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# RECONCILIATION THROUGH JUSTICE?

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## A CRITICAL ANALYSIS OF RWANDA'S TRANSITIONAL JUSTICE PROGRAMMES

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A minor dissertation submitted in partial fulfillment of the requirements for the award of the degree of Masters of Philosophy in Justice and Transformation

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### COMPULSORY DECLARATION

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

Signature: 

Signed by candidate
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 Date: 17 / 11 / 09

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## Abstract

Rwanda is seeking to address genocide and its consequences through one of the most comprehensive, and arguably innovative, set of transitional justice measures yet developed. This study provides a critical analysis of this 'Rwandan approach' to transitional justice with a focus on the key claim by Rwandan authorities, but often made in other contexts too, that transitional justice furthers post-conflict reconciliation.

The central objective is to analyse critically the implications and consequences of the Rwandan transitional justice programmes for reconciliation in a post-genocide society. This question lends itself to a twofold analysis, firstly in terms defined by the Rwandan process itself (thus asking about the implications of transitional justice for 'reconciliation' as envisaged in Rwandan programmes); but secondly, too, in terms of broader objectives related to reconciliation as described in transitional justice theory more generally.

Following Galtung's definition of 'positive peace', I conceptualise reconciliation as the removal of lingering or new forms of structural and cultural violence in a post-conflict society. Rwanda's 'official narrative', by contrast, views reconciliation primarily as the reconfiguration of racial and ethnic identities within a common framework of national belonging.

The study does not involve new primary research but is largely dependent on descriptive and evaluative studies of what the Rwandans are seeking to achieve. The case study is developed at three levels: firstly, in terms of a discussion of the national political and social context in Rwanda within which the transitional justice programmes operate; secondly, in terms of the official mandates of these institutions (which contain a specific conceptualisation of reconciliation consistent with the official Rwandan approach to reconciliation); and thirdly, by analysing the operational history and implementation of these mechanisms in terms of their goals (self-defined and broader). Throughout, the aim remains to generate insights regarding the often-claimed link between transitional justice mechanisms and reconciliation, however defined.

Borrowing from Mamdani, a key goal of countering cultural violence is identified as 'reconciliation with history' which entails building agreement through enabling engagement between opposing historical perspectives, as well as by acknowledging and including in the 'official narrative' individual 'little narratives' in the form of victim and perpetrator testimonies. Additionally, building the rule of law is identified as a key goal of overcoming structural violence that, in post-genocide contexts, typically entail both impunity and 'ethnicising guilt', that is the conflation of categories that shaped the conflict with categories which determines victim and perpetrator identities.

The main components of Rwanda's domestic transitional justice programme – the 'official narrative', national prosecutions as well as the *Gacaca* process – are evaluated in terms of the objectives developed above. This analysis produced a set of conclusions about the implications and consequences of transitional justice measures for reconciliation in Rwanda. The primary objects of the study, Rwanda's transitional justice mechanisms, remain in operation at the time of writing, making a conclusive judgement of their performance premature.

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This study would not have been possible without the assistance, and indulgence, of a number of important people in my life. First, without the support and love of my wife Sarah and the patience of Jennie and Daniel, this study would never have seen the light of day. Second, the meticulous counsel of Professor Andre du Toit and the in-depth insight of Professor Annette Seegers into African politics have enriched and improved the work significantly. Third, the staff and colleagues at the Institute for Justice and Reconciliation, with their profound knowledge of processes of reconciliation and transitional justice across Africa, have been a constant source of information and insight.

To all of them a profound thank you.

Fanie du Toit

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## Acronyms

AI	<i>Amnesty International</i>
AR	<i>African Rights</i>
CDR	<i>Coalition pour la Défense de la République</i>
DRC	<i>Democratic Republic of the Congo</i>
FARG	<i>Fonds d'Assistance aux Rescapés du Genocide</i>
FAR	<i>Forces Armées Rwandaises</i>
FDLR	<i>Forces Democratiques de Liberation De Rwanda</i>
HRW	<i>Human Rights Watch</i>
ICG	<i>International Crisis Group</i>
ICTR	<i>International Criminal Tribunal for Rwanda</i>
ISS	<i>Institute for Security Studies</i>
MRND (D)	<i>Mouvement Révolutionnaire National pour le Développement (et la Démocratie)</i>
NURC	<i>National Unity and Reconciliation Commission</i>
RDR	<i>Rassemblement Républicain Pour La Démocratie au Rwanda</i>
RPA	<i>Rwandan Patriotic Army</i>
RPF	<i>Rwandan Patriotic Front</i>
SNJG	<i>National Service of Gacaca Courts</i>
UN	<i>United Nations</i>

## Chapter 1: Introduction

In 1994, Rwanda suffered one of the most brutal outbreaks of violence in the twentieth century. Extraordinary numbers of victims perished or were mutilated, raped, looted and displaced. Equally extraordinary numbers of perpetrators committed these crimes. It is widely accepted that between 850,000 and 1,000,000 primarily Tutsis (out of an estimated total Rwandan population of 7,700,000) lost their lives at the peak of the violence during a period of approximately one hundred days, whilst estimates of those involved in the killings vary from several hundred thousand to several million.<sup>1</sup>

The mass killings were set in motion on 6 April 1994 when the plane belonging to the head of the Hutu-controlled government, President Juvénal Habyarimana, was shot down, triggering the onset of a systematic killing campaign targeting Tutsis as well as Hutu individuals suspected of opposing, or not fully supporting, the genocide.<sup>2</sup> Killings were committed driven by radicalised Hutu elements, first in the capital, Kigali, and then across Rwanda involving high numbers of civilian perpetrators, coinciding, in turn, with the invasion from Uganda of the *Rwandan Patriotic Front* (RPF).<sup>3</sup>

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<sup>1</sup> See Gérard Prunier, *The Rwanda Crisis: History of a Genocide 1959–1994* (Kampala: Fountain Publishers, 1995), 264 for a discussion of the contestation around the number of victims who perished during the genocide. For a discussion of estimated numbers of perpetrators, see Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Cape Town: David Philip, 2001), 266; also René Lemarchand, 'Coming to terms with the past: The Politics of Memory in Post-Genocide Rwanda,' *Observatoire de l'Afrique centrale* 3, 27 (23 July 2000): 7 [Electronic]. Available at: <http://membres.lycos.fr/obsac/OBSV3N27-TermswithPast.html?> [March 2008] who puts the number of those who participated in the killings, 'either as organisers, executors, or unwilling accomplices surrendering to threats' at 'approximately ten percent of the Hutu population of roughly 6.5 million'. This is strongly contested by the Rwandan government, which views the number of perpetrators to be around 1,000,000.

<sup>2</sup> The terms 'Hutu' and 'Tutsi' has been debated voluminously. For a detailed discussion of this field, see Mamdani, *When Victims Become Killers*, 1-55. He uses the terms mainly, not as self-evident ethnic/cultural or class/market-based categories, but as political categories. Similarly, I use the terms to designate mainly groupings identified as a result of political developments in Rwanda, rather than as ethnic/cultural or classmarket-based categories.

<sup>3</sup> For consistency I will refer throughout the discussion to the RPF. Strictly speaking it was the Rwandan Patriotic Army (RPA) which invaded Rwanda from the north. Despite President Habyarimana's softening stance towards domestic Tutsis, he failed to achieve a settlement with the RPF which operated as the political arm of the RPA. Since 1959, when a Hutu-dominated regime had come to power, a steady stream of Tutsi refugees and exiles congregated across the border in Uganda and began, gradually to organise militarily under the leadership of the RPF for a variety of reasons, some related to the quest to return to Rwanda, but others to political developments in Uganda. Insurgent attacks escalated into a full-scale civil war during the late 1980s, providing a pretext for increased repression and violence against Tutsi civilians in Rwanda. On 1 October 1990, the RPA attacked from their bases in Uganda. The initial attacks were successfully rebuffed, forcing General Paul Kagame to rebuild the RPA. By the middle of 1991, he led a 15,000-man force and controlled a strip of land straddling the Uganda/Rwanda border. On 4 August 1993, the Arusha agreement – signed between President Habyarimana's government and the RPF – provided for a future Broad Based Transitional Government, a National Transitional Assembly, united armed forces and a range of other measures designed to further democracy and power-sharing; see Prunier, *The Rwanda Crisis*, 191f. However, the war continued with waves of attacks, and lasted until June 1994 when Kagame took over Kigali, thereby bringing an end to the raging genocide.

In the days and weeks that followed, genocide and war unfolded together. The RPF conquered Kigali on 4 July, forcing the ruling *Mouvement Révolutionnaire National pour le Développement (et la Démocratie)* [MRND (D)] to flee to Zaire. The war officially ended on 16 July, but the mass killings only gradually fizzled out in the months thereafter, continuing largely as a result of displaced Rwandans moving across the border into the Democratic Republic of Congo's Kivu provinces in one way or the other until today. In and beyond Rwanda, the sequence of events during 1994 became known simply as 'the genocide'.

After winning military control of the capital and stabilising the country, the political arm of the RPA, the largely Tutsi-dominated RPF, embarked on a systematic project of rebuilding the country from the ruins of genocide and war. One of their first steps upon taking power was to arrest more than 120,000 perpetrators accused of varying degrees of guilt and complicity in the mass killings. Subsequent rebuilding efforts, now in their fifteenth year, have produced notable successes: reorganising the state, achieving economic growth and enhancing development opportunities, not least for rural women.

This period, however, has also been characterised by a unique approach to transitional justice programmes of unprecedented scope and variety, allied to a lack of democratic reform and political power-sharing.

### *1.1. The Central Question*

This study aims to provide a critical investigation of the Rwandan approach to transitional justice, based on a selective review of the literature. The study does not seek to address the causes of the genocide (a topic that has received substantial attention in the literature) but rather to focus on the *post-genocide* period, and more specifically on the Rwandan approach to transitional justice. Transitional justice has been an important priority of the government-driven rebuilding programme in Rwanda. Significantly, the Rwandan approach to transitional justice differs from the internationally prevailing approaches in important respects.

Transitional justice<sup>4</sup> may be understood in three distinct, but related ways: 1) with reference to the different practices and processes in which transitional or post-conflict societies 'deal with the past of political atrocities'; 2) with reference to the normative and other debates and discourses *about* the assumptions, mechanisms and objectives of such practices and processes for dealing with past political atrocities; and 3) in terms of the new field or sub-fields of *empirical and comparative research* about the various cases, processes and practices dealing with past political atrocities.

The term thus refers, firstly, to the various methods, practices and processes by which different post-conflict or transitional societies deal with past political atrocities in order to achieve some measure of accountability for these crimes as well as social reconciliation and/or democratic consolidation.<sup>5</sup> Transitional justice is differentiated from more routine and regular ways of dealing with the past in stable societies by a special concern with past political atrocities within the context of the particular challenges posed to justice during times of political transition, or in the aftermath of major civil conflicts. Consequently, the scope, intensity and legacies of past political atrocities, together with the fragile conditions of transitional and post-conflict societies, combine to shape the specific characteristics of transitional justice processes and mechanisms.

The generic concept 'dealing with the past' encompasses a diverse range of interventions addressing past atrocities in ways that seek to promote goals such as reconciliation and democracy.<sup>6</sup> Interventions associated with a transitional justice agenda typically include bringing past political perpetrators to book through criminal prosecution and punishment, vetting and lustration, structured processes of public truth-telling, production of publicly accessible archives about past political crimes or public apologies and other formal opportunities for reconciliation between former political and military opponents, as well as

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<sup>4</sup> For a recent, provocative analysis of transitional justice as 'non-field', see Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field,"' *The International Journal of Transitional Justice* 3,1 (2009): 5–28. See also Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice,' *Human Rights Quarterly* 31, 2 (May 2009): 321–367.

<sup>5</sup> See Andrew Rigby, *Justice and Reconciliation – After the Violence* (Boulder, Colorado: Lynne Rienner, 2001), 1–14; see also Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (New York: Cambridge University Press, 2004); Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2002); Juan E. Mendez, 'Accountability for Past Abuses,' *Human Rights Quarterly* 19 (1997): 255.

<sup>6</sup> This phrase has come to serve as the accepted shorthand for 'dealing with past atrocities', 'crimes against humanity' or 'gross human rights abuses'. 'Dealing with the past' could of course apply to all sorts of other cases from making antiquarian collections or writing memoirs to archival research and the heritage industry. But in the context of transitional justice, it is the more distinctive meaning of dealing with past political atrocities or gross violations of human rights that is at stake.

reparations for victims.<sup>7</sup> On the other hand, countries such as Spain encouraged citizens to forget the past through what Rigby calls a 'pact with oblivion'.<sup>8</sup> This set of distinctive practices and associated discourses of 'dealing with the past (of political atrocities)' includes the particular transitional justice approach taken by the RPF regime in Rwanda in dealing with the aftermath of the genocide in 1994, which will be a main object of investigation for this study. These include ambitious, if largely unsuccessful, attempts to prosecute alleged genocide perpetrators during the first five years after the RPF came to power, an evolving legal framework to enable a more nuanced and realistic prosecutions programme in later years, coupled with an extensive, national community court system called *Gacaca*, operating in tandem with the national courts.

The domestic approach to transitional justice by the RPF regime is not the only transitional justice measure implemented in the aftermath of the Rwandan genocide. Alongside the RPF-driven programmes, the International Criminal Tribunal for Rwanda (ICTR) operating from Arusha, was tasked to prosecute the leadership of the previous regime responsible for the genocide. In addition, various efforts to establish international justice in relation to the Rwandan case have been undertaken in line with the principle of 'universal jurisdiction'. Based on this notion, Belgium, Switzerland, Spain, Finland, Canada and the Netherlands began judicial procedures against genocide suspects from Rwanda. Such cases are founded on the principles of international human rights law informing the 1948 Genocide Convention: 'that certain crimes are of such gravity that no person or entity that committed them enjoys immunity and their punishment is the responsibility of the whole international community'.<sup>9</sup> Although significant for the development of international human rights law, the impact of these international interventions on Rwandan society is indirect and slight. They are also based on different assumptions, principles and objectives than the domestic Rwandan approach to transitional justice, which is the object of investigation of this thesis.

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<sup>7</sup> See Neil Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volumes I-III* (Washington, D.C.: U.S. Institute of Peace Press, 1995); Luc Huyse, 'Justice After Transition: On the Choices Successor Elites Make in Dealing With the Past,' *Law & Social Inquiry* 20 (1995): 51-78; Luc Huyse, ed., *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (Stockholm: Idea International, 2008); Claus Offe, 'Disqualification, Retribution, Restitution: Dilemmas of Justice in Post-Communist Societies,' *Journal of Political Philosophy* 1 (1993): 17-44.

<sup>8</sup> Rigby, *Justice and Reconciliation*, 2.

<sup>9</sup> Barbara Oomen, 'Justice Mechanisms and the Question of Legitimacy - The Example of Rwanda's Multi-layered Justice Mechanisms,' (Paper presented at conference entitled: *Building a Future on Peace and Justice*, Nuremberg, Germany, June 2007): 19. See also Luc Reydam, 'The ICTR Ten Years On: Back to the Nuremberg Paradigm?' *Journal of International Criminal Justice* 3 (2005): 977-88.

Accordingly, this thesis will *not* consider the ICTR or other international interventions in Rwandan transitional justice.<sup>10</sup>

Secondly (at the level of a literature *about* the processes and practices described above), transitional justice refers to normative discourses and debates *about* what ought to constitute the aims of measures and mechanisms for dealing with past political atrocities.<sup>11</sup> How and for what purpose transitional justice initiatives should, or should not, be undertaken, how they can be justified or on what grounds they can be criticised or should be opposed and how they contribute to outcomes such as justice or peace, are the subjects of ongoing normative debates on transitional justice.

Normative engagements of this kind range from *ad hoc* polemics and partisan controversies to more objective reports and commentaries, grounded justifications and sustained analyses. In so far as actual transitional justice processes and practices involve written outputs (e.g. the proceedings of tribunals or truth commissions), this may be closely associated with related normative discourses and debates *about* these interventions. However, while the former functions as an integral part of the practice of transitional justice itself, the latter is a secondary enterprise reflected in the literature regarding this practice.

Thirdly, the term 'transitional justice' can also refer to the new and burgeoning field or sub-fields of *empirical and comparative research* about the various cases, processes and practices dealing with past political atrocities. Transitional justice approaches in the first sense are thus the *object of investigation* of the field of transitional justice in this third sense, which may also critically challenge key assumptions and conclusions of normative approaches to transitional justice in the second sense. While normatively it is claimed that making perpetrators accountable for their past atrocities will serve to prevent the recurrence of political violence and atrocities in future (as against counter normative claims for the superior virtues of forgiveness and reconciliation), empirical investigation sets out to determine the actual (possibly unintended) consequences of both scenarios. Empirical investigations of various kinds have led to an interdisciplinary literature including

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<sup>10</sup> We will also not engage with the complications attached to the role of countries such as France, Germany and Belgium, not only as former colonial powers, but also as a result of perceptions in Rwanda about the role of these countries during the genocide. For a discussion in this vein, see Oomen, 'Justice Mechanisms,' 19.

<sup>11</sup> Neil Kritz, 'Where We Are and How We Got Here: An Overview of Developments in Search for Justice and Reconciliation,' in *The Legacy of Abuse: Confronting the Past, Facing the Future*, ed. Alice H. Henklin (New York: Aspen Institute, New York University School of Law, 2002), 21–45.

comparative and theoretical analyses of case studies and global trends.<sup>12</sup> As such, this sub-field of empirical and comparative research of transitional justice is closely related to another sub-field, namely that concerned with democratic transitions. The comparative study of transitions from authoritarian rule, which came to be known as 'transitology', includes much material and discussions relevant to transitional justice, though that is not a main concern.<sup>13</sup>

Distinguishing between different senses of transitional justice – firstly as a practice, secondly as normative discourses and debates in the literature *on* this practice, and thirdly as empirical investigations *of* this practice – is meant to clarify the relation between Rwandan transitional justice as the *object* of this investigation and the different kinds of literature *on* Rwandan transitional justice. These distinctions also aim to clarify the status of this study in relation to the various senses of transitional justice differentiated above. Much of the literature *on* this process has a notably normative orientation, ranging from the human rights activism informing reports generated by non-governmental organisations such as Human Rights Watch or Amnesty International, through publications geared to policy debates on the issues of humanitarian intervention and the responsibility to protect confronting the international community, to the more general project of establishing and consolidating international human rights law and a human rights culture.<sup>14</sup>

In contrast to this literature, my aim is to provide an account and analysis of the Rwandan transitional justice approach in the first sense of its actual practice, objectives and consequences. As such, this investigation accepts that the nature and objectives of the Rwandan practice of transitional justice may differ significantly from more familiar notions of transitional justice in the normative literature. At the same time, this study, as a *critical analysis*, is itself rooted in certain normative conceptions of transitional justice, the rule of law and democracy, which will be further explained in the subsequent conceptualisations of

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<sup>12</sup> A recent development is the launch of the *International Journal of Transitional Justice* in 2007. See, e.g., Stover and Weinstein, *My Neighbor, My Enemy*; Bell, 'The ICTR Ten Years On,' 9; also Carlos Santiago Nino, *Radical Evil on Trial* (New York: Yale University Press, 1996); and Elster, *Closing the Books*; Richard Wilson, *The Politics of Truth and Reconciliation – Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001) and Mamdani, *When Victims become Killers*. See also Hugo van der Merwe, Victoria Baxter & Audrey Chapman, eds., *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (Washington, D.C.: United States Institute for Peace Press, 2009).

<sup>13</sup> The seminal works were Guillermo O'Donnell, Phillippe Schmitter, Laurence Whitehead, eds., *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore, Maryland: The Johns Hopkins University Press, 1986) and Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman, OK: University of Oklahoma Press, 1991).

<sup>14</sup> For a more detailed discussion of these types of publications, please see Chapter 2.

reconciliation and the rule of law following below. This study therefore engages with both the first and second senses of transitional justice, namely an analysis of the actual practices and processes of transitional justice as these occur in Rwanda, but through a critical perspective on the Rwandan case informed by more general normative considerations. The discussion is not primarily a contribution to the empirical research and comparative analysis of different cases as described in the third sense of transitional justice above.

While the focus of this study will be on transitional justice as it appears in Rwanda, the discussion is organised around a specific theme in the literature on the subject, namely, with transitional justice as a *means to promote reconciliation*, more akin to the restorative justice approach than that of the retributive justice approach.<sup>15</sup> As such this reflects a more general normative conception of transitional justice itself. On this view, bringing victims and perpetrators of human rights violations together within a structured process of truth-telling, including apologies and reparations to victims, has the potential to obviate or quell the motivation for revenge after conflict. In the Rwandan case, too, transitional justice measures and institutions have been officially mandated to promote reconciliation, though it cannot be assumed that the thrust of this mandate is identical with more general normative conceptions of transitional justice. Part of the investigation will be to ascertain precisely the particular objectives and justifications of the Rwandan approach to transitional justice in relation to more general normative conceptions.

My central aim is therefore to identify some of the assumptions and implications of Rwanda's transitional justice programmes in the official quest for post-conflict national reconciliation, and then to analyse these processes critically, in terms of my own conceptual and normative framework of transitional justice and reconciliation.

### 1.2. *Reconciliation as building 'Positive Peace'*

At this point it is important to conceptualise 'reconciliation' more precisely. 'Reconciliation' is a key term in transitional justice, but with different and contested meanings. In post-

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<sup>15</sup> See Rigby, *Justice and Reconciliation*; Charles Villa-Vicencio, *Walk with us, but listen – Political Reconciliation in Africa* (Washington, D.C.: Georgetown University Press, forthcoming 2010); Wilson, *The Politics of Truth and Reconciliation*; Lyn Graybill, *Truth and Reconciliation in South Africa – Miracle or Model?* (Boulder, Colorado: Lynne Rienner, 2002); David Bloomfield, Teresa Barnes and Luc Huyse, eds., *Reconciliation After Violent Conflict* (Stockholm: Idea International, 2003); David Bloomfield, 'On Good Terms – Clarifying Reconciliation,' Berghof Report 14 (Berlin: Berghof Research Center for Constructive Conflict Management, October 2006); Hugo van der Merwe, *The Truth and Reconciliation Commission and Community Reconciliation: An Analysis of Competing Strategies and Conceptualizations* (Ph.D. dissertation, George Mason University, 1999).

conflict contexts, 'reconciliation' may refer to various stages of conflict resolution ranging from 'negative peace' to 'positive peace', a key distinction first introduced by Johan Galtung.<sup>16</sup> Similarly in a political sense 'reconciliation' may stretch from the quest to find a minimal *modus vivendi* for former enemies sharing the same territory to more active programmes of communal reintegration and nation-building.<sup>17</sup> For our purposes, though, Galtung's notion of 'positive peace' may assist in framing 'reconciliation' as a central concern of transitional justice.

