjudication	Sentencing by the judge.	The sentence is given by a college of judges (7 inyangamugayo)
6. Reconciliation	Reconciliation is not an aim and is not the business of the court.	Reconciliation is one of the pillars of Gacaca but there is no proceeding dedicated to that. Everybody believe that

		if the Gacaca process goes well it ends by automatically reconciling the Rwandans. This belief has led survivors and perpetrators who have completed their punishment to be able to renew a good relationship in their village with the acceptance of a sincere apology and forgiveness
7. Healing	Healing is not an aim, nor is it the business of the court.	Healing is like reconciliation - it is something which comes progressively with the care that is given to the victim. Experiencing the truth about, and information on, the death of their loved ones has helped victims to heal through Gacaca.
8. Role of the Government officials	None. Independence of the judiciary.	It does not intervene in decision making. Gacaca judges are independent.
9. Role of the community	None, no participation	Major and very important through community participation.
10. Role of defence lawyers	Very important and constitutes the right of defence.	None. Everybody (the community) plays the role of defence lawyers for any offender.

The comparison resulting between retributive justice and Gacaca courts shows that Gacaca courts are similar to retributive courts in a range of 40 per cent and different at a range of 60 per cent from retributive justice.

d. Table of comparison of restorative justice and Gacaca courts using the ten elements as criteria of comparison.

Elements of comparison	Restorative justice	Gacaca courts
1. Main stakeholders	1. Victim, offender and facilitator(s) and the community.	Community, victim and offender. The role of the community is mostly important because even when the victim had been killed, the Gacaca courts still try the case relying

		on the testimonies of the community. Judges are elected by the community.
2. Punishment	2. Reparation, apology, healing and reconciliation replace punishment (harm).	No reparation but there is restitution of property. There is an apology which is vague
3. Role of victim	Major .First to talk about their needs.	The victims play a very important role in Gacaca when they are available to make the accusations and they are allowed time to speak it through.
4. Role of offender	Respectable stakeholder, he must admit his offence but he is not compelled to. It is voluntarily. Needs to apologize to the victim.	The offenders have a large role defending themselves and can call their own witnesses and give their own testimony especially those who plead guilty. But he is not treated with respect because of the gravity of the crime of genocide.
5. Adjudication	No adjudication agent, the decision is made by consensus by the victim and offender through mediation.	The sentence is given by a college of judges (7 inyangamugayo)
6. Reconciliation	Reconciliation is a target.	Reconciliation is one of the pillars of Gacaca but there is no proceeding dedicated to that. Everybody believe that if the Gacaca process goes well it ends by reconciling automatically the Rwandans .But this belief has made survivors and perpetrators who had finished the punishment to start sincere apology and forgiveness and good relationship in their villages.
7. Healing	Healing is an aim targeted by the restorative justice.	Healing is like reconciliation it is something which comes progressively with the care that is given to the victim. Experiencing the truth about, and information on, the death of

		their loved ones has helped victims to heal through Gacaca.
8. Role of the Government officials	None but in some area it is secondary (role of diversion)	It does not intervene in decision making. Gacaca judges are independent.
9. Role of the community	Major via participation.	Very important through community participation. Gacaca is nothing without the community.
10. Role of defence lawyers	Not important	None. Everybody (the community) plays the role of defence lawyers for any offender.

This second set of comparisons using different parameters shows that Gacaca courts are similar to restorative justice at a range of 5/10 and different at the same range of 5/10

Section 4 The Real Nature of Gacaca Courts

Both sets of comparisons of Gacaca courts, using different parameters, show, on the one table of comparison (d), that these courts are half restorative and half not, whereas, on the other table (a), they are more retributive. If we take an average, it shows that Gacaca courts differ considerably from restorative justice.

Compared to retributive justice, Gacaca courts show, on the one hand, a similarity of 4/10 and a difference at a range of 6/10, whereas in the other table of comparison, the result of similarity was 3/4 and a difference of 1/4. This resulted in an average of similarity of 57.5 per cent between the Gacaca courts and retributive justice thus making Gacaca courts more similar to retributive justice. From the above comparison it can therefore be submitted that the real nature of Gacaca courts is more similar to retributive than restorative justice .The different tables have shown that the Gacaca courts compared to the very strict restorative justice lose similarity, while compared to the broader conception of restorative justice (as shown in the second comparison) gain similarity.