While Galtung's basic distinction between 'negative' and 'positive peace' has been widely accepted both in the peace studies movement and more widely in the conflict resolution literature, it has proved much more difficult to reach any kind of agreement on the more specific meaning of 'positive peace'. Galtung himself defined 'positive peace' in terms of another controversial distinction, that between 'structural violence' and 'cultural violence'. According to Galtung 'positive peace' entails the removal of both 'structural' and 'cultural' violence as the main underlying causes of internal war.<sup>18</sup> 'Structural violence' concerns the way power is organised in society in ways so as to inflict 'avoidable insults to basic human needs, and more generally to life, lowering the real level of needs satisfaction below what is potentially possible'.<sup>19</sup>

'Cultural violence', by contrast, refers to any aspect of culture that can be used to justify violence, either directly or structurally.<sup>20</sup> 'Cultural violence makes direct and structural violence look, even feel, right – or at least not wrong', writes Galtung. 'Cultural violence'

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<sup>16</sup> Johan Galtung described negative peace as the absence of direct, personal violence, most often achieved through the cessation of hostilities in the wake of military victory or negotiated settlements. Positive peace represents the removal of the main underlying causes of war. See Johan Galtung, 'Three Approaches to Peace: Peacebuilding, Peacekeeping and Peacemaking,' in *Peace, War and Defence: Essays in Peace Research 2* (Copenhagen: Christian Ejlertsen, 1975): 282–304. For a more recent adaptation, see Rama Mani, *Beyond Retribution, Seeking Justice in the Shadows of War* (Oxford: Polity Press, 2002), 12, 13. It needs to be noted that Galtung's formulations of 'positive peace' and 'structural violence' date back some fifty years. A range of innovations on, and criticisms of, Galtung's position exists; see, for example, Kenneth Boulding 'Twelve Friendly Quarrels with Johan Galtung,' *Journal of Peace Research* 14, 1 (March 1977): 75–86. Galtung himself, too, later revisited his own writing in Johan Galtung, 'Twenty-five years of peace research: Ten Challenges and Some Responses,' *Journal of Peace Research* 22, 2 (June 1985): 141–158 and in Johan Galtung, 'After Violence, Reconstruction, Reconciliation, and Resolution: Coping with Visible and Invisible Effects of War and Violence,' in *Reconciliation, Justice, and Coexistence: Theory and Practice*, ed. Mohammed Abu-Nimer (Lanham, MD: Lexington Books, 2001), 3–23. At the same time it is important to note that specific connotations of 'positive peace' are far from settled. The notion of 'structural violence', too, is contested. It has consistently been criticised as incoherent and/or ideologically loaded. So, while invoking these notions and adapting them for my own purposes, I am *not* thereby buying into Galtung's full theoretical scheme and/or the normative approach characteristic of the 'peace studies' movement.

<sup>17</sup> Harvey and Weinstein, *My Neighbor, My Enemy*, 2f.

<sup>18</sup> Johan Galtung, 'Cultural Violence,' *Journal of Peace Research* 27, 3 (1990): 297.

<sup>19</sup> Galtung, 'Cultural Violence,' 292.

<sup>20</sup> Galtung, 'Cultural Violence,' 291–305

involves 'those aspects of culture, the symbolic sphere of our existence ... that can be used to justify or legitimise direct or structural violence.'<sup>21</sup>

Galtung differentiates between the different types of violence thus: 'Direct violence is an event; structural violence is a process with ups and downs; cultural violence is an invariant, a "permanence", remaining essentially the same for long periods, given the slow transformations of basic culture ...'<sup>22</sup> Galtung describes direct violence 'as direct cruelty perpetrated by human beings against each other and against other forms of life and nature in general'.<sup>23</sup> Cultural violence is a 'substratum from which the other two can derive their nutrients'.<sup>24</sup> By contrast, patterns of structural violence vary over time. Generally, Galtung claims, there is a causal relation from cultural via structural to direct violence.<sup>25</sup>

In terms of this analysis, the Rwandan genocide itself would first and foremost count as 'direct violence'. But to what would 'structural violence' and 'cultural violence' refer in both the pre- and post-genocide Rwandan contexts? In general terms, 'structural violence' in the Rwandan context may refer to the ways in which power was organised so as to issue in both localised incidents of direct violence as well as eventually in the genocide itself. 'Cultural violence' would refer to those aspects of culture or symbolic resources available to motivate and justify direct violence, including the genocide. Taken together, they can provide an analytical framework in which reconciliation sought by transitional justice may be understood by analogy with Galtung's definition of 'positive peace'.

Reconciliation thus may be conceptualised as creating conditions for the removal of violence in its various forms, especially 'structural' and 'cultural violence'.<sup>26</sup> Whether or not reconciliation achieves this double aim can potentially be judged at two levels: firstly, by judging Rwanda's transitional justice processes against their own criteria, and, secondly, by postulating a different set of criteria derived from broader normative discourses. In the first instance, the Rwandan transitional justice processes are judged against the benchmark of reconciliation defined in Rwandan terms. In the second case, they are evaluated against

<sup>21</sup> Galtung, 'Cultural Violence,' 291.

<sup>22</sup> Galtung, 'Cultural Violence,' 294, 295.

<sup>23</sup> Galtung, 'Cultural Violence,' 295.

<sup>24</sup> Galtung, 'Cultural Violence,' 295.

<sup>25</sup> Galtung, 'Cultural Violence,' 295.

<sup>26</sup> Ironically, this definition of positive peace expands and in some ways counters Galtung's own definition of the term, which, like many others, tends to over-individualise reconciliation when he states that it involves 'the process of healing the traumas of both victims and perpetrators after violence, providing a closure of the bad relation'; see Galtung, 'After Violence,' 3.

reconciliation defined more broadly with reference to requirements associated with human rights, the rule of law and democratisation.

With regard to the first mode of evaluation against Rwanda's own goals for reconciliation, the guiding question becomes: to what extent do Rwanda's transitional justice mechanisms promote their stated objective of reconciliation as the reconfiguration of previous racial and ethnic categories in an official project of nation-building? With regard to the second mode of evaluation, the question is to what extent these transitional justice mechanisms promote reconciliation – understood as the removal of both structural and cultural violence as underlying causes.

### *1.3. Research Design*

The central research question of this thesis is to what extent, and in which ways, Rwandan transitional justice programmes have contributed or could contribute to reconciliation in the post-genocide Rwandan society. This question lends itself to a twofold evaluation, firstly in terms defined by the Rwandan process itself (thus asking whether transitional justice could promote 'Rwandanicity' or national belonging as envisaged in Rwandan programmes); but secondly, too, in terms of objectives related to reconciliation as they appear in broader transitional justice debates. Already, I have claimed that reconciliation includes the removal of forms of structural violence, specifically through the law (so as to help inaugurate the rule of law after periods of mass violence and/or political oppression), as well as forms of cultural violence, specifically in relation to how history functions within the new dispensation (so as to ensure adequate inclusion of conflicting views as well as grass-roots perspectives).

To generate the best results in this regard, this case study is developed at three levels: firstly, in terms of a discussion of the national political and social context in Rwanda within which the transitional justice programmes are required to operate; secondly, in terms of the official mandates of these institutions (which contain a specific conceptualisation of reconciliation consistent with the official Rwandan approach to reconciliation); and thirdly, by analysing the operational history and implementation of these mechanisms in terms of their goals (self-defined and broader). Throughout, the aim remains to generate insights regarding the often-claimed link between transitional justice mechanisms and reconciliation, however defined.

The main source of information for this study is a growing body of literature seeking to evaluate the Rwandan post-genocide reconstruction process in various ways. One such angle of critique emanates from transitional justice literature, and runs, broadly speaking, along the lines of the three types of transitional justice discourses identified earlier in this chapter, namely, as descriptive analyses of the actual operations, as normative debates about what the Rwandans ought to achieve and as comparative, empirical studies seeking to find ways to measure the impact of these processes in relation to other transitional justice case studies. Given the dearth of the last type of study, my discussion is largely dependent for its information on studies of the previous two types.

In focusing on structural and cultural violence, respectively, my aim is to develop a more precise set of criteria, over and above the benchmarks put forward by the Rwandan authorities themselves, of what ought to constitute the aims of a transitional justice programme that seeks to promote reconciliation in the aftermath of genocide. This is done, in each case, against the backdrop of an analysis of both the specific features of the Rwandan context – both culturally/historically and structurally/legally.

National genocide prosecutions as well as the *Gacaca* processes, the main components of Rwanda's domestic transitional justice programme, are evaluated in terms of the objectives developed above, those related, on the one hand, to the removal of cultural violence (in ways that history is handled), and, on the other hand, the removal of structural violence (in ways that the rule of law is applied).

This enables me to produce a set of provisional conclusions as to whether or not, and in what ways, transitional justice can, or cannot, contribute to reconciliation in Rwanda.

The study has two important limitations: firstly, this discussion contains relatively little fresh empirical study, but rather utilises what has already been recorded. Published data is augmented by informal observations of the author, obtained during regular visits to Rwanda over the past four years.

Secondly, the primary objects of the study, Rwanda's transitional justice mechanisms, remain in operation at the time of writing, making a conclusive judgement of their performance impossible. Throughout the discussion, therefore, I refer to *actual* as well as *potential* consequences of the transitional justice processes.

## Chapter 2: Rwanda as Transitional Justice Case Study

The Rwandan genocide has been called 'Africa's Holocaust'.<sup>1</sup> There is a growing consensus in the literature that around 10 percent of Rwanda's population died in 1994, that hundreds of thousands more were injured or raped and that about three million people were displaced.<sup>2</sup> This chapter selectively surveys the corpus of studies on Rwanda after 1994 and positions this investigation in relation to that.

On 7 April 1994, the day after President Habyarimana's plane was shot down, agents of the Habyarimana government and armed forces, with the help of the Presidential Guard and the *interahamwe* (unemployed youth organised in a military wing of the ruling party), began killing 'the enemy' in Kigali, systematically hunting down and killing those listed as targets. The first victims included prominent Tutsi politicians and civil society leaders, as well as a number of moderate Hutus accused of being RPF accomplices.<sup>3</sup>

Over the next weeks, international bodies debated whether the killings constituted 'genocide', not least because declaring the killings as 'genocide' would impose a duty on State Parties 'to prevent and punish' the killings.<sup>4</sup> The UN *Convention on the Prevention and Punishment of the Crime of Genocide* was approved by the United Nations General Assembly on 9 December 1948. It entered into force on 12 January 1951.<sup>5</sup> As this debate whether the Rwandan killings constituted genocide continued, the killings expanded beyond the capital, Kigali. Well organised, relying on Rwanda's efficient local government structures as well as on an established culture of enforced public service, and fomented by the fear of a return to Tutsi rule generated by war with the RPF, as well as by years of strident racist anti-Tutsi propaganda, local leaders enlisted the help of civilians at every level of society to help kill as many Tutsis as possible. Collaboration with the killers occurred at different levels of

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<sup>1</sup> For a comparative analysis of the Rwandan genocide and the Nazi Holocaust, see Nigel Eltringham, *Accounting for Horror – Post-Genocide Debates in Rwanda* (London: Pluto Press, 2004), 51–69.

<sup>2</sup> For a discussion of the various claims, see Gérard Prunier, *The Rwanda Crisis*, 263–265.

<sup>3</sup> Prunier, *The Rwanda Crisis*, 182.

<sup>4</sup> Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Toronto: Random House, 2003); See also Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (New York: Zed Books, 2000). See also the UN's own report: I. Carlson and H. Sung-Joo and R. Kupolati, *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda* (New York: United Nations, 1999).

<sup>5</sup> United Nations General Assembly Resolution 260A (II) (9 December 1948) [Electronic]. Available: [http://www.unhcr.ch/html/menu3/b/p\\_genoci.htm](http://www.unhcr.ch/html/menu3/b/p_genoci.htm) 2007 [June 2007]. Genocide accused are to be tried either in the State where the crime was committed or 'by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'.

complicity, from that of passive bystanders to passing on information or looting, to that of assisting killers in terms of logistics and provisions, as well as with the physical killing.

The combination of genocide and war initiated by the invading RPF, which eventually succeeded in deposing the incumbent MRND (D), left Rwanda in ruins. Apart from those killed, a further 30 percent of the population fled into exile. Property and infrastructure, such as homes, water and electricity supply and roads, were destroyed. The judicial system was decimated. Bodies were lying everywhere and thousands of women became pregnant following rape. Massive migration, national instability and the cessation of all formal economic activity were further challenges to the new regime.<sup>6</sup>

Following initial eyewitness reports of the devastation, a steady stream of publications began to emerge about the Rwandan genocide and its aftermath. For the purposes of this analysis, these publications can be divided into three main types:

### 2.1. *Type 1: Descriptive: 'This is Genocide!'*

The first type of publication is essentially descriptive of the extraordinary nature and extent of the political atrocities. These studies, broadly speaking, contain two kinds of information: on the one hand, statistical and factual reporting outlining the extent of the violence (often including attempts to establish the numbers of those killed, violated or displaced), and, on the other hand, detailed and graphic narrations of specific episodes of violence. The latter were often personalised accounts, organised around events and personalities. Analytical comments tended to be added largely as an afterthought.

More specifically we can distinguish two types of descriptive publications that began to appear as early as May 1994, namely, formal reports seeking to categorise the killings as 'genocide' as well as more journalistic and/or impressionistic accounts of the atrocities. The first type refers to field reports by human rights agencies as well as to United Nations (UN) briefs and communiqués into which the term 'genocide' was gradually introduced.<sup>7</sup> In this

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<sup>6</sup> Philip Gourevitch, *We Wish to Inform You that Tomorrow We will be Killed with Our Families – Stories from Rwanda* (London: Picador, 1998), 229, 230.

<sup>7</sup> United Nations (UN), 'Statement by the President of the Security Council', UN Doc. S/PRST/1994/16, (7 April 1994), [Electronic]. Hereafter UN Doc. S/PRST/1994/16. Available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N94/170/30/PDF/N9417030.pdf?OpenElement> [January 2008]; UN, 'Statement by the President of the Security Council', UN Doc. S/PRST/1994/21, (30 April 1994) [Electronic]. Hereafter UN Doc. S/PRST/1994/21. Available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N94/199/86/PDF/N9419986.pdf?OpenElement> [January 2008]; UN,

regard, it needs to be noted that 'genocide' is a technical term with major implications in international law and politics.<sup>8</sup> The emphasis, particularly soon after the event, was to ascertain whether what had happened was 'mere' mass killing, or indeed qualified as 'genocide'.<sup>9</sup> Initial UN reports were followed by more extensive human rights reports, most notably Alison Des Forges's *Leave None to Tell the Story: Genocide in Rwanda*.<sup>10</sup> A major contribution of this body of literature was that it brought the Rwandan atrocities to international prominence *as genocide*. A large number of books were subsequently published adopting a more journalistic and/or impressionistic approach, but with broadly the same objective as the reports cited above, namely, to underscore the Rwandan experience as 'genocide'. This type of descriptive publication, whether historical or journalistic, typically sought to impress on the reader the brutality of the Rwandan events of April 1994 through vivid details, narratives and anecdotes.<sup>11</sup>

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'Special Report of the Secretary-General on UNAMIR' UN Doc. S/1994/470 (20 April 1994) [Electronic]. Hereafter UN Doc. S/1994/470. Available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N94/186/70/PDF/N9418670.pdf?OpenElement> [January 2008]; UN, 'Report of the Secretary-General on the situation in Rwanda' UN Doc. S/1994/640 (31 May 1994) [Electronic]. Hereafter UN Doc. S/1994/640. Available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N94/234/12/IMG/N9423412.pdf?OpenElement> [January 2008]; UN, 'Report of the United Nations High Commissioner for Human Rights, Mr. José Ayala Lasso, on his Mission to Rwanda of 11–12 May 1994', UN Doc. E/CN.4/S-3/3 (19 May 1994) [Electronic]. Hereafter UN Doc. E/CN.4/S-3/3. Available at: <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G94/127/22/pdf/G9412722.pdf?OpenElement> [January 2008]; UN, 'Report on the Situation of Human Rights in Rwanda submitted by Mr. R. Degni-Ségui, Special Rapporteur of the Commission on Human Rights', UN Doc. E/CN.4/1995/7 (28 June 1994) [Electronic]. Hereafter UN Doc. E/CN.4/1995/7. Available at: <http://daccessdds.un.org/doc/UNDOC/GEN/G94/131/47/PDF/G9413147.pdf?OpenElement> [January 2008]; UN, 'Security Council Resolution 935', UN Doc. S/RES/935 (1 July 1994) [Electronic]. Hereafter UN Doc. S/RES/935. Available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N94/273/51/PDF/N9427351.pdf?OpenElement> [January 2008].

<sup>8</sup> The Genocide Convention, mirrored in the Rome Treaty, defines victims of genocide as those affected by 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such ...' More specifically this formal definition of 'genocide' includes 'killing members of the group, causing bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measure intended to prevent births within the group and forcibly transferring children of the group to another group.' See United Nations General Assembly Resolution 260A (III) (9 December 1948) [Electronic]. Available at: [http://www.unhcr.ch/html/menu3/b/p\\_genoci.htm](http://www.unhcr.ch/html/menu3/b/p_genoci.htm) 2007, [June 2007]. Available at: <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions> [June 2007].

<sup>9</sup> For example see: S. Kiley, 'I saw hills covered with bodies resembling lawns of flesh', *The Times*, 14 May 1994.

<sup>10</sup> Alison Des Forges for Human Rights Watch (HRW), 'Leave None to tell the Story – Genocide in Rwanda', (March 1, 1999). No Page Numbers. [Electronic]. Available at: <http://www.hrw.org/legacy/reports/1999/rwanda/> [January 2008]; HRW, 'Genocide in Rwanda', 6,4 (May 1, 1994) [Electronic]. Available at: <http://www.hrw.org/sites/default/files/reports/RWANDA945.PDF> [January 2009]; African Rights (AR), 'Rwanda. Death, Despair and Defiance' (London: Revised Edition 1995); AR, 'Rwanda: Broken Bodies, Torn Spirits. Living with Genocide, Rape and HIV/AIDS' (April 2004) [Electronic]. Available at: <http://web.archive.org/web/20060823111235/www.africanrights.org/publications/BrokenBodies404.pdf> [January 2008]; Amnesty International (AI), 'Rwanda: Reports of Killings and Abductions by the Rwandese Patriotic Army, April – August 1994', (October 1994) [Electronic]. Available at: <http://www.amnestyusa.org/document.php?lang=e&id=FA398E180777F0D6802569A6006055AF> [January 2008].

<sup>11</sup> See Prunier, *The Rwanda Crisis*; Gourevitch, *We Wish to Inform You*; Scott Peterson, *Me Against My Brother – At War in Somalia, Sudan and Rwanda* (New York: Routledge, 2001); Jean Hatzfeld, *Into the Quick of Life – The Rwandan Genocide: The Survivors Speak*, trans. Gery Feehily (Paris: Éditions du Seuil, 2000); Gil Courtemanche, *A Sunday at the Pool in Kigali* trans. Patricia Claxton, (Toronto: Alfred A. Knopf, 2003); Fergal Keane, *Season of Blood* (New York: Penguin Viking, 1995); Linda Melvern, *Conspiracy to Murder – The Rwandan Genocide* (London: Verso, 2004); Elizabeth Neuffer, *The Key to*

Some of the more journalistic accounts in particular have been criticised for presenting the violence in voyeuristic and superficial fashion – even of serving to reinforce stereotypical perceptions of African societies as inherently ‘tribal’ or ‘primitive’.<sup>12</sup> Taken together with the prominence given to the notion of ‘genocide’, an unintended outcome of the descriptive genre was the impression that the Rwandan violence amounted to another typical example of entrenched hatred. The extraordinarily high numbers of perpetrators further suggested that the Rwandan genocide was committed in the name of *blind* ethnic hatred. Implicitly these descriptions implied a particular explanation of the genocide, i.e. that the genocide was the result of ‘primordial bloodlust’ – rather than a modern, premeditated, well-organised attempt to annihilate Tutsi.<sup>13</sup>

## 2.2. Type 2: Analytical: ‘How could this happen?’

A second type of study, distinct from the descriptive genre, is analytical, explanatory and largely thematic. These studies typically relate the Rwandan genocide to more general explanations of the causes of wars typically associated with African conflict.<sup>14</sup> One factor that has frequently been invoked in this context, also to help ‘explain’ the Rwandan genocide, is that of ethnicity.<sup>15</sup>

It can hardly be disputed that the genocide was conducted *in the name of ethnicity*. However the precise manner in which ethnic identities contributed to genocide has been a matter of

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*My Neighbor's House – Seeking Justice in Bosnia and Rwanda* (New York: Picador, 2001); and Rosamond Carr, *Land of a Thousand Hills: My Life in Rwanda* (New York: Penguin Putnam, 1999).

<sup>12</sup> See Eltringham, *Accounting for Horror*, 63–65 where he lists headlines describing the Rwandan killings as ‘pure tribal enmity’, ‘tribal bloodlust’ and ‘tribal carnage’ and in the London *Times* as ‘tribal slaughter’ and ‘tribal carnage’. Words such as ‘savagery’ and ‘frenzy’ were often used, too. He also notes that *The Economist* editorialised in 2000 that ‘brutality, despotism and corruption exist everywhere – but African societies, for reasons buried in their culture, seem especially susceptible to them’. For a broader, but related, discussion on the ‘seductiveness of moral disgust’, see Michael Ignatieff, *The Warrior's Honor – Ethnic War and the Modern Conscience* (New York: Henry Holt, 1998), 72–109.

<sup>13</sup> Eltringham, *Accounting for Horror*, 64.

<sup>14</sup> The phenomenon of ‘ethnic war’ and its links to ‘genocide’ has produced volumes of studies trying to explain the proliferation of intrastate ethnic wars (defined as conflict with at least 1000 casualties per year and at least 100 on each side) since the Second World War. Fearon and Laitin, for example, claim that since the Second World War there have been 122 conflicts that fit their definition of civil wars, of which 73 were fought along ethnic lines. See James D. Fearon and David D. Laitin, ‘Ethnicity, Insurgency and Civil War,’ *American Political Science Review* 97, 1 (February 2003): 77–78. There has been no shortage of explanations for this increase in intrastate war. These include the emergence of weak postcolonial states. Others claim that ancient tribal hatreds revived as the Cold War ideological polarities disintegrated; see, for example, Robert Kaplan, *Balkan Ghosts: A Journey through History* (New York: St Martin's Press, 1993) and David Callahan, *Unwinnable Wars: American Power and Ethnic Conflict* (New York: Hill and Wang, 1998).

<sup>15</sup> See for example Andreas Wimmer, Richard Goldstone, Donald Horowitz, Ulrike Joras, Conrad Schetter, eds., *Facing Ethnic Conflicts: Toward a new Realism* (Oxford: Rowman and Littlefield Publishers, 2004); and David A. Lake and Donald Rothchild, ‘Containing Fear: the Origins and Management of Ethnic Conflict,’ *International Security* 21, 2 (Fall 1996): 41f; Chaim Kaufmann, ‘Possible and Impossible Solutions to Ethnic Civil Wars,’ *International Security* 20, 4 (Spring 1996): 136–175; Roy Licklider, ‘The Consequences of Negotiated Settlements in Civil Wars, 1945–1993,’ *The American Political Science Review* 89, 3 (Sept 1995): 681–690.

intense debate. There are some who postulate 'Hutu' and 'Tutsi' as predominantly *cultural* identities,<sup>16</sup> others who postulate them as primarily *economic* identities (where material conditions are seen as paramount)<sup>17</sup> and yet others who prioritise *political* identities (where the way political power is organised is seen as the key variable explaining ethnic conflict).<sup>18</sup> Mamdani views 'Hutu' and 'Tutsi' as political identities, and argues that a focus on the apparent ethnic revolutions and counter-revolutions in Rwanda is superficial and misleading. Actually, the different groups merely swapped positions between 'ruler' and 'being ruled', essentially preserving the oppressive nature of political relations, not only after 1959's Hutu revolution, but also after 1994. Scott Strauss recently produced another major study in this vein, *The Order of Genocide: Race Power and War in Rwanda*.<sup>19</sup> Together with Mamdani's study, this forms the most systematic attempt yet to explain the Rwandan genocide in terms of a coherent theorisation of ethnicity. Strauss identifies three aspects, namely, a context of civil war, state power and pre-existing racial and ethnic classifications, which, he claims, drove the genocide.

These more analytical studies, following on the first generation of 'descriptive' studies referred to above, were more sensitive to the allegations levelled at some of the earlier studies, namely that they reinforced the notion of African society as 'tribal' and 'primitive'. While seeking to advance a causal explanation of the genocide with reference to, amongst others, ethnicity, these studies also sought to refute the understanding of the genocide as simply an outburst of ancient ethnic hatred. Far from postulated as a 'spontaneous' outburst, the genocide was in fact presented as a calculated and coordinated response to a political

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<sup>16</sup> This view confirms the traditional approach to Rwandan studies by cultural anthropologists dating back to the original fascination of European researchers with perceived differences, both physical and social, between the Tutsi, Hutu and Twa. Conflict arose, these commentators claimed, primarily from cultural differences. Prunier writes: 'For nineteenth century European visitors preoccupied with race, the somatic differences between Hutu, Tutsi and Twa clearly indicated racial difference. John Hanning Speke first published a theory on racial difference in Rwanda in his *Journal of the Discovery of the Source of the Nile* in 1863 in which he speculated about the Tutsi as a "conquering, superior race" with a "foreign origin", possibly from southern Ethiopia.' See Prunier, *The Rwanda Crisis*, 7. See also John Hanning Speke, *Journal of the Discovery of the Source of the Nile* (Mineola, New York, Dover Publications, 1996) and Christopher, C. Taylor, *Sacrifice as Terror: The Rwandan Genocide of 1994* (Oxford: Berg, 1999).

<sup>17</sup> Mamdani describes this conception of ethnic identity within Rwandan studies as 'market-based identities'. See for example, Michel Chossudovsky, 'Economic Genocide in Rwanda,' in *The Globalisation of Poverty: Impacts of the IMF and World Bank Reforms*, ed. Michel Chossudovsky (Penang, Malaysia: Third World Network, 1997), 111–124; also Catherine André and Jean-Phillipe Platteau, 'Land Relations under Unbearable Stress: Rwanda caught in the Malthusian Trap,' (Namur, Belgium: Centre de Recherche en Economie du Développement (CRED), Faculty of Economics, University of Namur, February 1996); See too P. Verwimp, *Development and genocide in Rwanda – A political economy analysis of peasants and power under the Habyarimana regime*, (Leuven, Faculty of Economics, No. 170, 2003). See also Alain Destexhe, *Rwanda and Genocide in the Twentieth Century* (New York: New York University Press, 1996).

<sup>18</sup> See Mamdani, *When Victims become Killers*, 21–24. See also Helen M. Hintjens, 'When Identity becomes a Knife: Reflecting on the Genocide in Rwanda,' *Ethnicities* 1,1 (2001): 25–55, where she argues that the genocide was meticulously organised by a 'beleaguered inner core of state functionaries'.

<sup>19</sup> Scott Strauss, *The Order of Genocide – Race, Power and War in Rwanda* (Ithaca and London: Cornell University Press, 2006).

problem (that of the RPF invasion) within the context of a war. Genocide is recast as state violence, not popular violence.<sup>20</sup> Central to this quest has been efforts to analyse why such high numbers of perpetrators participated in the mass killings and why so many victims died.

If an unintended consequence of the descriptive genre of Rwandan genocide studies has been to reinforce 'tribalist' stereotypes, an ironic feature of the second type of study has been to parallel certain elements of the post-genocide ideology of the RPF. The government of Rwanda steadfastly maintains that it was *not* intrinsic ethnic relations but 'bad leadership', together with 'genocide ideology' and a culture of 'blind obedience' that lay at the root of the genocide.<sup>21</sup>

### 2.3. *Type 3: Comparative: 'How does Rwandan Transitional Justice compare?'*

A third major group of studies focuses on the post-genocide efforts to rebuild Rwanda. Among these are the various development reports and studies on the economic challenges of facing Rwanda, including regular World Bank reports.<sup>22</sup> There is also a steady stream of ongoing political commentary and analyses of issues such as democratisation and human rights.<sup>23</sup>

In the systematic treatments of Rwanda as a post-genocide case study, an important theme has been to identify ways in which the Rwandan context is comparable to other cases of transitional justice, as well as ways in which it is not. Literature on Rwanda's transition points, for example, to common ground with other cases where political transition was

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<sup>20</sup> The distinction between 'intentional killing' sustained by hatred and 'functional killing' deriving from calculated organisation and premediated outcomes is worked out in more detail by Jon Elster: See Elster, *Closing the Books*. For an application to the Rwandan case, see René Lemarchand, 'Disconnecting the Threads: Rwanda and the Holocaust reconsidered,' *Idea: A Journal of Social Issues* 7,1 (2002): 8–10. [Electronic]. Available at: <http://www.ideajournal.com/articles.php?sup=11> [January 2009]. For an example of the functional approach in Holocaust studies, see Christopher Browning, *The Path to Genocide* (New York: Cambridge University Press, 1992) and Christopher Browning, *Ordinary Men* (New York: Harper Collins, 1993). For the intentional approach, see Daniel Jonah Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (New York: Knopf, 1996); For some attempt at synthesis between the schools, see Yehuda Bauer, *Rethinking the Holocaust* (New Haven: Yale University Press, 2001).

<sup>21</sup> This point is made most extensively in Johan Pottier, *Re-imagining Rwanda: Conflict, Survival and Misinformation in the Late Twentieth Century* (Cambridge: Cambridge University Press, 2002).

<sup>22</sup> Available at: <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/RWANDAEXTN/0..menuPK:368660~pagePK:141159~piPK:141110~theSitePK:368651,00.html>.

<sup>23</sup> See, for example, annual reports by Freedom House [Electronic]. Available at: <http://www.freedomhouse.org/template.cfm?page=15> [January 2008]. See also the Organisation for Economic Cooperation and Development (OECD) reports on Rwanda [Electronic]. Available at: [http://www.oecd.org/LongAbstract/0,3425,en\\_2649\\_33731\\_38562992\\_70750\\_119687\\_1\\_1,00.html](http://www.oecd.org/LongAbstract/0,3425,en_2649_33731_38562992_70750_119687_1_1,00.html) [January 2008].

decisively shaped by military victory.<sup>24</sup> A convincing military victory by the RPF over the MRND (D) regime enabled the unfettered utilisation of state resources, meagre as these were, for genocide prosecutions. Victory ensured RPF control of state institutions and the judiciary, as well as, significantly from transitional justice, the apprehension of a high number of alleged perpetrators. By 1998, 120,000 alleged *génocidaires* were behind bars.<sup>25</sup>

The scope and nature of the violence also clearly places Rwanda in the category of other countries that had suffered genocide. A number of studies of the Rwandan genocide include comparison with similar cases, such as the Holocaust and the Balkan ethnic cleansings.<sup>26</sup>

Rwanda's efforts to prosecute *génocidaires* may thus be compared with other cases where transitional justice prioritised the prosecution of perpetrators of past political atrocities. In this connection, the 'Rwandan approach' to prosecute as many *génocidaires* as possible was also in line with the provisions in the so-called Rome Treaty, that amnesties amounting to legal impunity are no longer acceptable for crimes against humanity, war crimes and genocide. Although the Treaty was only enacted some years after the Rwanda genocide, it has, since its ratification, added momentum to international efforts to prosecute *génocidaires*.<sup>27</sup> Moreover, the United Nations-sponsored ICTR has added significantly to international genocide case law and has been the subject of various studies.<sup>28</sup>

In these ways, Rwanda has been compared with other cases where the international community conducted organised efforts to sponsor transitional justice, as, for example, in

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<sup>24</sup> For relevant discussions, see Huntington, *The Third Wave*, 124-151; Nino, *Radical Evil on Trial*, 118-127. See also Peterson, *Me Against My Brother*, 247-303.

<sup>25</sup> Charles Villa-Vicencio, Paul Nantulya and Tyrone Savage, *Building Nations, Transitional Justice in the African Great Lakes Region* (Cape Town: Institute for Justice and Reconciliation, 2005), 86.

<sup>26</sup> See for example, Eltringham, *Accounting for Horror*, 51f., Mamdani, *When Victims become Killers*, 264f. and Stover and Weinstein, *My Neighbor, My Enemy*, 1f.

<sup>27</sup> [Electronic]. Available at: [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf) [July 2007].

<sup>28</sup> See for example, Payam Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment,' *The American Journal of International Law* 90 (1996): 501-510; Payam Akhavan, 'Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda,' *Duke Journal of Comparative and International Law* 7, 2 (Spring 1997): 338; as well as Oliver Dubois, 'Rwanda's national criminal courts and the International Tribunal,' *International Review of the Red Cross* 321 (1997): 718; see also International Crisis Group (ICG), 'International Criminal Tribunal for Rwanda: Justice Delayed' (Nairobi, Arusha and Brussels: International Crisis Group, 7 June 2001): 11-12, [Electronic]. Available at: [http://www.crisisgroup.org/library/documents/report\\_archive/A400442\\_02102001.pdf](http://www.crisisgroup.org/library/documents/report_archive/A400442_02102001.pdf) [9 October 2007]; Alison Des Forges and Timothy Longman, 'Legal responses to genocide in Rwanda', in *My Neighbor, My Enemy*, ed. Eric Stover and Harvey M. Weinstein (Cambridge: Cambridge University Press, 2004), 53f; Madeline H. Morris, 'The Trials of Concurrent Jurisdiction: The Case of Rwanda,' *Duke Journal of Comparative and International Law* 7, 2 (Spring 1997): 363; Oomen, 'Justice Mechanisms,' 19. See also Reydam, 'The ICTR Ten Years On,' 977-988; Helena Cobban, 'The Legacies of Collective Violence: The Rwandan genocide and the limits of law,' *Boston Review* 7, 2 (April/May 2002) [Electronic]. Available at: [www.bostonreview.net/BR27.2/cobban.html](http://www.bostonreview.net/BR27.2/cobban.html) [April 2008].

Sierra Leone, Liberia and the former republics of Yugoslavia. Although an obvious point of comparison between Rwanda and other countries is found in the work of the ICTR, my particular focus is on Rwanda's domestic transitional justice processes. The ICTR was the result of the fact that the Rwandan case was important for a humiliated and chastised United Nations, which had failed to intervene to stop the genocide. The new RPF government constantly reminded the international community that, in their view, these failures generated obligations to help Rwanda serve justice to *génocidaires*.<sup>29</sup>

There are also a number of studies that analyse Rwanda's quasi-judicial transitional justice efforts, such as the *Gacaca* process, in relation to international law.<sup>30</sup> A prominent feature of the comparative literature has been to emphasise the distinctive ways in which Rwanda's transitional justice processes have developed. It had, firstly, to find ways to deal with extraordinary numbers of victims and perpetrators involved provide grounds to argue for the exceptional nature of Rwanda's challenge. Studies in this vein include a number of book-length studies,<sup>31</sup> as well as chapters and journal articles.

The result was a (possibly uniquely) ambitious domestic transitional justice process. With more than 120,000 perpetrators in prison awaiting trial, a complementary community court system, the *Gacaca* courts, was implemented. Initially, this led to an even greater proliferation of cases as even more people were implicated by witness testimonies. At the

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<sup>29</sup> For an elaborate illustration of this diplomacy by the Rwandan government, see Pottier, *Re-imagining Rwanda*, 151–179.

<sup>30</sup> Phil Clarke 'Judging Genocide on the Grass,' review of Rwanda's *Gamble: Gacaca and a new model of Transitional Justice*, by Paul Harrel, *The Oxonian Review of Books* 4, 2 (Hilary 2005) [Electronic]. Available at: <http://www.oxonianreview.org/issues/3-2/3-2-4.htm> [10 April 2008]; Institute for Security Studies (ISS), 'The Gacaca Process: Eradicating the Culture of Impunity in Rwanda?' Situation Report, (5 August 2005) [Electronic]. Available at: <http://www.iss.co.za/AF/current/2005/050805rwanda.pdf> [11 April 2008]; Barbara Roelof Haveman and Olaoluwa Olusanya (The Hague: Intersentia, 2006); Uvin and Mironko, 'Western and Local Approaches to Justice in Rwanda,' 226; Clarke, 'Hybridity,' 117; Waldorf, 'Mass Justice,' 3; Timothy Longman and Théoneste Rutagengwa, 'Memory, Identity and Community in Rwanda,' in ed. Eric Stover and Harvey M. Weinstein (Cambridge: Cambridge University Press, 2004), 162.

<sup>31</sup> Book length studies on transitional justice as it applies to Rwanda include Phil Clarke and Zachary D. Kaufman, ed., *After Genocide – Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (New York: Columbia University Press, 2009); Jean Hatzfeld, *Machete Season – The Killers in Rwanda Speak* (Paris: Éditions du Seuil, 2003); Neuffer, *The Key to My Neighbor's House – Seeking Justice in Bosnia and Rwanda*; Temple-Raston, *Justice on the Grass*, Heidy Rombouts, *Victim Organisations and the Politics of Reparation: a case study on Rwanda* (Oxford: Intersentia, 2004) as well as Eltringham, *Accounting for Horror* and Pottier, *Re-Imagining Rwanda*. A number of important essays are also contained in Stover and Weinstein (eds.), *My Neighbor, My Enemy*. See also Peter E. Harrel, *Rwanda's Gamble: Gacaca and a new Model for Transitional Justice* (New York: Writer's Club Press, 2003) and the following Amnesty International Reports: AI, 'Rwanda: Crying out for Justice', (April 1995) [Electronic]. Available at: [www.metafro.be/grandslacs/grandslacsdir0/0110.pdf/download](http://www.metafro.be/grandslacs/grandslacsdir0/0110.pdf/download) [January 2008] and AI, 'Rwanda: Arming the Perpetrators of the Genocide', (June 1995) [Electronic]. Available at: [www.grandslacs.net/doc/2671.pdf](http://www.grandslacs.net/doc/2671.pdf) [January 2008].

beginning of the full-scale rollout of the actual *Gacaca* hearings, this total grew to 818,564 cases.<sup>32</sup>

The differences and similarities with other cases thus invoked have given rise to a debate between the two main normative frameworks relevant to the literature on transitional justice in Rwanda. Retributive justice (a framework associated with a human rights and international law approach)<sup>33</sup> and reconciliation (another framework associated with the rebuilding of relations adversely affected by the conflict, especially those between victims and perpetrators of human rights violations)<sup>34</sup> are often perceived to be conflicting normative paradigms. Indeed, much of the debate about evaluating Rwandan transitional justice processes has been waged by adherents from one or the other of these schools, the retributive justice school measuring these processes against their compliance with due judicial process and international human rights standards, and the reconciliation school asking about the extent to which these processes have brought together, and helped make sustained peace between, erstwhile enemies.<sup>35</sup>

In so far as this thesis primarily deals with the domestic Rwandan approach to transitional justice and not with international transitional justice interventions such as the ICTR, it will also be less concerned with the latter normative framework of retributive justice and international human rights law and more with the notions of reconciliation and restorative justice which have enjoyed a high priority in domestic Rwandan processes. From a transitional justice perspective, the key question will be whether processes sensitive to

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<sup>32</sup> Mukantaganzwa, 'National Service of *Gacaca* Courts, op.cit.

<sup>33</sup> Diane F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,' in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes Volume 1*, ed. Neil J. Kritz, (Washington, D.C.: U.S. Institute of Peace Press, 1995), 375f.

<sup>34</sup> See Elizabeth Kiss, 'Moral Ambition within and beyond Political Constraints: Reflections on Restorative Justice,' in *Truth V. Justice: The Morality of Truth Commissions*, ed. Robert Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000), 68f.; Chris Cunneen, 'Exploring the relationship between reparations, the gross violation of human rights and restorative justice,' in *Handbook of Restorative Justice – a Global Perspective*, ed. Dennis Sullivan and Larry Tift (London and New York: Routledge), 355f. See also the *Truth and Reconciliation Commission of South Africa Report Volume 1* (Cape Town: CTP Printers, 1998), 114, 125–131.

<sup>35</sup> The most systematic attempt to analyse this debate is found in Eric Stover and Harvey M. Weinstein, eds., *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004). See also Peter Uvin and Charles Mironko, 'Western and Local Approaches to Justice in Rwanda,' *Global Governance* 9 (2003): 226; and Jeremy 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,' *Journal Of African Law* 45: 2 (2001): 143–172. [Electronic]. Available at: [http://journals.cambridge.org.ezproxy.uct.ac.za/download.php?file=%2FJAL%2FJAL45\\_02%2FS0221855301001675a.pdf&code=ad50c46a1b94f8256dc05fe2f918880a](http://journals.cambridge.org.ezproxy.uct.ac.za/download.php?file=%2FJAL%2FJAL45_02%2FS0221855301001675a.pdf&code=ad50c46a1b94f8256dc05fe2f918880a) [January 2008]. See also Phil Clarke, 'Hybridity, Holism And "Traditional" Justice: The Case of the *Gacaca* Courts in Post-Genocide Rwanda,' *George Washington International Law Review* 39, 4 (2007): 101–171; and Lars Waldorf, 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice,' *Temple Law Review* 79, 1 (Spring 2006).

communal concerns, local identities and historic ethnic relations can help a post-genocide society, such as Rwanda, to 'deal with the past' in a way that reduces the risk of a recurrence of mass violence.

#### *2.4. Conclusion*

This study focuses neither on a description of the genocide history, nor on a critical analysis of the historical antecedents, causes and consequences of the genocide itself. Rather, in positioning itself within a growing corpus of work on post-genocide recovery efforts, not least those concerned with transitional justice, this study will critically examine a claim often taken for granted: that addressing political crimes promote positive peace and reconciliation.

Rwanda is seeking to address genocide and its consequences through one of the most comprehensive, and arguably innovative, set of transitional justice measures yet developed. In these efforts there are similarities with other cases largely in relation to retributive justice as a normative framework for transitional justice. A range of studies compare Rwanda's efforts to cases elsewhere, where retributive justice was utilised to settle past political scores.

This study, however, focuses on another feature of Rwanda's domestic transitional justice process, more aligned with a framework based on reconciliation. It provides a critical analysis of this domestic 'Rwandan approach' to dealing with genocide with a focus on the key claim that transitional justice furthers post-conflict reconciliation.

The transitional justice processes are examined, not only in terms of their stated goals and mandates, but also in terms of their operational histories as these have begun to unfold. Presently there is a dearth of analysis in this area, and although this study does not claim to offer new empirical evidence, its novelty within the literature lies in the way it conceptualises reconciliation as an outcome of transitional justice and applies this framework to the Rwandan case.

### **Chapter 3: Countering Cultural Violence through ‘Reconciliation with History’**

In post-genocide Rwanda, ‘reconciliation’ has meant bringing all citizens to embrace ‘Rwandanicity’ at the cost of ‘Hutu’, ‘Tutsi’ or ‘Twa’ identities. The strongly promoted goal of nation-building is supported by an ‘official narrative’ that portrays the genocide as the result of the external influence of colonialism and its continuing impact on post-colonial rule. The ‘official narrative’ further postulates a benign pre-colonial period shared by flexibly differentiated Hutu, Twa and Tutsi groups, whose relations hardened into immutable, reinforcing cleavages only under colonial rule. It was the harmful legacies of the externally imposed ethnic divisions that were primarily responsible for the genocide.

The aim here is to determine the consequences and implications of Rwanda’s transitional justice programmes for reconciliation. I use reconciliation in a double sense: as defined by Rwandans themselves (reconstructed identities within the framework of national belonging) as well as within the normative framework which I develop, equating reconciliation with the removal of cultural and structural violence.

With this in mind, the argument is developed in several stages. First, a conceptualisation of ‘history as cultural violence’ is provided in order to identify more precisely, the ways in which history may function as cultural violence. Thereafter, a description of the ‘official narrative’ of Rwanda on reconciliation is offered, followed by a critical analysis of this narrative, pointing to various implications and consequences which it may have for its own stated goal of reconfiguring ethnic identity within a framework of national belonging.

The final part of the chapter provides a critical assessment of the Rwandan approach in terms of a range of analyses from theorists and commentators further afield. The aim is to examine the role of transitional justice more generally in cultivating an approach to history more conducive to reconciliation (understood as, *inter alia*, the eradication of cultural violence).

If reconciliation as an objective of transitional justice is thus understood as doing away with both 'structural' and 'cultural violence', it remains to consider to what the latter refers more precisely in a context marked by a political transition.

### 3.1. *History as 'Cultural Violence'*

For our purpose, 'cultural violence' is taken to refer to those aspects of cultural or symbolic resources available to motivate and justify direct or structural violence. The question is what this might mean in more specific terms relevant to Rwandan transitional justice as a quest for reconciliation.

From the literature, it is clear that in the Rwandan context certain political, cultural and social narratives and discourses, including notably the founding myth of the Tutsis as an 'alien race' espoused by the protagonists of 'Hutu Power', had a major part in preparing the way for mass participation in the genocide.<sup>36</sup> Pre-genocide, the mobilisation of cultural resources in motivating violence by the *génocidaires* is well-recorded, not least in the court records of the ICTR. In the trials of individuals, such as Professor Ferdinand Nahimana and others, the ICTR succeeded in documenting the role that history played as one such cultural resource to support the propaganda of the *génocidaires*.<sup>37</sup> In these ways, history, myths and narratives were utilised to favour one ethnic group above another.

Put together, these cultural beliefs and ideologies rooted in a specific approach to history amount to a form of 'cultural violence' in Galtung's sense; i.e. before and during the mass killings they provided the resources of a 'symbolic sphere' available to justify genocidal

<sup>36</sup> As founding myth of Hutu Power, the so-called 'Hamitic' thesis attributed any form of advanced social or political organisation on the African continent to groups who had moved there from elsewhere, and who were the 'cursed' progeny of Ham, son of Noah, unable to settle down and pre-ordained to be slaves. Ironically, during the colonial period in Rwanda, being a 'Hamite' had the positive implication of superiority over against the 'native Rwandans' who were often effectively viewed as subhuman. One step up, 'Hamites' were seen as 'Caucasians under a black skin'; see Mamdani, *When Victims become Killers*, 83; see also Prunier, *The Rwanda Crisis*, 9. 'Hutu Power' became a popular slogan amongst Hutu extremists convinced of the veracity of the claim implicit in the Hamitic thesis that the Tutsi was an 'alien race' to Rwanda, not 'an indigenous ethnic group'. 'Hutu Power', Mamdani claims, had been a fringe phenomenon among Rwandan Hutu elites during the late nineteen-eighties, but became a mainstream ideology in the early nineties. See Mamdani, *When Victims become Killers*, 190. The emblematic expression of the racism that fuelled the 1994 genocide is found in the so-called 'Ten Hutu Commandments', published in the *Kangura* newspaper. For a copy, see Dina Temple-Raston, *Justice on the Grass: Three Rwandan Journalists, Their Trial for War Crimes and a Nation's Quest for Redemption* (New York: Free Press, 2005), 116–117. Two of the 'commandments' include: 'consequently shall be deemed a traitor any Hutu male who marries a Tutsi woman, any Hutu male who keeps a Tutsi concubine; any Hutu male who makes Tutsi women his secretary or protégée.' And 'Hutu must cease having any pity for the Tutsi'.