The study has, however, shown greater similarity with retributive justice due to the fact that Gacaca courts have stressed deterrence in their objective of “eradication of the culture of

impunity” which emphasizes retributivism. In conclusion, there is some justification for those who have described Gacaca courts as being restorative, because they came into being in 2001 as an alternative to the formal courts. Those who call Gacaca courts retributive are disappointed by the fact that the punishments given are similar to those handed down in formal courts while these critics expected there to be a move away from punishment towards reparation and reconciliation between survivors and offenders.

Although these results show that Gacaca courts are a mixture of restorative and retributive elements, this chapter has analysed these elements to reveal that the real nature of the courts is more retributive and less restorative.

The statement by Gerry Johnstone and Daniel Van Ness that “to be credibly described as restorative justice, it will usually have one or more of the following ingredients, which are presented in no particular order of importance” is confusing because they appear to side with those who believe Gacaca courts to be a restorative justice system.

CHAPTER V

GENERAL CONCLUSION

This dissertation has shown the extent to which Gacaca courts are retributive and restorative. By analysing the similarities and differences between the Gacaca and the retributive and restorative justice systems, this thesis has shown that the Gacaca contain elements of both but with a slant towards retributive justice.

1. An overview

This thesis has given an overview of the origin of the Gacaca courts in Rwanda and how they succeeded in trying over 1.2 million people accused of the international crime of genocide against the Tutsi during a civil war between RPF and the former Rwandan Government from 1990 and 1994. These courts must be a first in the history of justice.

Through a court of lay judges using a procedure designed to reveal to neighbours what had happened, how it happened and who bore the responsibility, Gacaca courts used popular participation at a local level to allow people to talk about what they saw during the genocide. This information allowed the judges to determine who were the accused and who the victims of the crimes committed during the genocide of Tutsi, and to use this information to conduct trials and issue judgment after hearing the accuseds' contentions and the different views and testimonies of the public audience.

Without any ill intention of criticism, Phil Clark has labelled the Gacaca courts "justice without lawyers". Although they are courts without lawyers, they are courts of truth because they allow any member of the public to give testimony or suggestions about the accusation thereby acting as a lawyer for (or prosecutor against) the accused. It was a question of establishing the facts which everybody saw, because the genocide of Tutsi was executed publicly at a time when contemporaries did not hide or feel ashamed of committing those crimes.

The strengths of Gacaca courts have been the participation of the population and the fact that they adopted approaches different to those of the formal criminal justice system which allowed them to act more quickly.

Did the use of lay judges and the community make Gacaca courts a system of restorative justice? The findings of this study have revealed that they were more retributive, even if they were unlike the formal courts.

The reasons for these differences lie in the reasons why these courts were initially instituted, as demonstrated in this thesis. The objective of Gacaca courts was to eradicate the culture of impunity which had evolved in Rwanda from 1959 to 1994 during which mass killing of Tutsi were carried out with impunity and without a sense of shame or wrongdoing. People needed to be made aware that such killings were wrong and discriminatory, because such impunity only occurred when the victims were Tutsi. They needed to be made aware of the feelings and the sufferings of the Tutsi so that they could start seeing them no longer as “the other” but as part of their community. They needed to be made aware, as a community, of the evils that were done in broad daylight with popular acquiescence and with no sense of guilt. These attitudes had to change so that Rwanda could take its place among the community of nations as a country with a culture of human rights and knowledge of good and evil. This could only be done by trying these cases within the community.

The findings of this thesis distinguish the Gacaca courts of Rwanda from other forms of restorative justice, such as mediation and commissions of truth and reconciliation. For countries who would like to consider applying the methods of Gacaca courts themselves it is important for them to understand the differences. This knowledge will also be of help to scholars and researchers who will need clarity in their understanding of the Gacaca system.

2. Recommendations for further research

This thesis has discussed similarities with the sentencing circles model of restorative justice because the sentencing circle involves many victims and offenders together with their families and communities in trying to find a solution to conflicts much as is the case in Gacaca courts which also involves all the population of the village (cell) including the survivors and the accused.

An analysis of these similarities would help to simplify an understanding of these systems. The Gacaca court system seems to be better for solving conflicts between two communities where each community has the opportunity to discuss the problem with the other through the mediation

of a neutral committee. One such example is the suggestion made by Job Ngugi that Gacaca courts be applied to handle the ethnically-based killings in post election Kenya in 2009. A thorough study based on this thesis would help to determine principles and strategies before implementing Gacaca courts in the Kenyan conflict.

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