<sup>37</sup> An example is the case of the 'media trial' where the trio of accused included history professor Ferdinand Nahimana, editor Hassan Ngeze and *Coalition pour la Défense de la République* (CDR) party leader Jean-Bosco Barayagwiza; see *Prosecutor V. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze Case No. ICTR-99-52-T*. [Electronic]. Available at: [http://www.crdi.ca/genociderwanda/ev-108222-201-1-DO\\_TOPIC.html](http://www.crdi.ca/genociderwanda/ev-108222-201-1-DO_TOPIC.html) [12 April 2008]. For a discussion of the 'media trial', see Temple-Raston, *Justice on the Grass*, 230f.

violence. The role of history is thus central to this investigation. Cultural violence was involved in the invocation of history to motivate and justify the genocide. In post-genocide Rwanda, history is now called upon to support reconciliation. This amounts to an ironic reversal, from history as a cultural resource for genocide, to the construction of an 'official history' as a motivation for reconciliation. It also suggests the need for critical analysis of the implications of history in the new official Rwandan narrative – not only in the 'official narrative', but also in those transitional justice processes shaped by this narrative.

Once the actual killings were brought to an end, the further question facing the Rwandan post-genocide transitional justice project was how to deal with this underlying cultural violence. Ideally, the Rwandan approach to transitional justice needed to be able to draw on elements of alternative 'symbolic spheres' to counter the 'cultural violence' that had contributed to the genocide. If different accounts of the past, often specific to Hutu or Tutsi Power, had the potential to generate, sustain or justify cycles of structural and direct violence, any attempt to bring about social and political reconciliation must of necessity also need to address these conflicting histories to the extent that they continued to hold sway over the post-genocide society.

The prominence of historical narratives in the shaping of Rwandan conflict over many decades, as well as their potential uses post-genocide, necessitates what Mahmood Mamdani calls 'reconciliation with history'. Mamdani provocatively describes Rwanda's key dilemma as the quest to build a democracy that can incorporate a guilty majority alongside an aggrieved and fearful minority.<sup>38</sup> And yet Mamdani claims that, despite the public nature of the genocide, the identities of neither the perpetrators nor the survivors are as transparent as they, at face value, might seem. 'This is because the identification of both perpetrators and survivors is contingent on the historical narratives that frame the events of the genocide. This is why it is not possible to think of reconciliation between Hutu and Tutsi in Rwanda without a prior "reconciliation with history": History in Rwanda comes in two versions: Hutu and Tutsi.'<sup>39</sup> From this statement, Mamdani concludes that 'to break the stranglehold of Hutu Power and Tutsi Power on Rwanda's politics, one also needs to break their stranglehold on Rwanda's history writing, and thus history making'.<sup>40</sup>

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<sup>38</sup> Mamdani, *When Victims become Killers*, 266.

<sup>39</sup> Mamdani, *When Victims become Killers*, 267.

<sup>40</sup> Mamdani, *When Victims become Killers*, 268.

For our purposes, it follows that an account and assessment of the Rwandan approach to transitional justice will need to ascertain how the genocide, as historical event, is conceptualised and presented to Rwandans in and through the transitional justice process, and what the wider implications are for the way history is presented to Rwandans today.

In what follows, the focus shifts to an analyses of the cultural beliefs and historical narratives fostered by the RPF regime in the context of their transitional justice project, followed by a description of their role in the quest for 'reconciliation with history'. Whereas for Mamdani this mainly requires 'putting the genocide in the correct historical perspective', I use the concept of 'reconciliation with history' in an expanded sense. 'Reconciliation with history' is conceptualised, not primarily as the correction of historical fallacies, important as that may be, but as the conscious effort to construct a new historical narrative and framework able to accommodate the needs and interests of both sides so as to provide a basis for facilitating further discussions while remaining open to critical engagement.

The notion of 'reconciliation with history' involves creating deeper insight into the opposing Hutu and Tutsi accounts of past and conflicts and atrocities, and so, in the longer term, enabling a shared understanding of the past. In Galtung's terms, it may be viewed as an important dimension of the agenda for removing possible sources of 'cultural violence' and thereby furthering reconciliation-through-transitional-justice in Rwanda. More specifically, the question is whether the Rwandan approach to transitional justice, as it has been conceptualised and implemented in Rwanda, is suited to assist in this quest for 'reconciliation with history'. First however, we need to determine what the 'official approach' entails and how this relates to its own definition of reconciliation, namely the reconfiguration of ethnic identity within a framework of national belonging.

### 3.2. *'Official Narrative' in Post-Genocide Rwanda*

Since taking power in July 1994, the RPF government has made a concerted effort to promote the national unity of all Rwandan citizens through the creation of 'an official narrative of memory'.<sup>41</sup> This official post-genocide narrative of reconciliation has been at the

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<sup>41</sup> See Longman and Rutagengwa, 'Memory, Identity and Community in Rwanda,' 164. These efforts need to be understood against the essentialist and racist narrative of Rwandan history espoused by radical elements in the MRND (D) government which prepared the ground for the genocide – as a form a cultural violence, it contributed to direct violence against the Tutsis before and during the genocide.

core of the Rwandan programme of transitional justice and its efforts to promote reconciliation, so counteracting the cultural violence contained in the narratives of the *génocidaires*.

The preamble to the Rwandan Constitution, adopted in 2003, states that ‘... we enjoy the privilege of having one country, a common language, a common culture and a long shared history which ought to lead to a common vision of our destiny;’ and ‘it is necessary to draw from our centuries-old history the positive values which characterised our ancestors that must be the basis for the existence and flourishing of our Nation’.<sup>42</sup> Accordingly the Constitution prohibits political mobilisation on the basis of racial or ethnic identity. A common national identity, one precluding the recognition of distinct racial or ethnic identities, is thus postulated as both the basis for and the objective of reconciliation. The Constitution further determines that ‘political organisations are prohibited from basing themselves on race, ethnic group, tribe, clan, region, sex, religion or any other division which may give rise to discrimination.’<sup>43</sup>

The Constitution states that ‘freedom of thought, opinion, conscience, religion, worship and the public manifestation thereof is guaranteed by the State in accordance with conditions determined by law’.<sup>44</sup> Nevertheless, it determines in the same article that the ‘propagation of ethnic, regional, racial or discrimination or any other form of division is punishable by law.’ It limits political parties to those not associated with the 1994 genocide or with any kind of ethnic constituency. Consequently, the MRND (D), which historically represented Hutu peasants (but also presided over the genocide) was outlawed, as well as the extremist *Coalition pour la défense de la République* (CDR).<sup>45</sup> Furthermore, the Constitution demands that political organisations ‘must constantly reflect the unity of the people of Rwanda and gender equality and complementarity, whether in the recruitment of members, putting in place organs of leadership and in their operations and activities’.<sup>46</sup>

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<sup>42</sup> *The Constitution of the Republic of Rwanda*, (The Rwandan Constitution). [Electronic]. Available at: [www.cjcr.gov.rw/eng/constitution\\_eng.doc](http://www.cjcr.gov.rw/eng/constitution_eng.doc) [4 April 2008].

<sup>43</sup> Article 54, *The Rwandan Constitution*.

<sup>44</sup> Article 33, *The Rwandan Constitution*.

<sup>45</sup> Prunier describes the CDR as a ‘radical racist party working on the right of the MRND and goading it and the regime for the supposed “softness” towards the RPF and its democratic *ibyitso* (accomplices)’; see Prunier, *The Rwanda Crisis*, 128.

<sup>46</sup> Article 54, *The Rwandan Constitution*.

These views are echoed in the mandates of the various transitional justice mechanisms, as well as that of the *National Unity and Reconciliation Commission* (NURC). The NURC was established in 1999 to serve as a forum for Rwandan people to exchange views on, and find solutions to, mutual challenges through a variety of 'national programs for the promotion of national unity and reconciliation'. These include, for example, 'solidarity camps' called '*ingando* seminars' for released prisoners and returning refugees about to be reintegrated into society.<sup>47</sup> *Ingando*, taken from the Kinyarwanda verb, *Kuganda*, refers to a breaking-off from normal activities in order to reflect on issues of importance. The customary practice carrying this name was first developed by pre-colonial military leaders, but fell into abeyance during the post-colonial period.<sup>48</sup> Today, *ingandos* take the form of residential camps hosting between 300 and 400 released prisoners, former officials and returning refugees for between 3 and 8 weeks, during which they are lectured on topics such as 'analyses of Rwanda's problems', 'the history of Rwanda', 'political and socioeconomic issues in Rwanda and Africa' and 'rights, obligations and duties and leadership'.<sup>49</sup> In addition to mounting a range of community-based reconciliation initiatives, such as 'cultural festivals' and 'mediation panels', the NURC also conducts a national reconciliation summit, chaired by the President, every second year. In the words of the President: 'The Commission is propagating and promoting a new philosophy and outlook that is Rwandan, rather than being Hutu, Tutsi or Twa. In that respect, the Government has abolished the use of labels in our National Identity Card.'<sup>50</sup>

A similar emphasis on bringing about post-genocide reconciliation informs the Rwandan approach to transitional justice. Thus, the *Gacaca* Service Commission received a mandate to promote 'national unity and reconciliation'.<sup>51</sup> *Gacaca's* founding act states that the aim of the

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<sup>47</sup> See the official website of the National Unity and Reconciliation Commission. [Electronic]. Available at: [www.nurc.gov.rw](http://www.nurc.gov.rw) [11 April 2008].

<sup>48</sup> See [www.nurc.gov.rw/](http://www.nurc.gov.rw/).

<sup>49</sup> Students about to enter university are reported to have undergone this training, too. In addition, the NURC has trained *Abakangurambaga*, or peace monitor volunteers, who can be called upon to intervene in local disputes anywhere in Rwanda. See [www.nurc.gov.rw/](http://www.nurc.gov.rw/).

<sup>50</sup> Paul Kagame, 'Managing Post Genocide Era: Managing Ethnic Relations and National Reconciliation in a Post-Genocide State' (public address delivered at California State University, Long Beach, 14 April 2005). See also Anastase Shyaka, 'The Rwandan Conflict: Origin, Development, Exit Strategies,' Commissioned by the Rwandan National Unity and Reconciliation Commission (28 January 2005) [Electronic]. Available at: <http://www.nurc.gov.rw/index.php?Res> [11 April 2008].

<sup>51</sup> Significantly, the Security Council resolution that gave birth to the ICTR used language reminiscent of this official Rwandan emphasis on post-genocide 'reconciliation'. While it mandated the ICTR with the task of bringing to justice the perpetrators of genocide in Rwanda because they were a threat to 'international peace and security', it also charged the ICTR with the objective to help foster reconciliation in Rwanda. The preamble to the resolution reads: 'convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for genocide and other above-mentioned violations of international law would enable this aim [bringing effective justice] to be achieved and would contribute to the process of reconciliation and to the restoration and maintenance of peace ...' The explicit reference to 'reconciliation and to the

Commission is 'to achieve reconciliation and justice in Rwanda, to eradicate for good the culture of impunity and to adopt provisions enabling to ensure [sic] prosecutions and trials of perpetrators and accomplices without only aiming for simple punishment, but also for the reconstitution of the Rwandese society made decaying [sic] by bad leaders who prompted the population to exterminate one part of that society'.<sup>52</sup>

The 'official narrative', reflected in these official documents of post-genocide Rwanda, has a number of tenets:<sup>53</sup> *firstly*, it encourages Rwandans to reconcile by recalling a pre-colonial past of harmonious and fluid ethnic relations. It calls to unity all Rwandans on the basis of a historical narrative that emphasises Rwandan society's pre-colonial, 'natural' unity. The 'official narrative' claims that pre-colonial Rwanda had been essentially unified and that distinctions between Twa, Hutu and Tutsi demarcated occupational differences only. They all shared a religion and language, often intermarried and were loyal to the same royal house. 'Fluid occupational' identities were facilitated through the institution of 'cattle clientship' or *ubuhake*.<sup>54</sup> Pre-colonial Rwandan history was not exempt from localised tit-for-tat skirmishes, but ethnic mobilisation on the basis of these identities did not take place. The official RPF narrative therefore implies that post-genocide reconciliation of Rwandan society can happen on the basis of the recovery of Rwanda's pre-colonial unity.<sup>55</sup>

*Secondly*, the 'official narrative' views distinct ethnic identities as a colonial imposition. The thesis that the Hutu were indigenous Rwandans and the Tutsi 'Hamitic' settlers, thereby reinforcing Hutu and Tutsi divides, was first voiced by European observers. The post-colonial ideology of Hutu Power effectively developed from colonial ideology in this way.<sup>56</sup> By organising the colonial state according to these categories, the colonial powers imported forms of structural violence (fed by ideas that were culturally violent) that had not only survived colonial rule, but played an important role in motivating the genocide. Imposed

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restoration and maintenance of peace' in the Security Council resolution clearly takes a similar line to the nation-building narrative of the Rwandan government. The fact that 'reconciliation' (however it was conceptualised) is acknowledged as the objective of the ICTR, enables Rwandan authorities to articulate and interpret its work in terms familiar to its own 'official narrative' of unity and reconciliation.

<sup>52</sup> See <http://www.inkiko-Gacaca.gov.rw/pdf/Law.pdf>

<sup>53</sup> Office of the President of the Republic of Rwanda, *The Unity Of Rwandans – Before The Colonial Period And Under The Colonial Rule, Under The First Republic* (1999) [Electronic]. Available at: <http://www.grandslacs.net/doc/2379.pdf> [4 April 2008].

<sup>54</sup> Pottier, *Re-Imagining Rwanda*, 110.

<sup>55</sup> Office of the President, 63.

<sup>56</sup> For years prior to the 1994 genocide, Hutu propaganda belaboured the Tutsis' 'foreign' Hamitic roots and therefore their status as settlers. This ideology evoked parallel theories of ethnic hierarchies imposed by colonialism. During colonialism, much was made of the Tutsis' fine, angular features suggesting a different heritage; see Prunier, *The Rwanda Crisis*, 5, 6.

racism, so the official history goes, was at the root of the internal conflict, and the colonial powers were to blame for the ultimate result, namely, genocide. President Kagame put it thus: 'But if you remember the main features of our history, the leading aspect would be that our nation was never an aggregate of brute savages, inclined to kill each other at the slightest opportunity. This outlook of a dark continent where primitivity prevails, long popularised mainly by western anthropology and sociology, and echoed by some in African scholarship, has evident faults and must be discarded. The different sections of Rwandans, Bahutu, Batutsi and Batwa, are and were, until the colonial adventure, Banyarwanda – or Rwandan people.'<sup>57</sup>

*Thirdly*, the 'official narrative' views the post-colonial period as an extended preparation for the genocide. The Hutu government that replaced the Belgium-led Tutsi elite as rulers of the country adopted the colonial world-view it sought to replace. Ironically, their acceptance of the colonial creation of Hutu and Tutsi ethnic divisions provided the groundwork for developing the 'final solution' to this problem, namely, the complete extermination of the Tutsi. The key point here is that the official history does not see the genocide as a latter-day development, but as part and parcel of the Hutu-led government's initial plan, even as it assumed power in 1959, which had also been responsible for the large-scale exodus of Tutsis (known today as the 'Fifty-Niners') to the Congo in anticipation of Hutu revenge at that time. PARMEHUTU<sup>58</sup> is represented as driven by a Hutu leadership sold on 'elitist, North-Rwanda-dominated, anti-Tutsi ideology'. The 'official narrative' further denies the role of other motivations, such as anti-royalist sentiments, in the 1959 regime change. Neither does it recognise the significance of any democratic gains in achieving post-colonial self-rule. Instead of calling the 1959 regime change a 'revolution', the RPF sees it as the first step in a progressively comprehensive genocide against the Tutsis. The period from 1959 to 1994 is 'a history of genocide in slow motion'.<sup>59</sup>

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<sup>57</sup> Paul Kagame, 'Beyond Absolute Terror: Post-Genocide Reconstruction in Rwanda,' (public address delivered in San Francisco, 7 March 2003), in *Rwanda: Towards Reconciliation, Good Governance and Development*, ed. Uma Shankar Jha and Surya Narayan Yadav (New Delhi: Association of Indian Africanists, 2003), 114.

<sup>58</sup> PARMEHUTU was the party 'of the revolution'. During the 1959 transition of political power to Hutu Power, PARMEHUTU was the major political force representing Hutu interests. See Mamdani, *When Victims become Killers*, 118. Mamdani describes PARMEHUTU as 'militantly Hutu'; Kagame, 'Beyond Absolute Terror', 119. Helen Hintjens, 'Genocide and Obedience in Rwanda,' (paper presented at the conference *Conflict and Identity in Africa*, University of Leeds, African Studies Unit, September 1997): 7, 12.

<sup>59</sup> Kagame, 'Beyond Absolute Terror', 115. President Kagame further stated: 'Well, the genocide has a long history, if you know a bit of what happened in 1959 alone. There was a civil strife which led to many refugees moving out of the country in hundreds of thousands and tens of thousands of people being killed. More or less, genocide started around that time. There had been other genocides in 1963, 1967, 1973 and 1993 while we were negotiating a peace agreement in Arusha (people living in the north-west of the country were exterminated by the then government forces). So you can see

On this basis, the 'official narrative' presents a view of post-colonial rule as fundamentally (culturally and structurally) violent. Two successive regimes (those of Kayibanda and Habyarimana) were both in denial, reproducing the very colonialist ideology they had suffered under, and took it to new genocidal extremes whilst relying on the 'blind obedience' of uneducated Hutu peasants. 'The genocide was the result of a hundred-year betrayal by the state', the RPF President claims elsewhere, i.e. a form of structural violence embedded in the systematic promotion of ideas that contained cultural violence.<sup>60</sup>

*Fourthly*, the 'official narrative' exhorts the Rwandan nation to remember the RPF's role in liberating the country from the horrors of a government actively pursuing genocide within its borders. The implication is that the RPF's unique role as liberation movement provides the basis for its right to govern post-genocide Rwanda. The 'official narrative' represents RPF rule as *inherently* liberating and as the antithesis of the previous regimes, which are represented as *fundamentally* genocidal and therefore criminal. These assertions have served as justification, not only for the banning of the MNRD (D), but also for a complete rejection by Kigali of any possibility of political reconciliation with Hutu forces, which remain stationed in South Kivu.<sup>61</sup>

*Fifthly*, the official history encourages all Rwandans to denounce their ethnic identities as false and to embrace 'Rwandanicity'.<sup>62</sup> An entirely new national symbolism has been developed, including a flag, national colours and a national crest. 'Rwandanicity' is reinforced by a national campaign seeking to 'educate' returning exiles and freed *génocidaires* who have served their time or have successfully plea-bargained a lesser punishment of

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that genocide is not just a result of the downing of Habyarimana's plane. It has been taking place for quite a long period. A section of our population has always been targeted by the government and its forces. Huge sections of the population were wiped out from different parts of our country. This had been going on over thirty years. See Adam Gaye, 'Paul Kagame: My side of the Story', *West Africa Magazine* (not dated). [Electronic]. Available at: [http://www.gov.rw/government/president/interviews/2000/interviews\\_my\\_side.PRINT.html](http://www.gov.rw/government/president/interviews/2000/interviews_my_side.PRINT.html) [January 2008].

<sup>60</sup> Kagame, 'Beyond Absolute Terror', 114.

<sup>61</sup> The International Crisis Group estimates that the *Forces Démocratiques de Libération De Rwanda* (FDLR), a mix of *génocidaire* elements and other scattered Hutu groups, has roughly 6500 fighters spread over a territory four to five times the size of Rwanda itself. Following a recently brokered agreement between Kigali and Kinshasa, Rwandan and DRC troops are now working together to effect a 'military solution' to the problem of the remaining *génocidaire* forces in the DRC, effectively aiming to conquer and forcibly disarm the FDLR. See International Crisis Group, 'The Congo: Solving the FDLR Problem Once and for All', *Africa Briefing* 25 (12 May 2005). [Electronic]. Available at <http://www.crisisgroup.org/home/index.cfm?l=1&id=3426> [19 February 2008].

<sup>62</sup> Says Kagame: 'The history of that has a lot to do with the make-up of our society. There were divisions in our society with three ethnic groups. But despite the fact that we were one people sharing a lot of things together, with one culture, the colonialists and the politicians who took over from them at independence, tried to build on the artificial or superficial division in our society to entrench themselves. That led to the tragic situation of 1994; see Kagame, 'My side of the Story'.

community service instead of prison time. The 'solidarity camps' are tasked to stimulate historical education and public debate.<sup>63</sup> The official history is further institutionalised through an ambitious campaign of memorialisation, in which the RPF's liberation of Rwanda from the genocidal ideology is celebrated as a milestone founding event of the Rwandan nation.

In line with these perspectives, the 'official narrative' therefore conceives transitional justice primarily as punishment for the perpetrators of a genocidal ideology, while the project of national reconciliation is conceived as a strategy of inclusion through adopting and propagating a version of history that portrays racial otherness as a colonial imposition – thereby eliminating the notion of racial and ethnic 'otherness' as political reality in post-genocide Rwanda. On this basis, it claims the moral high ground over its Hutu predecessor, which did not seek to eradicate racial or ethnic 'otherness' as such, but rather individuals deemed as racially and ethnically 'other'.

### 3.3. *Problematizing Rwanda's 'Official Narrative'*

Earlier, I argued that the way the Rwandan population had been categorised into Hutus and Tutsis entrenched both cultural as well as structural violence within the pre-genocide society, eventually contributing to the massive direct violence of the genocide. The question of whether reconciliation is possible has to be closely related to the extent to which these social categories, which helped to motivate the genocide, continue to operate in the post-genocide society, and how – if still present – they interact with new modes of (post-genocide) categorisation that emerged since 1994 on the basis of the new 'official narrative'.

With the aim to develop a more accurate assessment of the extent to which these categories remain operative, I discuss four questions raised by the 'official narrative' – each with important implications for post-genocide social categorisation and thereby also for reconciliation. My aim is not, in the first place, to question the historical accuracy of the 'official narrative' as such, but rather the implications it has for transitional justice and post-genocide reconciliation. The analysis is first and foremost concerned with the function and significance of particular modes of *categorisation* inherent in this narrative – in order to determine more precisely how reconciliation is conceived. The historical accuracy of the

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<sup>63</sup> Longman and Rutagengwa, 'Memory, Identity and Community in Rwanda,' 163.

'official narrative', often criticised, is only a concern to the extent that it has implications for the way that post-genocide reconciliation is structured.

The *first* critical question in relation to the 'official narrative' concerns its portrayal of ethnic categories during the pre-colonial era as essentially benign, and the way in which this picture is used as a basis for reconciliation in the present. Effectively, the 'official narrative' of the post-genocide government claims that by reverting to the benign ethnic interactions of pre-colonial times, a framework of national unity once again becomes possible as a foundation for post-genocide reconciliation. This may underplay, or even ignore, the extent to which categories that structured the genocide were entrenched as a form of structural violence, not only in colonial and post-colonial times but *through* the genocide itself. By viewing post-genocide reconciliation through the romanticised lens of pre-colonial harmony, the 'official narrative' runs the risk of underestimating the extent to which ethnicity contributed to structural and cultural violence in pre-genocide Rwanda, and potentially therefore, in the post-genocide society, too.

Calling on Rwandans to refute identification patterns that shaped their society for so long and in such dramatic ways, does not guarantee that these categories have indeed disappeared. This means that, *in principle*, Rwanda's call to reconciliation through its transitional justice processes denies making provision for the possibility of the ongoing influence of previous categories and does not begin to address in any effective way their underlying functions as a form of structural or cultural violence.

In line with the Rwandan Constitution's prohibition of political activity based on ethnic affiliation, the Rwandan transitional justice mechanisms have been designed so as to avoid a discussion of the continuing role of ethnic categories. The assumption of the Rwandan approach to transitional justice appears to be that the legacy of ethnic categorisation can be overcome by an appeal to national belonging. In so doing, the transitional justice mechanisms actually create the *possibility* for ethnic categorisation to continue operating under the guise of the official assertion of 'Rwandanicity', which may remain an ideal rather than become reality. The question is in what ways such an approach to transitional justice would promote, or rather obstruct, reconciliation by covering up the unwitting continuation of the structural violence of ethnic categorisation in Rwanda.

*Secondly*, there are strong indications that at least some form of Hutu/Tutsi rivalry predates colonialism. The implication is that ethnic rivalry is not simply a colonial import, as the 'official narrative' claims. Pottier remarks that 'despite uncertainty about the exact use of ethnic labels in nineteenth-century social and political discourse, there is today certainty that the European colonisers were not the first to rule Rwanda along divisive ethnic lines ... The [colonial] interventions were racist, but the seeds for a racialised ethnic division had well germinated by then.'<sup>64</sup> Pottier also contends, more controversially, that the 'blame-it-all-on-the-European-colonisers position' serves largely to justify Tutsi elite rule, because it does not take into account how Tutsi rulers collaborated with, and benefited from, colonialism.<sup>65</sup>

If ethnic fault lines predate colonialism, this has important implications for the prospects of post-genocide reconciliation. It raises the question whether reconciliation, including the removal of this dimension of structural violence, is possible without a more in-depth acknowledgment of Tutsi complicity in, and accountability for, the hostilities and atrocities of the past. The issue of the need for *acknowledgment* of Tutsi guilt and complicity for past hostilities and atrocities is a crucial condition for some form of reconciliation 'with history' between Tutsi and Hutu, quite apart from the historical accuracy of the 'official narrative'. There are ways in which the two sets of issues are related but they should not be conflated. Of primary importance to us at this point is that the 'official narrative' makes scant provision for the need to acknowledge Tutsi accountability.

*Thirdly*, while the 'official narrative' tends to represent post-colonial Hutu Power in an exclusively negative way, Hutu Power had in fact been a more nuanced and complex phenomenon. The 1959 revolution had the democratic objective of empowering a disenfranchised majority of peasants. These aims were articulated in a document central to the 1959 revolution, originally entitled *Notes on the Social Aspect of the Racial Native Problem in Rwanda*. Popularly known as the *Bahutu Manifesto*, and signed by a group of nine Hutu intellectuals, it put forward and defended efforts to bring about a post-colonial revolution and to establish a (Hutu-dominated) majority government. The *Bahutu Manifesto* revolved around the core assertion that the Bahutu historically suffered a double oppression by colonisers as well as by the Tutsi. The democratising significance of Hutu Power as a force

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<sup>64</sup> Pottier, *Re-imagining Rwanda*, 112.

<sup>65</sup> Pottier, *Re-imagining Rwanda*, 118.

for liberation has been lost in the 'official narrative' of post-genocide Rwanda.<sup>66</sup> In the 'official narrative', Hutu power is portrayed exclusively as the 'oppressor', whereas it may rightly also lay claim to the label of having been the 'oppressed', at least during colonialism. The consequences are doubly significant. Not only does the 'official narrative' not acknowledge the legitimate historical ideals of Hutu Power, but over time it risks permanently demonising Hutu identity – not least in how criminal guilt is linked to Hutu identity. A more nuanced understanding of Hutu Power is required if transitional justice is to promote reconciliation in the sense of eradicating cultural violence perpetrated in, and through, 'history making'. At the very least, it needs to take into account the evidence of the historical role of Hutu Power in the democratising thrust of post-colonial self-rule (as well as that of some Hutu resistance to genocide).

*Fourthly*, the 'official narrative' is characterised by a curious paradox in its treatment of the genocide itself, both privileging it as the central event of Rwandan history but at the same time removing it from historical scrutiny. On the one hand, the '1994 genocide is singled out as an event producing the only politically correct categories for identification and guidelines' of actions by the state.<sup>67</sup> In order to ensure that genocide never happens again, the 1994 genocide has been made the ideological and historical cornerstone of the new regime. On the other hand, and at the same time, the 'official narrative' serves to block any thoroughgoing public and historical analysis about what had caused the genocide, beyond its own tenets and assertions. Mamdani calls this the 'official narrative's' failure to put the truth of genocide in historical context.<sup>68</sup>

The representation of the more immediate dynamics of the genocide in the 'official narrative' needs to be questioned. The genocide could, for example, be conceptualised not only as the result of 'bad leadership', 'Hutu racism' and 'blind obedience of rural peasants', as the official history holds, but also as a defensive tactic on the part of the incumbent regime in a situation of war, strategically aimed at the elimination of possible civilian strongholds of the RPF, and consolidating power amongst the country's Hutu majority. In

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<sup>66</sup> Mamdani, *When Victims become Killers*, 83.

<sup>67</sup> Mamdani, *When Victims become Killers*, 266.

<sup>68</sup> Mamdani, *When Victims become Killers*, 268.

these ways, the genocide could be seen as 'one outcome of defeat in the civil war', as political violence and as an outcome of the power struggle between Hutu and Tutsi elites.<sup>69</sup>

This does not mean that one needs to 'dissolve' the genocide into the war as if it does not merit significant attention as a historic event in itself, as some revisionist Hutu ideologues tend to do. Yet the RPF, too, needs to take responsibility for its part in instigating and committing political atrocities both in Rwanda and in the Democratic Republic of the Congo (DRC).<sup>70</sup> However, the implication for the agenda of reconciliation through transitional justice is that while the 'official narrative' posits the 'genocide' as 'prime evil', it has also ensured that the underlying causes of the genocide, including sources of cultural and structural violence, have been inadequately investigated and examined.

### 3.4 'Reconciliation with History': A Challenge to the 'Official Narrative'

Cycles of violence can be perpetuated by lingering structural inequalities, as well as by conflicting narratives and memories of past atrocities that continue to hold sway after direct violence ceases. Reconciliation therefore requires addressing the lingering impact of conflicting accounts of the past *as it influences the present*.

Moving from 'negative' to positive peace' in post-conflict societies therefore ultimately requires the building of common ground between conflicting historical accounts of the past. Mamdani calls this process 'reconciliation with history': 'The identification of both perpetrator and survivor is differently constructed in conflicting historical narratives. This is why it is not possible to think of reconciliation between Hutu and Tutsi in Rwanda without a prior reconciliation with history,' writes Mamdani.<sup>71</sup>

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<sup>69</sup> Mamdani, *When Victims become Killers*, 268.

<sup>70</sup> Lemarchand offers an explanation of the difference on this point between Hutu and Tutsi ideologues. 'For most Hutu ideologues there is only one explanation: the RPF invasion. Everything else is secondary, except the shooting down of Habyarimana's plane on April 6, 1994, for which they do not hesitate to blame the RPF. From this vantage point the invading Tutsi army must bear the full onus of responsibility for the tragedy they brought onto themselves and their people in Rwanda. Much the same blinkered view of history, though admittedly closer to the truth, can be seen in the argument set forth by some Tutsi intellectuals, to the effect that (a) the invasion is not at issue, for it would never have happened if the Habyarimana regime had given them a chance to return to their fatherland; (b) historically, the roots of genocide are traceable to Belgian rule, which introduced divisions where none previously existed; (c) the immediate cause of the tragedy must be found in the sheer perversity of Habyarimana's genocidal clique, as well as in the dual complicity of the French in abetting his regime, and the international community in failing to intervene.' See Lemarchand, 'Coming to terms with the past.'

<sup>71</sup> Mamdani, *When Victims become Killers*, 267.

Mamdani's notion needs to be developed further. First we need to identify what kind of approach to history is needed for the creation of historical common ground between former enemies. Secondly, we must identify the key dimensions or components of the process of achieving 'reconciliation with history'. And we need to clarify what level of agreement about the past would qualify as 'reconciliation with history'.

#### 3.4.1. 'Forgetting-but-not-Denying' versus 'Denying-through-Excessive-Remembering'

Pragmatic notions of the need for 'a usable past' in the context of nation-building should be differentiated from the more specific concerns of transitional justice approaches as ways of dealing with past political atrocities.<sup>72</sup> Similarly, Nietzsche's distinction between 'antiquarian', 'monumental' and 'critical' history delineates different 'uses of the past' in general but does not specifically focus on dealing with past atrocities.<sup>73</sup> However, they can readily be adapted to transitional justice concerns.<sup>74</sup>

To overcome the past, it must be remembered in appropriate ways (even more so in the case of a past of political atrocities). Whereas 'antiquarian' history reveres and preserves the past for its own sake, the 'monumental' approach to the past has typically been concerned with 'celebrating the greatness and glory of the past' while 'critical' history is concerned with 'accountability for the past'.<sup>75</sup> Of these, a 'critical' history would be most suited to general conceptions of transitional justice, not least to the extent it is shaped by human rights discourses. However, Nietzsche claimed that there is also a place for a 'monumental past' if the past is to be overcome.<sup>76</sup> This would apply, for example, to the recognised need of reconciling a post-conflict society through appropriate symbolism and memorialisation efforts – by convincing opposing groups to accept a common, new symbolic order rooted in a celebrated past.<sup>77</sup> Nietzsche described this as 'an attempt to give oneself, as it were *a posteriori*, a past in which one would like to originate, in opposition to which one did

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<sup>72</sup> See, e.g., Ernest Renan, 'What is a nation?' (Lecture presented at the Sorbonne, Paris, 11 March 1882); Henry Steele Commager, *The Search for a Usable Past* (New York: Knopf, 1967); Terence O. Ranger, 'Towards a Usable African Past,' in *African Studies since 1945 – A Tribute to Basil Davidson*, edited by Christopher Fyfe (Longman, London, 1976).

<sup>73</sup> Friedrich Nietzsche, *Untimely Meditations*, ed. Daniel Breazeale (Cambridge, Cambridge University Press, 1999).

<sup>74</sup> For one such attempt, see André du Toit, 'The Truth & Reconciliation Commission as Contemporary History,' in *Toward New Histories for South Africa: on the Place of the Past in our Present*, ed. Shamil Jeppie (Lansdowne: Juta Gariep, 2004), 1.

<sup>75</sup> Du Toit, 'The Truth & Reconciliation Commission,' 3.

<sup>76</sup> Du Toit, 'The Truth & Reconciliation Commission,' 3.

<sup>77</sup> See the following articles asserting the need for memorialisation and symbolic reconstruction in the Rwandan context: Longman and Rutagengwa, 'Memory, Identity and Community in Rwanda,' 177; Cobban, 'The Legacies of Collective Violence'; Lemarchand, 'Coming to terms with the Past'; Catharine Newbury, 'Ethnicity and the politics of history in Rwanda' *Africa Today* 45, 1 (January–March 1998): 7–25.

originate in – always a dangerous attempt because it is so hard to know the limits to denial of the past'.<sup>78</sup>

Nietzsche, however, importantly and provocatively also warned against 'an excess of history' in the sense of being dominated by a past that cannot be forgotten, a condition that can become life-threatening, and which he elsewhere calls 'a malady of history'.<sup>79</sup> The question is therefore how to develop a monumental history, ensuring that history is not 'denied', while at the same time avoiding 'an excess of history', in the sense of being dominated by that past. This is in line with what Paul Ricoeur refers to as the twin dangers of either having 'too much memory' or of having a 'lack of memory'. The former occurs when post-conflict societies are 'haunted by the recollection of the humiliations they suffered in a distant past as well as by that of glory past'. The latter, on the other hand, is the result of such societies refusing to acknowledge the past, 'as if they were fleeing from an obsession with their own past'.<sup>80</sup> In the Rwandan context, both the Tutsi and Hutu communities are haunted by specific traumatic episodes, framed and narrated as directly attributable to the opposite group.

The distinction between denial of, and dominance by, the past needs to be further refined. How is the middle position, somewhere between 'too much memory' and 'too little memory', to be conceptualised? To this end, I propose a further distinction – that between 'forgetting' and 'denial'.<sup>81</sup> While transitional justice approaches tend to insist on the need for remembering past atrocities and stress the dangers of 'denial', Nietzsche rightly observes that overcoming the past requires the ability to forget in order to move on (which would evidently have to be different from simply denying past atrocities).

This paradoxical Nietzschean notion of overcoming the past by, what can be called 'forgetting-but-not-denying' provides a point of departure for this analysis. Denial, or what

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<sup>78</sup> As quoted in Du Toit, 'The Truth & Reconciliation Commission,' 4.

<sup>79</sup> Friedrich Nietzsche, *Untimely Meditations*, 64, 102, 109.

<sup>80</sup> Paul Ricoeur, 'Can Forgiveness Heal?' in *The Foundation and Application of Moral Philosophy*, ed. Hendrik J. Opdebeeck (Leuven, Belgium: Peeters, 2000), 31f.

<sup>81</sup> A similar attempt to arrive at 'an understanding of the many blind spots in Rwanda's official memory', is offered by Lemarchand, based on Ricoeur's distinction between 'thwarted memory', 'manipulated memory' and 'enforced memory'; see René Lemarchand, 'The Politics of Memory in Post-Genocide Rwanda,' in *After Genocide – Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, ed. Phil Clarke and Zachary D. Kaufman (New York: Columbia University Press, 2009), 69–73.

Ricoeur calls 'oblivion', is characterised by a refusal to engage with the past at all.<sup>82</sup> However, denial does not necessarily imply *not* talking about the past. In fact, denial often coincides with obsessive and oppressive remembering and fervent documentation of history, designed, however, to exclude and thereby subjugate opposing groups. This form of denial could indeed be seen as one way in which history becomes a form of cultural violence, justifying the use of direct violence against those one-sidedly portrayed as perpetrators, outsiders and as dangerous to society.

By contrast, to 'forget' one has to remember first. One cannot forget publicly that which was not known in a deliberate and public way. Yet, reconciliatory forgetting engages the past in order to move beyond it, not to entertain it for its own sake. 'Forgetting-but-not-denying' lays the past to rest only *after* a thorough confrontation with it. Forgetting therefore presupposes a vigorous engagement with the past, whereas denial shuns such engagement in favour of silence or glib and inaccurate histories.<sup>83</sup>

'Forgetting-but-not-denying' entails a move beyond the preoccupation with one's own traumatic experiences, powerful as these may have been during an event such as a genocide, towards a shared understanding of the past. It includes the ability to interpret one's own experience within a broader context. Ricoeur writes: '... the meaning of what happened to us, whether we have actively done it to ourselves or have undergone it, is not fixed once and for all ... So what can be changed to the past is its moral load, its burden of debt which weighs both upon the project and the present.'<sup>84</sup>

'Forgetting-but-not-denying' thus involves a move towards democratising the debate about the past, because it allows others to engage with the history of one's own suffering (for victims) or one's own crimes (in the case of perpetrators). Such a form of remembering that takes into account divergent views, lies at the root of desirable forms of post-conflict memorialisation – of remembering collectively, inclusively and with a view to future

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<sup>82</sup> Ricoeur, 'Can Forgiveness Heal?' 33. The standard work on 'denial' in the transitional justice literature is that of Stanley Cohen, *States of Denial – Knowing about Atrocities and Suffering* (Oxford: Polity Press, 2001). Cohen provides a psychologically oriented analysis rather than one oriented to the politics of history and memory, like Nietzsche and Ricoeur.

<sup>83</sup> 'Forgetting-but-not-denying' in this sense is akin to what is often called 'closure' in psychological terms, the ability to place traumatising events in a proper context and so 'forgetting' the singular horror of the immediate experience of gross human rights violations in favour of a more historical and comprehensive view of what happened. See, for example, Denise R. Beike, and Erin T. Wirth-Beaumont. 'Psychological closure as a memory phenomenon,' *Memory* 13, 6 (2005): 574–593.

<sup>84</sup> Ricoeur, 'Can Forgiveness Heal?' 33.

stability. In this way, *forgetting eventually enables deeper and fuller remembering*. As Ricoeur remarks: 'This modifying of the past, consisting in telling it differently and from the point of view of the other, becomes crucially important when it concerns the foundations of the common history and memory.'<sup>85</sup>

Reconciliatory forgetting of this kind cannot be achieved in abstraction but requires specific and concrete preconditions. For 'victims' and 'perpetrators' to be willing to forget past atrocities and to be reconciled as citizens, a number of basic conditions need to be met, such as a representative political dispensation and a reasonable chance to attain better living conditions. In the absence of at least some political justice and economic development, patterns of exclusion which marked the previous dispensation are bound to be perpetuated and the willingness to 'forget' severely compromised.

'Forgetting-but-not-denying' may thus be described as the positive or desired outcome when survivors of violent intra-state conflict declare themselves willing to relinquish the identities of 'victim' and 'perpetrator' in favour of a common citizenship in order to share political rights and pursue post-genocide reconstruction across social fault lines and within a single political and economic community.<sup>86</sup> The willingness to 'forget' past suffering most decidedly therefore does *not* equate denial. In fact, it allows, after deliberate remembering, victims and perpetrators to embrace their identities as 'citizens', thereby escaping a future dominated by 'too much memory'.

However, where voices representing opposing perspectives are systematically excluded in a hegemonic, all-consuming and coercive portrayal of the past, and where this exclusion is experienced as an ongoing form of cultural violence, it becomes difficult or impossible for those who are excluded to 'move on', that is, to forget. This situation represents 'denying-through-excessive-remembering' – the opposite of 'forgetting-but-not-denying'.

If 'reconciliation with history' requires an approach of 'forgetting-but-not-denying', but not 'denying-through-excessive-remembering', what are the practical steps or components of such a process?

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<sup>85</sup> Ricoeur, 'Can Forgiveness Heal?' 33.

<sup>86</sup> For an extended version of this argument, see Mark A. Drumbl, 'Punishment, Post-Genocide: From Guilt to Shame to *Civis* in Rwanda,' *New York University Law Review* 75, 5 (November 2000): 1292–1308.

### 3.5. *Towards 'Reconciliation with History'*

A minimalist understanding of 'reconciliation with history' would entail no more than a non-violent engagement (in the form of entering into debate or dialogue without necessarily reaching agreement) between rival groups about the interpretation of key events in the country's history and their significance for the new dispensation. A 'thicker' conception of reconciliation, by contrast, would require more than 'an agreement to disagree'. It would seek a 'settling of accounts' between victims, perpetrators of past atrocities, as well as bystanders and other citizens.

#### 3.5.1. From Historical Exclusion to Debate to a Settling of Accounts

A first, modest step towards Mamdani's 'reconciliation with history' would presumably be a process of non-violent engagement between the perspectives and historical claims of opposing groups in an effort to generate deeper mutual insight into opposing views. To begin with, this could take the form of engaging in open-ended historical debate on key issues regarding past political atrocities.

It is important to acknowledge that debating history in the context of a post-conflict society could well prove counter-productive. Therefore the reopening of historical controversies between erstwhile enemies carries considerable risks. Such historical debates could spark fresh cycles of violence unless they are inclusively framed. Contrasting historical narratives produced for sectional and partisan constituencies could, in fact, consolidate and even deepen divisions in post-conflict society. This could motivate revenge attacks, but could also favour the newly powerful, and therefore contain subtle forms of cultural violence that support ongoing forms of structural violence. The perpetuation of violence is not only due to conflict *between* histories, but to the *manner in which* history is debated and produced in the wake of conflict.

There is therefore an important difference between the sectional and partisan uses of narratives of past political atrocities, such as those used to motivate revenge or consolidate victor's power and former adversaries formulating 'stories' about these atrocities and the conflict more generally in inclusive and more self-reflexive ways. In truth and reconciliation commissions, for example, contradicting perspectives, such as those of victims and

perpetrators, are recorded within the same process. These views, standing side by side, profess to the inclusive nature of such a process and moreover the nature of the project of creating a shared history beyond the conflict – not by absolutising one side or the other, but by allowing adversaries to offer their differing perspectives to a shared project designed to make sense of the past.

By contrast, it seems that the official policy in Rwanda does not allow for this kind of historical debate. Immediately after the genocide, the Ministry of Education, for example, placed a moratorium on the teaching of Rwandan history in schools out of fear for the conflict that such as debate might engender. 'Almost a decade later', researchers comment, 'this emergency measure remains in place.'<sup>87</sup> Maria Hodgkin claims that this process of 'the repression of discussion of divisive and contested moments in Rwandan history, both within and outside the school curriculum, will only serve to create new dynamics of social exclusion.'<sup>88</sup>

### 3.5.2. Including 'Little Narratives'

The latter leads us to a second dimension of 'reconciliation with history', over and above the non-violent engagement between historical perspectives that might have been at the root of the original conflict, namely, the chance for individual victims and perpetrators to contribute to the official historical record of a post-conflict society within a framework of reconciliation and truth-seeking. It concerns the measure to which a post-conflict society, in addition to facilitating an engagement between the master narratives of former adversaries, enables ordinary citizens (as victims and perpetrators) to tell their own particular stories concerning past atrocities. 'Reconciliation with history' not only entails engagement across major social divisions, but also a 'bottom-up' process that enables individual narratives to impact on the national consensus. Openness across conflict lines needs to be augmented with openness towards the 'grass roots'. So far, this chapter has worked around the notion of the 'official narrative', describing its structure and logic, problematising it and arguing for the need to

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<sup>87</sup> Sarah Warshauer Freedman, Déo Kambanda, Beth Lewis Samuelson, Innocent Mugisha, Immaculée Mukashema, Evode Mukama, Jean Mutabaruka, Harvey M. Weinstein and Timothy Longman, 'Confronting the past in Rwandan Schools', in *My Neighbor, My Enemy*, ed. Eric Stover and Harvey M. Weinstein (Cambridge: Cambridge University Press, 2004), 248.

<sup>88</sup> Marian Hodgkin, 'Reconciliation in Rwanda: Education, History and the State', *Journal of International Affairs* 60, 1 (Fall/Winter 2006): 199–210 [Electronic]. Available at: <http://web.ebscohost.com.ezproxy.uct.ac.za/ehost/detail?vid=3&hid=120&sid=7cc45419-2e7a-451e-8e06-0201326d8bd2%40sessionmgr9&bdata=JnNpdGU9ZWVhvc3QtbGl2ZQ%3d%3d#db=aph&AN=23532432> [June 2008]. See also Freedman *et al.*, in *My Neighbor, My Enemy*, ed. Eric Stover and Harvey M. Weinstein (Cambridge: Cambridge University Press, 2004), 248f.

open it to critical questioning and debate, including a possible engaging with counter-narratives. All of this concerns narratives at the level of macro- or master narratives. Now, I would like to extend that to the level of the need to allow space for 'little narratives'.

Whereas the former manner of exclusion relates to the relationship between political opponents with radically different views of history, favouring the one above the other in a culturally violent way, this paragraph contends that cultural violence may also occur in the relation between the 'official narrative' and ordinary citizens, when individual accounts of past atrocities are ignored in favour of the 'official narrative' presented as complete and adequate in and of itself – without the recording of individual memories regarding the past.

Ordinary victim narratives are similar to what Lyotard, in a different context, called 'the little narrative [that] remains the quintessential form of imaginative invention'; they not only challenge established meta-narratives, but hegemonic representation of the past *as such*.<sup>89</sup> Lyotard writes within the context of the postmodern challenge to totalising modernist discourses, a challenge which he defines as the fundamental 'incredulity towards meta-narratives'.<sup>90</sup> On the one hand, he affirms the epistemological validity of such little narratives as *legitimate* knowledge, but on the other hand also makes a case for what has become known as constructing 'history from below' or building a picture of the past through the painstaking labour of piecing together individual narratives.

In transitional justice, a similar endeavour has received increasing recognition in the form of public truth-telling at victims' hearings as a legitimate counter to the official record of a conflict. Victims allowed to tell their own stories of past atrocities, typically do not present comprehensive perspectives; rather, they serve to challenge and unravel claims of hegemonic narratives to represent a comprehensive and authoritative account of past political atrocities. Truth processes in the context of transitional justice are particularly well suited to create opportunities for these 'little narratives' to proliferate, in the form of victim testimonies and perpetrator statements.<sup>91</sup> These incomplete, often incoherent and even conflicting 'histories', the memories and perspectives of particular victims and perpetrators, form an important

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<sup>89</sup> Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Manchester: Manchester University Press, 1979), 60.

<sup>90</sup> Lyotard, xxiv.

<sup>91</sup> See Stephanus F. Du Toit, 'Ideas of Truth and Revelation in the Light of the Challenge of Postmodernism' (D.Phil diss., Oxford University, 1995), 68f.

component of reconciliation with history during times of transition, ensuring that the new rapprochement does not result in fresh exclusions and new forms of cultural violence.

There are therefore two related dangers when seeking to construct a historical common ground (or monumental history) after conflict, namely, preventing debate between competing histories by simply replacing one hegemonic history with another – thus avoiding transformative engagement between opposing historical views – and excluding individual stories or narratives that might challenge the notion that the ‘official narrative’ contains a complete representation of the past. As we move on to assess the Rwandan cultural framework for transitional justice, as reflected in its ‘official narrative’, we need to establish whether it is constructing historical narratives as a resource of ‘cultural violence’ or, conversely, enabling truth processes in such a way that these might serve the goal of helping to eradicate or at least minimise cultural violence by finding new, less exclusionary ways for history to function in Rwanda, by stimulating engagement between Hutu and Tutsi versions of Rwandan history as well as by enabling ordinary Rwandans in voicing their memories, experiences and perspectives.

### *3.6. Conclusion*

This chapter determined that Rwanda’s colonial and post-colonial eras had been marked by high levels of cultural violence (in the form of exclusionary historical myths such as the ‘Hamitic thesis’), that served to provide justifications for ongoing structural violence (first against Hutus and later against Tutsis) and eventually provided the ideological framework for the genocide ideology of Hutu Power as the impetus behind the genocide’s extraordinary high levels of direct violence. Today this ideology continues in the form of genocide denialism.

Moreover, I argued that Rwanda’s official post-genocide narrative likewise runs the risk of perpetuating fresh cycles of cultural violence by silencing credible alternative historical perspectives and closing down space for public participation in producing a shared view of Rwanda’s past. The ‘official narrative’ has a central significance in Rwanda’s domestic approach to transitional justice. Next to *Gacaca* it is *the* central component of that domestic approach to transitional justice. For their part revisionists (and those who can be accused of ‘genocide-laundering’) seek to either deny or downplay the magnitude of the genocide. The

prevalence of both these historical frameworks underscores the need for 'reconciliation with history' to counter these invocations of history which otherwise might serve to justify renewed cycles of cultural or other forms of violent exclusion.

To understand more precisely what this would mean in a post-genocide society, I used Nietzsche's distinctions between 'monumental' and 'critical history' to develop the ideas of 'forgetting-but-not-denying' as against that of 'denying-through-excessive-remembering'. 'Forgetting but not denying' as a desired outcome of a process of reconciliation, would entail that survivors of violent intra-state conflict declare themselves willing to relinquish the identities of 'victim' and 'perpetrator' in favour of a common citizenship in order to share political rights and pursue post-genocide reconstruction within a single political and economic community.

Through this analysis we arrive at the point where concrete steps could be identified towards realising 'reconciliation with history', defined not as the reconfiguration of conflicting identities within a common national framework *per se*, but primarily as the eradication of violence in all its forms – including, in this case, cultural violence. These steps include, but are not limited to, the creation of opportunities for engagement with historical difference as part of the quest for national unity, together with space for individual narratives to be voiced, recorded and formally acknowledged. This reasoning leads me to conclude that, for a transitional justice process to be contributing to reconciliation in the sense of eradicating cultural violence, it would have to contribute to more open debate about the past, as well as the recording and acknowledgment of 'little narratives'.

## Chapter 4: Challenging Structural Violence through the Rule of Law

'All human beings are equal before the law. They shall enjoy, without any discrimination, equal protection of the law.'

Article 16 of the Rwandan Constitution

In Chapter 1, post-conflict 'reconciliation' was conceptualised as the removal of cultural *and* structural violence. Whereas the previous chapter focused on cultural violence, this chapter considers the removal of structural violence as an underlying obstacle to reconciliation in Rwanda. To what extent are Rwanda's transitional justice measures conceived so as to contribute to the establishment of the rule of law within the context of a post-genocide society? As in the previous chapter, the focus here is on the *mandates* and *founding conditions* of the various transitional justice measures and not on an evaluation of their outcomes.

Following Galtung, we have earlier defined structural violence as forms of state-sanctioned inequality, not least the institutions and practices shaped by the racial and ethnic classifications which also structured the genocide. For our purposes, this raises the question of how Rwanda's transitional justice processes, and their efforts to classify the population in order to execute their respective mandates, relates to the legacy of racial and ethnic classification.

This question can be answered, like in the case of cultural violence discussed in the previous chapter, first by judging Rwanda's transitional justice processes against their own criteria. Secondly, a different set of criteria can be postulated, derived from broader normative discourses in the transitional justice literature more generally. In the first instance, transitional justice processes need to be judged against the benchmark of reconciliation defined in Rwandan terms and, in the second case, against reconciliation defined more broadly with reference to the eradication of forms of structural violence which impedes democracy, the rule of law and human rights.

This chapter seeks to lay the foundation for the discussion of the *Gacaca* courts in the next chapter about the extent to which transitional justice in Rwanda has contributed, or could

contribute, to building the rule of law, formally and substantively, through its own practices and its likely impact on the broader judiciary.

It does so in four sections: the first section defines more carefully and specifically those areas of 'structural' violence that transitional justice in Rwanda need to address in order to promote reconciliation; the second section describes the broader legal context in which transitional justice took shape in Rwanda, in order to better understand the forms of structural violence that were likely to exist within the post-genocide judicial system and which transitional justice would have to counter; the third section looks more closely at how Rwandan transitional justice defined its participants in order to see to what extent previous discriminatory categories (including importantly those of 'Hutu' and 'Tutsi'), and thus the discriminatory legal framework represented by these categories, were reproduced or transcended in the proceedings of the transitional justice programmes; and the fourth section looks at how Rwandan transitional justice programmes sought to handle the vexed issue of attributing individual accountability for genocide in a context where collective action played such an important role. This last section, which entails a more critical discussion of Rwanda's transitional justice programmes, as measured against broader norms and standards, finally sets a benchmark for the Rwandan context in order for transitional justice processes to be seen to act according to human rights standards, *thereby* helping to overcome structural violence in the judicial system and *thus* promoting reconciliation.

#### *4.1. Law as 'Structural Violence'*

The massive and direct violence of the 1994 genocide has come to dominate Rwandan history and politics so much that it may seem inappropriate to emphasise the importance of structural violence in relation to the genocide. Yet any investigation of the pre-genocide period, the genocide itself or its aftermath soon uncovers a range of social, institutional and structural features without which the 1994 events simply cannot be understood.

'Structural violence' is taken here to designate 'violence (that) is built into the structure and shows up as unequal power and consequently unequal life chances'.<sup>92</sup> The most obvious example of such state-sponsored structural violence in Rwanda was the official system of ethnic categorisation, exemplified by the identity documents issued first by the colonial

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<sup>92</sup> Johan Galtung, 'Violence, Peace and Peace Research', *Journal of Peace Research*, 6 (January 1969): 171.

rulers and maintained by post-colonial regimes, which classified Rwandans into Hutu, Tutsi and Twa groups, each with significantly different 'life chances'.<sup>93</sup> These identity documents, and the policies that supported and flowed from such official differentiations, provided the basis for a discriminatory legal dispensation covering every aspect of life, much like in apartheid South Africa. This, commentators claim, had the effect of hardening historically fluid ethnic divisions into immutable 'racial' boundaries between 'Hutu', 'Tutsi' and 'Twa'.<sup>94</sup> Significantly, structural violence in this form persisted despite two post-colonial regime changes, which merely inverted relations between victims and oppressors – targeting Hutus with discriminatory legislation in the colonial era and Tutsis under the post-colonial Hutu regimes.<sup>95</sup>

From a perspective that looks further than merely bringing to an end the mass killings in some form of 'negative peace', the relevance of these underlying structural features must be vital. If transitional justice aims to build 'positive peace', it follows that it should aim at removing the vestiges of structural violence, not least in the form of institutions and practices shaped by the dreaded racial and ethnic classifications that eventually issued in the genocide. These were closely associated with violations of the rule of law. The way the law was applied in pre-genocide Rwanda represented an important instance of structural violence, where 'leaders consistently used the law to protect themselves and their supporters from prosecution for serious violations of human rights. Over time, this pattern of legislative behaviour became so entrenched that, instead of signifying the rule of law, it resembled the 'institutionalisation of impunity'.<sup>96</sup>

The notion of the rule of law (conceptualised as including formal equality before the law and fair administration of judicial processes) is used here in both a formal and a substantive sense.<sup>97</sup> Formally, and in a minimalist sense, the rule of law is concerned with the consistent application of rules and procedures, as well as a general acceptance of this fact by the

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<sup>93</sup> See Timothy Longman, 'Documentation and Individual Identity in Africa: Identity Cards and Ethnic Self-perception in Rwanda,' in *Documenting Individual Identity: The Development of State Practises in the Modern World*, ed. Jane Caplan and John Torpey (Princeton: Princeton University Press, 2001).

<sup>94</sup> Mamdani, *When Victims become Killers*, 76f.

<sup>95</sup> See Longman, 'Documentation and Individual Identity'; Mamdani, *When Victims become Killers*, 76f.

<sup>96</sup> For an exposition of 'the institutionalisation of impunity' in the pre-genocide Rwanda, see Martin Ngoga, 'The Institutionalisation of Impunity: A Judicial Perspective on the Rwandan Genocide,' in *After Genocide – Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, ed. Phil Clarke and Zachary D. Kaufman (New York: Columbia University Press, 2009), 321–332.

<sup>97</sup> rule of law in its formal sense refers to the consistent and fair application of the laws of a country by its judiciary, regardless of the background or power of an individual appearing before it, whereas the rule of law in a substantive sense refers to the measure to which a country's laws conform to human rights standards.

citizenry, not in the first place as a result of the content of this body of law, but rather on strength of the fact that laws are applied consistently and comprehensively (i.e. to all individuals). In this sense, the rule of law could be consistent, not only with societies where there is a just legal order, but also with a (consistently applied) legalistic discriminatory order, as was the case of apartheid South Africa. In this sense the rule of law could thus *in fact* be compatible with structural violence. Having the rule of law in the formal sense does not exempt a society from experiencing structural violence in and through the law.

*Substantively*, the rule of law requires a normative and proactive commitment to human rights and freedoms *in addition to* the consistent application of these principles in all cases. This latter objective is derived from the view that Mani calls the 'maximalist' definition of the rule of law, which holds that human rights and values are a 'fundamental underpinning of the rule of law'.<sup>98</sup> In this substantive sense, the rule of law would not be consistent with legalist apartheid or the discriminatory uses of the Rwandan ethnic and racial classificatory scheme. It would presumably also be incompatible with structural violence, as a substantive commitment to the rule of law would imply, not only the consistent application of the rule of law, but also a fair, non-discriminatory and just legal order.

Impunity, a situation where certain perpetrators are not held accountable under the law for their crimes, represents one form of structural violence. Another form of structural violence would be when individuals are wrongfully prosecuted and punished (often in the name of a formalistic commitment to the rule of law), either because they broke unconscionable laws, or because they are targeted, for whatever reason, by those with the power to manipulate the courts. For our purposes, impunity as well as wrongful prosecution both imply instances of structural violence, whether through actions taken by the courts or another authority, such as the executive or military command issuing a formal amnesty, or through simply by failing to act at all. Whereas impunity typically results from either a diminished capacity of the judiciary (implying that certain individuals or categories of individuals remain effectively outside the ambit of the law) or the discriminatory application of the law (exempting certain individuals or categories of individuals from accountability under the law but not others), wrongful prosecution is most often the result of either a discriminatory legal system or

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<sup>98</sup> See for example, Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework,' *Public Law* (Autumn 1997): 467–487; Rachel Kleinfeld Belton, 'Competing Definitions of the Rule of Law: Implications for Practitioners,' *Carnegie Paper 55, Carnegie Endowment for International Peace* (2005): 6f.; Joseph Raz, 'The Rule of Law and its Virtue,' *Law Quarterly Review* 93 (1977): 195, 198; see also Mani, *Beyond Retribution*, 28.

discriminatory application of the legal system. When such practices become widespread and/or institutionalised, this would amount to structural violence. In post-genocide Rwanda, a culture of impunity threatened not only as a result of the destruction of the judiciary, resulting in virtually no capacity to exercise the rule of law (let alone hold accountable those responsible for the genocide), but also through a history of unfair and unjust application of the law.<sup>99</sup>

A judiciary with an entrenched history of discriminatory practice, and marked by the institutionalisation of impunity, typically lacks legitimacy and is ill suited to establish a new culture of the rule of law.<sup>100</sup> The public perception of the judiciary then becomes that of an institution complicit in a history of structural violence. This perception in itself constitutes an obstacle to building the rule of law.

In these circumstances, the challenge for transitional justice must involve firstly ensuring that citizens are treated fairly within its *own* processes regardless of their positions or background, but secondly also helping to eradicate structural violence in the broader judiciary – by recommending and stimulating institutional reform. Dealing with the perpetrators of past political atrocities in a manifestly fair manner would be an important step towards addressing impunity, provided that it succeeded in holding accountable those who perpetrated genocide, as well as to extend the ambit of the fledgling judiciary to areas where it had previously not been able to reach. At the same time, transitional justice measures would need to be careful not to become guilty of wrongful prosecution.

It is widely accepted, also within Rwanda, that transitional justice should aim to help restore the rule of law. In this regard, the objective of Rwanda's post-genocide 'reconciliation' and transitional justice processes significantly prioritises the removal of the pre-genocide racial and ethnic classification system and thus of the structural violence associated with that. It needs to be kept in mind however, that 'reconciliation' as an objective of transitional justice has, as we have seen, a quite different normative content for the 'Rwandan approach' as compared to 'reconciliation' as an objective of transitional justice where that is linked to

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<sup>99</sup> For a discussion of structural impunity in Rwanda, see Ngoga, 'The Institutionalisation of Impunity,' 321f.

<sup>100</sup> Mamdani states of the colonised Rwanda, for example, that 'the legal basis of group discrimination was race' whereas in the post-colonial state 'this two-fold discrimination, civic and ethnic, became the basis of a distinction between two types of citizenship in the post-colonial period: Civic and ethnic'. Thus concludes Mamdani: 'Even if conservative nationalism turned the world designed by the settler upside down, it did not change it'; see Mamdani, *When Victims become Killers*, 24f, 31.

democratic transitions. Nonetheless, if reconciliation in the sense of the eradication of structural violence through the law is to be enhanced through transitional justice, it would have to help build the rule of law, both formally and substantially, in its own operations and in the judiciary more generally. It furthermore has a unique opportunity to help overcome entrenched perceptions about the judiciary as an instrument of impunity or wrongful prosecution, given its typical prominence during political transition. This is true of transitional justice measures in Rwanda as much as anywhere else.

#### 4.2. *Domestic Attempts at Genocide Justice since 1994*

The Rwandan genocide obviously posed an urgent challenge to bring the perpetrators to account. However, the criminal justice system had been all but destroyed during the genocide. In these circumstances, there was an obvious danger that a 'culture of impunity' might result.

The Rwandan state sought to deal with this threat of impunity in a number of ways. The imperatives of securing justice in the face of such crimes against humanity also prompted a more systematic and ambitious response by international agencies than any previous genocide had done. Initiatives to bring perpetrators to book included the ICTR in Arusha, Tanzania, prosecutions in national courts in Rwanda as well as in Belgium, Switzerland and the United States and community trials in a revived traditional arbitration system called *Gacaca* – where approximately one million cases have been heard to date.

On closer analysis, it appears that three factors bolstered this expanded response to the demands for 'justice'. Firstly, a convincing military victory of the RPF over the MRND (D) regime enabled the unfettered concentration of state resources, meagre as these were, on genocide prosecutions. Victory ensured control over state institutions and the judiciary but also the apprehension of a large number of alleged perpetrators. Once the RPF gained control of Kigali, arrests of suspected perpetrators began without delay.<sup>101</sup>

Secondly, the massive scope and horrific nature of the genocide provided powerful moral support to the new rulers to pursue justice against their political opponents. This moral high ground was further strengthened by a growing international consensus, captured in the

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<sup>101</sup> Villa-Vicencio, Nantulya and Savage, *Building Nations*, 86.

Rome Statute, that amnesties and legal impunity are not acceptable for crimes against humanity, war crimes and genocide. Although the treaty only came into effect after the Rwandan genocide, it nevertheless added considerable international pressure and resolve to the prosecution of the *génocidaires*.<sup>102</sup>

Thirdly, 'justice' was not only advocated by the new government, but also by a chastised international community, which pledged substantial resources in an effort to make amends for its obvious failure to intervene during the genocide. The new government of Rwanda regularly reminded the international community that the failure to intervene timeously created 'obligations'.<sup>103</sup> Gerald Gahima, secretary-general of Rwanda's ministry of justice, for example, argued: 'If the international community had acted, the Human Rights Violations of 1994 would not have taken place. It was possible to stop [the genocide]'.<sup>104</sup>

Early efforts to bring genocide perpetrators to book were shaped by two major sets of factors: on the one hand, the magnitude of the task posed massive logistical and operational challenges; on the other hand, an adequate legal framework was required within which the operation could be conducted. We will briefly consider each of these challenges in turn.

Firstly, enormous logistical challenges faced the new regime. Although Rwanda had been a relatively well-organised state before 1994, the combination of war and genocide left the country, and its judicial systems, in ruins. Gourevitch remarks about post-genocide Rwanda that 'everything needed doing – at once'.<sup>105</sup> Similarly, René Degni-Séqui, UN Special Rapporteur, wrote in his report after a second visit to Rwanda in May 1994: 'The FPR [RPF], which has won a military victory, has only an embryonic administration, a war administration, which at the present time is fulfilling a transitional role; in fact, everything remains to be done. The country needs to be rebuilt virtually from nothing'.<sup>106</sup> A displaced population amounting to millions of scattered Rwandans had to be stabilised and basic

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<sup>102</sup> [Electronic]. Available at: [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf) [12 July 2007].

<sup>103</sup> For an elaborate illustration of this diplomacy by the Rwandan government, see Pottier, *Re-imagining Rwanda*, 151–179.

<sup>104</sup> Gerald Gahima, 'What is understood by Justice in Rwanda today?' (Paper presented at the Newick Park Initiative conference entitled *The Role of the Churches in the Restoration of Justice in Rwanda*, Kigali, 19–21 August 1997, in *Re-Imagining Rwanda: Conflict, Survival and Misinformation in the Late Twentieth Century*, Johan Pottier (Cambridge: Cambridge University Press, 2002), 177.

<sup>105</sup> Gourevitch, *We Wish to Inform You*, 229.

<sup>106</sup> UN, 'Report on the Situation of Human Rights in Rwanda submitted by Mr. R. Degni-Séqui, Special Rapporteur of the Commission on Human Rights', UN Doc. E/CN4/1995/12. Hereafter Un Doc. E/CN4/1995/12 (12 August 1994.) [Electronic]. Available at: [http://www.metafro.be/grandslacs/grandslacsdir200/2433.pdf/base\\_view](http://www.metafro.be/grandslacs/grandslacsdir200/2433.pdf/base_view) [9 April 2008].

security arrangements made. At the same time basic state institutions and core infrastructure had to be rebuilt. The army had to be stabilised, the economy restarted and a transitional government installed. Two objectives dominated this agenda: preventing further violence between large numbers of displaced Hutus, returning Tutsis, the RPF and groups of armed *interahamwe* poised across the border in the DRC<sup>107</sup>

Given these circumstances, early initiatives to affect genocide justice were extensive, but also had considerable limitations. During the first few months, thousands of genocide suspects were arrested. The first genocide cases in Rwandan courts commenced in 1995 but the majority of suspects continued to await trial in dire prison conditions for long periods of time. By 1999, some 120,000 suspected *génocidaires* were in prison, the vast majority still awaiting trial. The prosecutor in Kigali later estimated that as much as twenty percent of these early detainees were, in all likelihood, innocent.<sup>108</sup>

The legal system, already weak before the genocide, was decimated during it. Before the genocide, there were 758 'judges' and investigators, 70 prosecutors and 631 staff in the judiciary. After the genocide, these figures dropped to 244 'judges', 12 prosecutors and 137 staff.<sup>109</sup> The new government, with the help of foreign donors, undertook an extensive (and in retrospect largely successful) rebuilding process of the judiciary, which saw judges and other staff trained and appointed, a bar association established in 1997 and courts restored.<sup>110</sup>

Despite this progress, numerous problems continued to beset genocide prosecutions. By 1997, only 322 of the thousands in jail had been tried in 105 trials. Of these, 111 were sentenced to death while 9 were acquitted. In April 1998, in the only official executions to date for genocide crimes, 22 death row inmates were executed by firing squads in various sport stadiums around the country.

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<sup>107</sup> Longman and Rutagengwa, 'Memory, Identity and Community in Rwanda', 162.

<sup>108</sup> Des Forges, *Leave None to Tell the Story*, Conclusion.

<sup>109</sup> Villa-Vicencio, Nantulya and Savage, *Building Nations*, 86. These figures are counter-intuitive. They imply that there were more 'judges' in the judiciary pre-genocide than either 'prosecutors' or 'administrative staff'. While these figures are corroborated by the United States Embassy of Rwanda website; [Electronic] Available at: <http://www.rwandemb.org/justice/justice.htm> [18 June 2009], they beg further explanation. The high number of 'judges' compared to other legal personnel is explained by Rwanda's decentralised system, which had many local courts where the large majority of 'judges' have historically – both before 1994 and up till 2003 when important reforms took place – been non-professionals with no formal law qualifications, but only six months' training.

<sup>110</sup> Des Forges, *Leave None to Tell the Story*, Conclusion.

In August 1997, Vice-President Kagame remarked: 'this is an incomprehensible situation and this is the most essential: there are innocent people, arbitrarily detained. Justice must be done for these innocent people; no one should be unjustly detained.'<sup>111</sup> Having acknowledged the unacceptably slow rate of prosecutions, authorities began to explore alternative measures to deal with the vast backlog of cases. A year after Kagame's comments, the government publicly mooted the possibility of releasing significant numbers of genocide suspects. Two previous screening exercises by the government, in 1995 and 1997, enabled the release of 3,365 detainees in 1998, despite protests from the survivor community, but this initiative was curtailed by the possibility (and in some cases the eventuality) of revenge attacks once prisoners returned to their villages. This prompted renewed government resolve to see the cases dealt with as full criminal trials. A target of trying 5,000 cases by 1998 was subsequently set, but the state succeeded in producing only 864 judgments.<sup>112</sup> By 2002, still only 7,211 trials had been completed. At the same time, numerous deaths in detention occurred due to dire overcrowding in detention facilities across the country. By March 2003, 24,873 detainees in total had been released including 14,636 'confessed detainees', that is, detainees who made use of a special plea bargain dispensation included in the 'Organic Laws' described in more detail below.

Despite all these various efforts, by 2003 there were still some 100,000 genocide accused in jail, many of whom had, nine years on, not yet been charged. Not only did this constitute a legal crisis, but, writes African Rights (AR), 'the ever-growing prison population was a source of political tensions and social division within Rwanda'.<sup>113</sup> Moreover, since all genocide accused were Hutu, these efforts to achieve genocide justice threatened to divide the population along ethnic and racial lines.

Secondly, the absence of an adequate legal framework posed a *further* major challenge in the quest to prosecute genocide suspects. Before 1994, Rwandan law did not recognise genocide as a crime. Creating a legal framework within which to prosecute genocide crimes proved complex and frustrating. An early attempt to pass a law in 1995 was declared unconstitutional by Parliament. A second law in 1996, known as the first in a series of

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<sup>111</sup> As quoted in Des Forges, *Leave None to Tell the Story*, Conclusion.

<sup>112</sup> Des Forges, *Leave None to Tell the Story*, Conclusion.

<sup>113</sup> AR, 'Confessing to Genocide: Responses to Rwanda's Genocide Law,' Report 17 (June 2000), 1.

'Organic Laws', officially incorporated genocide as a crime into Rwandan law and provided the basis for prosecutions to follow.<sup>114</sup>

Frequently amended since 1996, the 'Organic Laws' have provided the main legal framework for genocide justice in Rwanda. Originally 31 December 1997 was set as the deadline for all genocide cases to have been heard, but, when this proved unrealistic, the deadline was extended to 31 December 1999.<sup>115</sup> When the next deadline also proved unattainable, efforts to find alternative means to deal with genocide accountability gained momentum. This eventually resulted in the adoption of *Gacaca*, an entirely new quasi-legal system designed to deal exclusively with genocide crimes, and comprising thousands of community courts across Rwanda running parallel to the formal judiciary as a codified form of traditional justice.

From this discussion, it is clear that in order to reaffirm accountability under the law after genocide a serious, if initially flawed, attempt was made to bring *génocidaires* to account. To this end, an elaborate set of laws was developed to ensure that prosecutions were conducted consistently and fairly. In terms of punishment, executions were kept to a minimum, but continuing mass incarceration remained a major logistical and human rights dilemma – recognised as such by the government as well as by external observers. In response to these challenges, the government eventually turned to the adaptation of customary justice practices as measures of transitional justice, to which we return below, for an alternative process of dealing with genocide crimes.

Taken together, this amounts to a sustained quest by the Rwandan state for genocide justice instead of a culture of impunity. To what extent did it also comply with, and contribute to, the rule of law and thus to the eradication of structural violence associated with impunity

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<sup>114</sup> The first 'Organic Law' categorised perpetrators into four categories: Category 1 included those who had planned, organised, incited, supervised and instigated genocide. The Supreme Court prosecutor subsequently published a list of 1,946 names of those suspected of masterminding the genocide. Category 2 consisted of suspected perpetrators of murder, or of attacks resulting in death. Category 3 comprised those suspected of causing serious injury, and Category 4 those who committed property crime. Category 1 convictions carried as maximum sentence the death penalty; Category 2, life imprisonment; Category 3, imprisonment and payment of damages; and Category 4, the payment of reparations. Perpetrators convicted in Category 1 were 'jointly and severally' liable for the genocide as a whole, while those convicted in the other categories were held responsible only for their own immediate actions. Included in the 1996 'Organic Law', was a system of confession and reduced sentences subject to an apology and full confession, including details about the actions of accomplices. A detainee who apologised and made a full confession could benefit from a much reduced sentence. The law also established special chambers for genocide crimes in the civil and military courts. See Organic Law No 08/96 of 30 August 1996; [Electronic]. Available at: <http://www.preventgenocide.org/law/domestic/rwanda.htm> [9 April 2008]. See also Dubois, 'Rwanda's national criminal courts', 720.

<sup>115</sup> Des Forges, *Leave None to Tell the Story*, Conclusion.

and wrongful prosecution? Given the overwhelming logistical challenges of the initial circumstances, the obvious way out for the RPF government could have been sought in summary trials on a mass basis. By comparison, going the route of full criminal trials, developing alternative policies to deal with the backlog of cases, and eventually developing and fine-tuning a legislative framework, arguably indicates a strong commitment to the rule of law, at least in the formal administrative sense. Yet, the steady rise in extrajudicial executions by the police since late 2006 may be a symptom of an erosion (or failure to take hold) of faith in the rule of law.<sup>116</sup>

However, in terms of establishing a rule of law culture in a more substantive sense, this Rwandan approach to transitional justice has also received criticism. A central question concerns the almost exclusive focus on 'crimes of genocide', which, by definition, involves only one side of the Hutu–Tutsi conflict. In consequence, war crimes and crimes against humanity allegedly committed by some holding power in the current government have been ignored in domestic prosecutions, inevitably creating the impression of political influence and bias in the process.<sup>117</sup> Justified by the official narrative, which postulates the genocide as the single most decisive event in Rwandan history, efforts to deal with the genocide past have not sought to include other categories of crimes. The official argument seems to be that genocide, as the decisive moment in Rwandan history, is also the most fundamental crime of the past, in response to which all other crimes committed during this period (including war crimes and crimes against humanity) need to be judged, and in comparison to which all these other crimes pale into insignificance.

Bearing in mind the central question of building the rule of law through transitional justice, both formally and substantively, we are specifically interested in how these early forms of genocide justice conceptualised its participants. It is on this issue that one can detect an important example of the confluence of past and present categorisation schemes – inherent in attempts to subject one group or another to structural violence. In large part, this is due to the historical fact that the genocide was a Hutu-driven crime aimed primarily against Tutsi victims. As genocide justice dominated the dawn of the post-genocide state, Tutsis therefore found themselves perpetually cast by and large as 'the genocide victims' and Hutus as the

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<sup>116</sup> Freedom House, '2007 Country Report – Rwanda,' [Electronic]. Available at: [www.freedomhouse.org/modules/publications/ccr/modPrintVersion](http://www.freedomhouse.org/modules/publications/ccr/modPrintVersion) [5 January 2008].

<sup>117</sup> Des Forges and Longman, 'Legal Responses', 49.

perennial 'genocide perpetrators', this despite the fact that during the preceding years political atrocities were committed on all sides of the conflict. However, the more substantive commitment of developing a legal framework equally concerned with *all* victims of human rights violations in the country regardless of the side they fought on during the genocide, and not only with those who were regarded victims of the genocide, is in need of further investigation.

#### 4.3. *The Transitional Justice Framework for Categorising Rwandans*

In this section, we investigate in more depth how the categories employed by the transitional justice programme in Rwanda to conceptualise 'victims' and 'perpetrators' of genocide relate to the prior categories 'Hutu' and 'Tutsi' as racial and ethnic identities. Our analysis will be especially concerned with the question to what extent the function of these categories in the transitional justice process served to remove the 'structural violence' of that prior categorical framework in favour of a more equitable framework for the rule of law – based not only on formal or consistent application of the law, but also on a substantive commitment to human rights. To determine this, we need to look quite closely at who could claim 'victim' status in the context of this transitional justice process, who would face genocide justice as a 'perpetrator' and who was seen as complicit 'bystanders'.

##### 4.3.1 Who is the 'Genocide Victim'?

The 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>118</sup> defines a victim of genocide states without an explicit reference to human rights. Yet, subsequent UN documents have stressed the importance of international rights and humanitarian law.<sup>119</sup> Significantly for our purposes, the definition is specifically

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<sup>118</sup> : 1. "Victims" means persons who, individually or collectively, *have suffered harm*, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power. 2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who suffered harm in intervening to assist victims in distress or to prevent victimisation.' 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,' adopted by the General Assembly Resolution 40/34 of 29 November 1985; see [Electronic]. Available at: [http://www.unhchr.ch/html/menu3/b/h\\_comp49.htm](http://www.unhchr.ch/html/menu3/b/h_comp49.htm) [June 2009].

<sup>119</sup> A later UN document, the 'Basic Principles and Guidelines on the right to remedy and reparation for victims of violations of international human rights and humanitarian law', submitted to the Second Consultative Meeting of the UN High Commissioner for Human Rights in Geneva on 23 October 2003, defines a victim as follows: 'For purposes of this document a victim is a person or a collectivity who suffers harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights. A "victim" may also be a legal personality, a dependant or a member of the immediate family or household of the direct victim, as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental or economic harm. For the purposes of this document a victim as defined above is one who suffers harm as a result of acts or omissions that constitute a gross violation of international human rights or serious violations of humanitarian law. A person's status as a "victim"

formulated in terms of 'victims' *as individuals* and not in terms of membership of ethnic or other collectivities.

These definitions, together with the international legal principle of the right to reparation for victims, render the term 'victim' legally as well as morally significant by imposing correlative duties on states.<sup>120</sup> On the one hand, it indicates a legal right to reparations, enforceable in a court of law, and, on the other hand, it designates a moral right to reparations, not because of legal status in the first place, but because of sympathy and solidarity with those suffering.<sup>121</sup> In post-conflict situations, designations of individuals and groups as 'victims' have important political implications by either legitimising or delegitimising political elites as a result of their actions during the conflict.

The question is how the concept of 'victim' was applied in the Rwandan approach to genocide justice, and what its legal, moral and political implications are. In this regard, a significant precedent was set by an official finding on 28 June 1994 by the then United Nations High Commission for Human Rights Special Rapporteur, René Degni-Ségui, who concluded in his report to the Security Council 'that the term "genocide" should henceforth be used *as regard the Tutsi*' (my italics).<sup>122</sup> This assumption, that genocide victims in Rwanda were exclusively Tutsi, lent ideological support to the arrest and early efforts to prosecute thousands of Hutu *génocidaires* immediately after the genocide as perpetrators and to render support to Tutsis as victims of genocide. The Rwandan authorities themselves never asserted that Tutsis had exclusive claim to victim status. The official narrative recognised at least two caveats to the exclusivity of Tutsi-victimhood, namely firstly that a group of 'Hutu moderates' were also targeted and died at the hands of the *génocidaires*, and secondly that a number of civilian Hutu refugees suffered isolated incidents of violent crime committed by the RPF at places like Kibeho and in the eastern forests of the DRC. However, despite these

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should not depend on any relationship that may exist or may have existed between the victim and the perpetrator, or whether the perpetrator of the violation has been identified, apprehended, prosecuted or convicted.' See Commission on Human Rights, E/CN.4/2003/L.44.

<sup>120</sup> For a discussion of the debate of whether individuals have a right to reparation under international law, see Rombouts, *Victim Organisations*, 19f., where she concludes that the 'global "right to reparation" is only a principle, not a fully fledged right.' However, 'well-established and beyond dispute is the duty of the state to provide reparation for any wrongful act under international law'.

<sup>121</sup> See Rombouts, *Victim Organisations*, 21. Solidarity was mentioned by an international working group at the invitation of the UN Commission on Crime Prevention and Criminal Justice tasked to consider the establishment of an international fund for victims of crime and abuse of power. See Proposal for the Foundation of an International Fund for Support to Victims of Transnational Crime, 2000. [Electronic]. Available at: <http://www.victimology.nl/onlpub/fundproposal.pdf> 9 June 2009

<sup>122</sup> UN Doc. E/CN4/1995/7.

caveats, the overwhelming number of victims acknowledged in the domestic trials remained Tutsi.<sup>123</sup> Effectively, this implied that, because the genocide was seen as the defining event in Rwandan history, and Tutsis suffered uniquely during this event, it was reasonable to accept the arrest, incarceration, prosecution and punishment of Hutu *génocidaires*, even if this meant potential ethnic tension. At stake was the post-genocide state's symbolic distancing itself from the racism of the past, by punishing those responsible for its most heinous crimes.

Mamdani argues that this position led the Rwandan state eventually to re-adopt a 'genocide framework' categorising the *entire* population, not only victims and perpetrators of genocide.<sup>124</sup> Because of the magnitude of the event, it was only a small step to extend the twin identities of 'perpetrator' and 'victim' by proxy to the entire population. Furthermore, by responding to past political crimes exclusively within the framework of genocide, Mamdani claims that the population was not only drawn in as either perpetrators or victims, but also once again divided along the same categories which shaped the genocide, although this time not explicitly stated but nonetheless enacted within transitional justice efforts.<sup>125</sup> The implication of this claim, if correct, is that by giving the genocide predominance in the domestic criminal justice approach, the Rwandan approach runs the risk of reifying the categories which motivated the genocide in the first place, namely, the ethnic and racial categorisation scheme inherited from colonial and post-colonial regimes.

We need to look in more depth at the official notion of victimhood in Rwanda. Mamdani identifies five categories of transitional justice participants, namely refugees, returnees (i.e. refugees), victims, perpetrators and survivors: *Refugees*, Mamdani claims, are divided into two groups, the 'old case load' referring to the mainly Tutsi pre-genocide refugees known as the 'fifty-niners' because they left Rwanda after the 1959 transition, and the 'new case load' referring to post-genocide refugees – virtually all Hutu and associated with the *génocidaires*. *Returnees* are those mainly Tutsi (and some Hutu) refugees who returned to Rwanda during the RPF campaign in 1994 and who are acknowledged to have legitimate claim on

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<sup>123</sup> Exact numbers of Hutu victims are deeply contested, with some international observers, such as Lemarchand, implying that Hutus died in numbers comparable to those of the Tutsi: 'The official number of Hutu killed by Hutu during these events ranges from 30,000 to 50,000. But if we add the Hutu losses at the hands of the RPF within and outside Rwanda during and after the genocide, including those refugees who were killed by Rwandan troops in the Congo, as well as those who died of disease and starvation, we reach at least half a million deaths,' writes Lemarchand. To these may be added the events in Burundi in 1972 and 1993 – the latter the first genocide in the region and directed by Tutsis against Hutus. This remains a matter of intense historical contestation, with other commentators, including the Rwandan government, rejecting in the strongest terms any notion of a 'second genocide'.

<sup>124</sup> Mamdani, *When Victims become Killers*, 266.

<sup>125</sup> Mamdani, *When Victims become Killers*, 266.

reparation. Those exiles who did not return to Rwanda in 1994 are 'old case load' *refugees*.<sup>126</sup> Although there have been millions of Hutu 'returnees', these tended to be vanquished Hutu refugees who returned to Rwanda 'under a cloud of suspicion or outright condemnation', and who did not qualify in official parlance as 'returnees' with claims for compensation such as those enjoyed by returning Tutsis.<sup>127</sup>

Significantly, the category of 'victim' thus does not apply only to those who were killed or abused in the genocide, as distinct from those who were not. Both Hutu and Tutsi are recognised as 'victims', though not in the same respect. Tutsis are 'victims' by virtue of being Tutsi, since all Tutsis were targeted by the genocide. Accordingly Tutsi survivors are also (living) 'victims of the genocide'. Hutu 'victims' were those who paid with their lives for associating too closely with the Tutsi cause. An important implication is that Hutu 'victims' all died during the genocide whereas all Tutsis who survived the genocide are categorised as 'victims'.<sup>128</sup> It follows that no Hutu 'victims' survived the genocide whereas all Tutsi survivors are automatically 'victims'.<sup>129</sup>

When it comes to identifying *living 'victims'*, Mamdani claims that this is limited to 'Tutsi genocide survivors' and 'old case load refugees' (that is, mainly Tutsi pre-genocide refugees, such as the 'fifty-niners'), some of whom have returned while others have elected to stay in their adopted communities, most often in the eastern DRC. However, whether returning or not, these individuals are seen as victims of genocide which Kagame claims started in 1959. 'New case load' refugees (Hutus who fled advancing RPF forces or expected retribution from the post-genocide government) are not considered 'victims', nor are any Hutu survivors who may have been a target for *génocidaires*.<sup>130</sup> This scheme, offered by Mamdani, coheres with my description of the official narrative in Chapter 3. The most important conclusion is that, officially in Rwanda, to be a 'victim' in Rwanda *is* to be a 'genocide victim'. Victimhood as a result of political crimes in the past is thus reduced to violence that happened during and as a consequence of 'the genocide', as it is figured in the 'official narrative'.

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<sup>126</sup> This scheme therefore implies that there are no *refugees* within Rwanda. The assumption is that the 'new case load' of mainly Hutu *refugees* have all gone into exile and that there remained no internally displaced persons in Rwanda.

<sup>127</sup> Cyprian F. Fisiy, 'Of Journeys and Border Crossings: Return of Refugee, Identity and Reconstruction of Rwanda,' *African Studies Association* 41,1 (April 1998): 17–28.

<sup>128</sup> Mamdani, *When Victims become Killers*, 267.

<sup>129</sup> Eltringham concurs by asking whether 'Hutu moderate' does not simply designate a 'deceased "righteous minority",' Eltringham, *Accounting for Horror*, 98.

<sup>130</sup> Mamdani, *When Victims become Killers*, 267.

#### 4.3.2 Who is a 'Genocide Perpetrator'?

The flipside to the danger of categorising most or all Tutsi as 'victims' emerges as the consequence of viewing most or all surviving Hutu as 'perpetrators' of genocide. This is the result of effectively equating past political crimes with the perpetration of the genocide: to be a 'perpetrator' of political crimes in Rwanda *is* to be a 'genocide perpetrator'. This stance was taken to an extreme and extrapolated into the post-genocide era when (former) President Pasteur Bizimungu was arrested.

While in the process of establishing a political party in competition to the RPF he once headed, he was accused of propagating 'genocide ideology' and imprisoned.<sup>131</sup> It seems that the post-genocide government has difficulty in recognising any other political crimes than perpetrating 'genocide' in some form. The obvious danger is that democratic opposition is mistaken for an effort to undermine the project of national unity and reconciliation and thus of spreading 'divisionism' and 'genocide ideology'.<sup>132</sup>

Consider Mamdani's analysis of how the related term 'genocide survivor' is used. The term 'survivor' can of course be used in two distinct ways, either as a living 'victim' or, in Mamdani's words, as anyone who is 'blessed with life after genocide'.<sup>133</sup> However, officially it pertains only to those Tutsis who had been in the country during the genocide and who are alive today. This is because of the assumption that 'the genocide was aimed only at Tutsi'.<sup>134</sup> If no Hutu is a genocide survivor, then the implication is that every innocent Hutu victim or sympathiser with Tutsis was killed. This means that every Hutu who is alive today was either a perpetrator or a bystander/onlooker.

While perpetrators are presumed to be guilty, the position of 'onlookers' or 'bystanders' is more complicated. At best, they could be argued as 'complicit' rather than 'guilty'. The fundamental dilemma however, says Mamdani, is 'that to be Hutu in contemporary Rwanda is to be presumed a perpetrator'.<sup>135</sup>

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<sup>131</sup> Filip Reyntjens, 'Post-1994 Politics in Rwanda: problematising "liberation" and 'democratisation'', *Third World Quarterly* 27, 6 (2006): 1106.

<sup>132</sup> Reyntjens provides an extended discussion of this point in Reyntjens, 'Post-1994 Politics,' 1106f.

<sup>133</sup> Mamdani, *When Victims become Killers*, 273.

<sup>134</sup> Mamdani, *When Victims become Killers*, 267.

<sup>135</sup> Mamdani, *When Victims become Killers*, 267.

In actuality, writes René Lemarchand, most informed observers would agree that only some 10 percent of a Hutu population of roughly 6.5 million did in fact participate in the killings, either as organisers, executioners or unwilling accomplices. This leaves millions of Hutus who are not guilty of killing, who were bystanders or perhaps even assisted Tutsis to escape the genocide: 'Suffice it to note that thousands of Tutsi were saved from the *interahamwe's* machete by their Hutu neighbours and this at considerable risk to themselves and their families. But this is never officially acknowledged by the Kagame regime.'<sup>136</sup>

At the same time, it must be conceded that the levels of participation in the killings were extraordinarily high. Not only did thousands of civilians take part as perpetrators of killings, but these killings took place mostly in full public view of women, children, priests, teachers and mayors, who, in some cases, assisted the killers, in others looted from victims in the wake of the killings, and in others simply observed.<sup>137</sup> The spectrum listed here requires a closer differentiation between the guilt of perpetrators and the degrees of complicity of bystanders and/or onlookers depending on how close or removed they were from the actual killings.

Meanwhile, we may conclude that even when the terms 'victim' and 'perpetrator' were not overtly linked to ethnic categories, they nonetheless harboured a distinct and consistent relationship to the categories of 'Hutu' and 'Tutsi'.

#### 4.4. *Building the Rule of Law after Genocide*

The Rwandan government has consistently shunned any use of racial and ethnic categories like 'Hutu' and 'Tutsi', insisting rather on an official narrative of national unity and belonging as described in Chapter 3. However, the preceding analysis shows the implicit links between such terms as 'genocide victim' and 'genocide perpetrator', and those of 'Tutsi' and 'Hutu'. At the very least, this raises questions about the transitional justice programmes categorisation framework. Indeed, one needs to ask whether the Rwandan transitional justice process does not involve, in some ways, what Lemarchand terms the 'ethnicisation of guilt and innocence'.<sup>138</sup> Lemarchand describes this phrase as the failure to recognise that Hutus and Tutsis share, albeit unevenly, guilt and innocence. A key question

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<sup>136</sup> Lemarchand, 'Coming to terms with the past,' 2.

<sup>137</sup> A point first made by Mahmood Mamdani; see Mamdani, *When Victims Become Killers*, 185, 266.

<sup>138</sup> Lemarchand, 'Coming to terms with the past,' 9.

in determining if transitional justice can contribute to the eradication of structural violence, is whether it operates as a forms of ethnicised justice, or indeed has been able to contribute towards a dispensation built on the rule of Law.

#### 4.4.1. Ethnicised Justice or the Rule of Law?

The 'ethnicisation of guilt and innocence' involves attributing blame or guilt to ethnic collectivities rather than to the individual members of such collectivities. Mamdani's conclusion, that to be a Hutu is to be presumed guilty by the transitional justice regime in Rwanda, is a case in point. He has argued that in Rwanda justice historically is pursued as a form of revenge where power relations are not *subverted* but rather *inverted*.<sup>139</sup> Such 'ethnicisation of guilt and innocence' risks being unfair to both the individuals and the groups concerned; it would be unfair to individuals in so far as 'innocent' members are included in the 'guilt' of the groups to which they belong, and it may be unfair to characterise groups as either 'guilty' or 'innocent' in so far as these are unevenly shared by members of each group.<sup>140</sup> Lemarchand notes that 'guilt and innocence do not run parallel to ethnic lines'. 'Nonetheless', he continues, 'seen through the prism of the Rwandan media, victimisation and guilt are concepts that are becoming increasingly "ethnicized": because the Tutsi are the epitome of a victimised community, they can do no wrong.'<sup>141</sup> International commentators, scholars, NGOs and diplomats often fall into the same trap of associating guilt and innocence with one group or another, claims Lemarchand.<sup>142</sup>

It is important not to homogenise the Hutu community as perpetrators, not least because the often quoted figure of 175,000 to 210,000 genocide perpetrators implies that this does not include a large majority of Hutus.<sup>143</sup> Moreover, the presence of 'moderate Hutu' at the time of the genocide points to the *political diversity* within the Hutu group. It is equally important not to homogenise the Tutsi group, not least because of the important fault line between 'returnees', 'victims' and 'survivors'. Thus, exiles from Uganda and Tanzania who joined in the RPF military campaign are English-speaking and form the core of the RPF power base.

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<sup>139</sup> See Mamdani's discussion of the "'Social revolution" of 1959' in Mamdani, *When Victims become Killers*, 101–131 but especially p. 126; his discussion of the 'Second Republic' on pp. 132–157 but especially pp. 133, 134 and finally his discussion of post-genocide politics pp. 264–282, especially 275, where he states: 'the result was to reproduce the bifurcated world created by colonialism: the distinction between indigenous and non-indigenous, abolished in the civic sphere, remained in the ethnic sphere. Even if turned upside down, the political world remained as designed by the settler.'

<sup>140</sup> Lemarchand, 'Coming to terms with the past,' 9.

<sup>141</sup> Lemarchand, 'Coming to terms with the past,' 2.

<sup>142</sup> Lemarchand, 'Coming to terms with the past,' 2.

<sup>143</sup> Waldorf, 'Mass Justice,' 33.

By contrast, the largely Francophone genocide victim groups, such as *Ibuka*, often express some measure of marginalisation by the post-genocide leadership.<sup>144</sup>

Nor are all genocide victims automatically at one with the RPF regime's approach. Waldorf draws attention to several issues over which the government of Rwanda has clashed with victims: victims opposed the reintegration of perpetrators into their communities; survivors clashed with the government over how to commemorate the genocide; some groups objected to the official policy of publicly displaying skulls, bones and corpses at memorial sites, claiming that these violate Rwandan cultural sensibilities; and survivors and victims have complained bitterly about the lack of reparations.<sup>145</sup> In 2000, the government of Rwanda accused several prominent Tutsi elites of corruption and, as Waldorf states, 'plotting the return of the Tutsi king from exile'. This led to some fleeing the country and others being arrested. One person was assassinated.<sup>146</sup> Moreover, during the 2003 elections, the RPF accused the Liberal Party of promoting 'ethnic divisionism' by its advocacy on behalf of Tutsi survivors.

In this context, the ways in which transitional justice mechanisms attribute guilt and innocence to individuals and collectivities may either serve to challenge the 'ethnicisation of guilt' or in fact reinforce it. On the basis of the preceding analysis, it must be concluded that the Rwandan transitional justice mechanisms are, in some ways, reinforcing the historically established racial/ethnic categorisation.<sup>147</sup> The implication of this discussion for our analysis of transitional justice and its implications and consequences for reconciliation in Rwanda is that, despite the stated objective of national reconciliation transcending the former racial/ethnic categories, transitional justice may still in effect discriminate in its treatment of ethnic groups, thereby perpetuating rather than removing structural violence. In short,

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<sup>144</sup> See Rombouts, *Victim Organisations*, 366f.

<sup>145</sup> Waldorf, 'Mass Justice,' 37.

<sup>146</sup> Waldorf, 'Mass Justice,' 37.

<sup>147</sup> Indeed, in this much-contested context the international literature commenting on the Rwandan conflict also runs the risk of contributing to the further 'ethnicisation of guilt or innocence'. Lemarchand writes: 'In France the historian Jean-Pierre Chrétien has long been identified as the most articulate and persistent champion of the good guys (Tutsi) vs. bad guys (Hutu) school of thought. This tendency to ethnicise guilt is also shared by the London-based human rights organization African Rights, headed by Rakiya Omaar and Alex de Waal; their position on the Hutu-Tutsi problem is at considerable variance with that of, say, Amnesty International, which, rightly or wrongly, is perceived by other analysts as being overly sympathetic to the Hutu cause (assuming that such a cause can be readily identified);' see Lemarchand, 'Coming to terms with the past,' 4. Eltringham notes: '... the concern is with the interplay between two abstract notions of "ethnicity" deployed by two visible groups: the perpetrators of the genocide and "international commentators";' see Eltringham, *Accounting for Horror*, 5. Pottier concurs with this analysis: by 'upholding the image of an undifferentiated Hutu collectivity, UNHCR and the implementing NGOs encouraged and reinforced the notion that it was right to essentialise ethnicity; by clearly siding with the RPF-led authorities in Kigali ..., the international aid effort indirectly promoted the notion of a Hutu collective responsibility;' see Pottier, *Re-imagining Rwanda*, 150.

transitional justice measures that strive to reconcile Hutus and Tutsis may instead result in ethnicising genocide guilt and innocence.

The challenge is to allow the categories of transitional justice to function in ways that do not reinforce the historical legacy of ethnic cleavages. Positively, the challenge is to make space for adequate ascriptions of guilt through notions of individual as well as collective accountability, and so to build the rule of rule of law. In contrast to the 'ethnicisation of guilt', the rule of law acts as a mechanism fostering cross-cutting identifications, precisely because all are presumed equal before the law regardless of ethnic or any other affiliation. If the formal concern of the rule of law after a genocide is to treat people equally and fairly (and the danger is that hidden inequalities may be perpetuated in the name of transitional justice), then the substantive concern after a genocide is to be able to give adequate meaning to the notion of accountability within a framework that acknowledges the complex layers of collective responsibility and complicity prevalent during an event such as a genocide.

It is the unique challenge of transitional justice to develop appropriate ways for balancing individual accountability with collective complicity, which neither render entire groups guilty nor provide overly individualist (and therefore simplistic) accounts of popular participation in collective atrocities. While the literature on transitional justice is concerned with these issues at a general level, particular societies must in practice devise their own approaches to dealing with a past of political atrocities. Transitional justice mechanisms, based on international law and a human rights framework, are well equipped to establish *individual* criminal accountability. Post-genocide Rwanda has developed a different approach to transitional justice aimed at national reconciliation, seeking to transcend the historical legacy of ethnic/racial identities – though it is questionable whether this has not served to reinforce the underlying structural violence of this categorical framework rather than remove it – so as to establish a new rule-of-law culture.

#### *4.5 Conclusion*

Transitional justice is often promoted as a means to counter a 'culture of impunity' after conflict by establishing accountability for past political atrocities. It is also seen as a counter to the development of new forms of structural violence in the judiciary through a skewed, biased and partisan application of rules and regulations.

From the discussion in this chapter, it is clear that there is a lack of convergence between the evaluative framework developed in terms of reconciliation as structural violence and the Rwandan approach. The RPF government argued from the outset that to function effectively in the aftermath of the genocide when an entire justice system had been delegitimized, debilitated or destroyed, the legal system would have to regain a basic capacity to administer the law.<sup>148</sup> By hauling *génocidaires* before a court of law, or before a *Gacaca* hearing, so the government claimed, impunity was being countered and the important principle of ‘equality before the law’ was being practised and strengthened, in a society that had become accustomed ‘a culture of impunity’ – not least because some of the *génocidaires* had been powerful individuals who, previously, operated with impunity.

Whereas the ruling elite of the RPF profess their satisfaction with the official project to dissolve ethnicity into a transcendent national identity, our analysis has raised questions that the structural violence of the ethnic/racial categorical framework may have been reinforced rather than removed. The main difficulty is that the Rwandan approach, through its exclusive focus on genocide and its definitions of who victims and perpetrators of the genocide were, seems to keep alive the ethnic categories they are ostensibly seeking to overcome. I called this unintentional consequence of the quest to build the rule of law the ‘ethnicization of justice’.

Some claim that Hutus bear the brunt of transitional justice prosecutions whereas Tutsis are almost universally cast as victims. If so, then Rwandan transitional justice amounts to little more than what Mamdani terms ‘victor’s justice’ – that is, justice to serve the exclusive interests of the new political elite.<sup>149</sup> In our terms, it would also amount to little other than a continuation of structural violence in Rwanda – this time in the name of transitional justice.

Reconciliation-as-rule-of-law however does appear, from this discussion, to enjoy considerable convergence with the more general international human rights discourses. Yet, there are also differences here. The notion of ‘structural violence’ (together with ‘cultural violence’) has the advantage, I would contend, that it allows for determining accountability for genocide crimes in, through more than a focus on individual guilt. Structural violence

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<sup>148</sup> Mani, *Beyond Retribution*, 6.

<sup>149</sup> Mamdani, *When Victims become Killers*, 270.

also take into account collective issues, so important in genocide and post-genocide societies, not least on how power is organised in society. In a context where the extermination of one group was an explicit objective of the conflict, a focus on structural violence, in addition to direct violence, enables the analysis of impunity to move beyond the preoccupation with 'bad apples' to a more systematic and systemic understanding of how genocide became possible.

A more detailed analysis of Rwanda's transitional justice processes, which now follows, will help to further determine the implications and consequences they may have for the quest to eradicate structural violence in the post-genocide society, not only as a remnant of past abuse, but in ways, more generally in Rwanda, in which all Hutus are rendered guilty of genocide, and all Tutsis identified as victims of the same crime.

## Chapter 5: *Gacaca* and Reconciliation

This chapter will provide an account, discussion and assessment of the *Gacaca* process as an integral part of the Rwandan approach to transitional justice and reconciliation. More specifically, we will consider the *Gacaca* process in terms of its consequences for two dimensions of reconciliation, namely, its ability to address residual forms of cultural violence as well as its relation to the legacies and present-day practises that perpetrate structural violence.

Promulgated in the 2000 Organic Law and further refined in the 2004 law, the *National Service of Gacaca Courts* (SNJG), a body to oversee the implementation of a system of community courts nationwide, was launched as a direct response to the logistical and other challenges of bringing to justice some 120,000 individuals accused of genocide and held in prolonged detention.<sup>1</sup> Based on traditional practices of communal reconciliation, the *Gacaca* hearings were officially instituted as an elaborate and sustained exercise of transitional justice in local settings with grass-roots participation. As such, *Gacaca* represents a mainstay of the Rwandan approach to transitional justice: *Gacaca* falls under the jurisdiction of the Rwandan government, the *Gacaca* hearings took place in local Rwandan communities and the SNJG comprises exclusively Rwandan staff.

The chapter opens with a brief overview of the operational history of *Gacaca*, as an example of the increasingly prominent phenomenon of transitional justice at a local or community level. This is followed by a summary discussion of some main issues and arguments in the literature on the *Gacaca* process. Like other traditional and community-based forms of justice, especially prevalent on the African continent where large swathes of citizens are governed (most immediately) by traditional rulers, the *Gacaca* hearings tend to be criticised for their perceived lack of legal due process, or praised for their indigenous and accessible

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<sup>1</sup> Organic Law No 40/2000 of 26/01/2001 set up the various '*Gacaca* jurisdictions' and institutions with responsibilities for prosecutions of offences constituting the crime of genocide or crimes against humanity committed between 1 October 1990 and 31 December 1994; [Electronic]. Available at: <http://www.inkiko-Gacaca.gov.rw/pdf/Law.pdf> [9 April 2008]. Organic Law No 16/2004 of 19/6/2004 established 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 1 October 1990 and 31 December 1994, and its amendments; [Electronic]. Available at: <http://www.inkiko-Gacaca.gov.rw/pdf/newlaw1.pdf> [9 April 2008].

nature. For our purposes, the significance of the *Gacaca* process relates to the extent to which it represents key elements of the Rwandan approach to transitional justice.

The second half of the chapter is divided into two sections, one containing a discussion of *Gacaca* as a way of overcoming cultural violence, and the other an assessment of *Gacaca* as a way of eradicating structural violence. The discussion of the consequences of *Gacaca* for the residual forms of *cultural violence* will focus specifically on the extent to which these community courts are able to promote a 'reconciliation with history' in the two senses discussed in Chapter 3, namely, as initiating debate about Rwanda's new monumental history, as well as its openness to the incorporation of the personal narratives of ordinary Rwandans, not least those of particular victims and perpetrators.

This concerns its ability to accommodate both Hutu and Tutsi narratives of the genocide. At a local level, the more than 12,000 courts will have access to, and eventually written recordings of, individual victim and perpetrator narratives from ordinary Rwandans at every level of society. Depending on how these narratives are handled, preserved and published, they could provide an unprecedented repository of personalised narrations of the genocide.

The latter section analyses *Gacaca's* role in assisting the process of removing *structural violence* from Rwanda's judicial systems and thus promoting reconciliation. Here, the focus is on ways that *Gacaca* is able to extend the reach of the law, how it fares in relation to the danger of 'ethnicising human rights', and thus its contribution to the ways that Rwandan transitional justice defines and attributes accountability for the genocide.

### 5.1. *Implementation – An Overview*

The RPF regime realised in 1999, after several self-imposed deadlines had been missed, that the formal justice system, even if taken together with the ICTR, would only ever be able to deal with a small, symbolic number of genocide cases. Either the state would have to release the hundred thousand or so genocide accused back into society, a decision which could have major destabilising effects, or it would have to find another, less rigorous but credible process to handle the case load.<sup>2</sup>

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<sup>2</sup> In the words of President Kagame: 'We are in a very difficult situation. It is like we are damned if we do and damned if we don't. We have to find a way to manage our problems. The problems are likely to be there, we must therefore find ways to manage them. But we have a huge problem on our hands, that is, 115,000 people in prison. We simply cannot

In June 1998, the possibility of revitalising the customary practice of *Gacaca* was raised by a group of provincial prefects.<sup>3</sup> On 17 October 1998, then President Bizimungu established a commission to investigate the possibility of building the fledgling *Gacaca* community structures that had survived the genocide into a national mechanism designed to address post-genocide justice. Traditionally, these meetings 'on the grass' (*Gacaca* literally means 'on a patch of grass') were presided over by *Inyangamugayo*, or elders. They were designed, by and large, to handle less complicated communal disputes relating to land use, livestock or damage to property. Male heads of households oversaw proceedings. Women could not participate, even as witnesses. It was now proposed that these customary communal practices be adapted to meet the urgent need to achieve accountability, as well as reconciliation, in post-genocide Rwanda.

Consequently, *Gacaca* was reinvented as a state-sponsored quasi-legal mechanism to deal with the enormous number of outstanding genocide cases – and to do so in close proximity to the communities where the crimes were committed. The aim of *Gacaca* was not to mete out punitive justice exclusively, but also to restore social harmony by finding appropriate ways to manage processes of restitution between former adversaries.<sup>4</sup> *Gacaca* was to operate at four levels, namely cell and sector levels (where the least severe cases would be tried, e.g. those involving property crimes), district level (where Category 2 suspects would be heard on charges ranging from murder to that of inflicting grievous bodily harm<sup>5</sup>) and provincial level (where appeals arising from district-level hearings would be heard).<sup>6</sup>

The new Organic Law provided for the creation of *at least* 10,000 courts, one in each cell, sector, district and province in the country – eventually 12,103 courts would be established.<sup>7</sup> Judges were to be elected by communities from within their own ranks. Criteria for election included that persons be 'of outstanding integrity', and those elected then had to undergo limited legal training. By 2004, 170,000 judges had been elected and trained.<sup>8</sup> Prior to the

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continue with this situation indefinitely. We had to devise a solution to this problem. But in solving this problem, other problems may arise. We shall deal with them and devise solutions as we go along.' BBC interview with President Kagame.

<sup>3</sup> Clarke, 'Hybridity,' 117.

<sup>4</sup> Waldorf, 'Mass Justice,' 10.

<sup>5</sup> Please see the discussion in section 4.1. on the various categories of crime provided for in the Organic Laws.

<sup>6</sup> Cobban, 'The Legacies of Collective Violence,' 10.

<sup>7</sup> Uvin and Mironko, 'Western and Local Approaches to Justice in Rwanda,' 226.

<sup>8</sup> Oomen, 'Rwanda's *Gacaca*.'

commencement of *Gacaca* hearings, elected judges in each community compiled histories and determined lists of victims and crimes based on a range of sources, including state files and prisoner testimonies. The accused were then categorised and their files sent to the appropriate jurisdiction for prosecution. All cases that had not been referred to Rwandan courts were to be taken up by *Gacaca*.<sup>9</sup> Only Category 1 cases, dealing with the so-called 'masterminds of the genocide', and suspects of sexual crimes, initially fell outside the jurisdiction of *Gacaca* and had to be referred directly to national courts (a feature that was reversed through later legislation).

A nationwide trial-run for *Gacaca* courts, involving 751 courts in 118 sectors, commenced in June 2002 and continued for just over four years, a period during which operational problems were identified, data collected and the accused categorised.<sup>10</sup> An amended *Gacaca* law, promulgated in 2004, took into account the 'lessons learnt' during the pilot phase, such as, for example, collapsing cases previously categorised as Categories 3 and 2. *Gacaca* courts commenced full operations in July 2006. In 2007, a final round of refinements was promulgated by law, such as, for example, increasing the number of judges in each court.<sup>11</sup>

To begin with, the number of outstanding genocide cases that *Gacaca* was expected to try amounted to around 100,000. In a development that surprised managers and observers alike, this total ballooned to 818,564 when *Gacaca* commenced duties, as the number of individuals implicated by testimonies mushroomed.<sup>12</sup> Yet, looking back at this point, it seems that the system was indeed able to process this eight-fold increase in cases.

As of April 2007, 12,103 courts nationwide had heard 84,125 cases, returning 76,371 verdicts. By April 2009, the projection was that the courts, staffed with about 250,000 'judges', would by the end of that year have handled the cases involving 760,446 individuals. Taking into account other participants, the process would involve around 85 percent of the

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<sup>9</sup> ISS, 'The *Gacaca* Process.'

<sup>10</sup> Domitilla Mukantaganzwa, 'National Service of *Gacaca* Courts,' (Paper presented to *Institute for Justice and Reconciliation Africa-Wide Consultation*, Johannesburg, 7–10 June 2007).

<sup>11</sup> Organic Law No 10/2007 of 1 March 2007, [Electronic]. Available at: [http://www.inkiko-gacaca.gov.rw/pdf/L\\_O%20N%2010.2007%20VERSION%20FINALE.pdf](http://www.inkiko-gacaca.gov.rw/pdf/L_O%20N%2010.2007%20VERSION%20FINALE.pdf) [January 2009]. The Organic Law of 1996, together with the 2001 *Gacaca* Law, modified five times, forms the legal basis of *Gacaca*; see Phil Clarke, 'The Rules (and Politics) of Engagement', in *After Genocide – Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, ed. Phil Clarke and Zachary D. Kaufman (New York: Columbia University Press, 2009), 298.

<sup>12</sup> Mukantaganzwa, 'National Service of *Gacaca* Courts', op.cit.

population.<sup>13</sup> Despite this massive workload, the Rwandan authorities remains confident that the *Gacaca* courts will be able to hear all their cases by December 2010.<sup>14</sup>

## 5.2. Community Justice – Politicised or Progressive?

From the extant literature, it is clear that the *Gacaca* system has sparked intense debate internationally as well as domestically. The literature typically exhibits two opposing points of view. Arguments against community justice highlight the perceived politicised and compromised nature of *Gacaca*, but also its lack of due process. Arguments in favour of community justice present *Gacaca* as a progressive option because it is able to operate in close proximity to victim communities, thus rebuilding the rule of law at grass roots while employing restorative, non-adversarial processes.

From a pronounced human rights perspective, activists and commentators have strongly criticised the *Gacaca* process. Amnesty International and other human rights agencies, but also various international commentators, view the *Gacaca* process primarily, or even exclusively, as an exercise in criminal justice; and to them, lapses in due process are so grave as to compromise the entire effort.<sup>15</sup> As Clarke notes: 'The form of justice that most commentators (such as Amnesty International and Human Rights Watch) employ when analyzing *Gacaca*, is *formal* in method and *deterrent* in outcome.'<sup>16</sup> From this perspective, *Gacaca* is mainly criticised for its lack of judicial rigour, for example, in not employing legally qualified judges.

Waldorf has taken this criticism further: *Gacaca* does not only fail to deliver justice but actively undermines whatever post-genocide reconciliation might have happened, and

<sup>13</sup> IRIN, 'RWANDA: Reconciliation still a major challenge', KIGALI, (14 April 2008) [Electronic]. Available at: <http://www.irinnews.org/Report.aspx?ReportId=77748> [16 April 2008].

<sup>14</sup> Mukantaganzwa, 'National Service.'

<sup>15</sup> Amnesty International, for example, commented: 'On the contrary, consistent reports that fair trials guarantees are not being applied in the *Gacaca* process, which is investigating and prosecuting a massive amount of the crimes committed during the 1994 genocide, undermines the whole legal system and raises concerns about the importance that will be attached to these rights by other sectors of the justice system.' See AI: 'Rwanda: Suspects must not be transferred to Rwandan courts'; (2 November 2007) [Electronic]. Available at: <http://asiapacific.amnesty.org/library/Index/ENGAFR470132007> [January 2009]; See also AI, 'Rwanda. The Troubled Course of Justice', (April 2000) [Electronic]. Available at: <http://www.amnesty.org/en/library/info/AFR47/010/2000/en> [9 April 2008]; AI, 'Rwanda: Gacaca: A Question of Justice', (December 2002), [Electronic]. Available at: <http://www.amnesty.org/en/library/info/AFR47/007/2002> [9 April 2008]. See also HRW, 'Rwanda: Killings Threaten Justice for Genocide: Authorities Must Ensure Full, Impartial Accountability for Recent Killings', New York, (22 January 2007) [Electronic]. Available at: <http://www.hrw.org/english/docs/2007/01/19/rwanda15126.htm> [April 2008]; HRW, 'Rwanda: Gacaca Trial Condemns Activist to Prison: Judge Fails to Recuse Himself Despite Past Conflict With Defendant', New York, (30 May 2007), [Electronic]. Available at: <http://www.hrw.org/english/docs/2007/05/30/rwanda16024.htm> [9 April 2008].

<sup>16</sup> Clarke, 'Hybridity,' 139.

threatens to *worsen* ethnic relations. As *Gacaca* was about to commence duties, Waldorf asked whether the direct involvement of communities might lead to the intimidation of witnesses and reprisal attacks. Moreover, he speculated that, within a society already so deeply traumatised, community dialogue sessions during the *Gacaca* hearings could serve to rekindle animosity. In his view, furthermore, the customary practice of *Gacaca* was 'warped beyond recognition' by turning it into a quasi-state institution, robbing *Gacaca* of its potential reconciliatory content and thus not only risking causing fresh agitation but also courting irrelevance.<sup>17</sup> Moreover, Waldorf claimed, Hutu and Tutsi perceived *Gacaca* quite differently: 'Hutu generally view it as a way to release family members wrongly imprisoned, while Tutsi survivors often see it as a disguised amnesty for those who killed their family members'.<sup>18</sup> As a result, 'a few' survivors and perpetrators had fled their communities and approximately fifteen witnesses had been killed by 2005. This indicates that *Gacaca* 'upends a shaky peace' and disturbs the fragile '*modus vivendi*' that survivors have worked out with their neighbours over the past eleven years.<sup>19</sup>

More fundamentally, Waldorf concluded that *Gacaca* results in the gross and large-scale 'ethnicisation of guilt' because it is so heavily 'politicised'.<sup>20</sup> In this way, the *Gacaca* process would 'wind up criminalising a vast swath of the Hutu population'.<sup>21</sup> The inescapable conclusion is that a post-conflict government could never render justice for a mass atrocity such as the Rwandan genocide, and by attempting to do so it not only saddled the justice sector with an impossible task but 'most cruelly diverted resources away from survivors'. This, according to Waldorf, amounted to 'victor's justice'.<sup>22</sup>

In stark contrast, there were other commentators who viewed *Gacaca* as an exemplary model of best practice for transitional justice. Paul Harrel's *Rwanda's Gamble – Judging Genocide on the Grass* is the first book-length academic investigation of *Gacaca* as a response to genocide crimes. Harrel's core argument is that the 'liberal-prosecutorial model of transitional justice' dominates international interventions after conflict. Consisting of three elements – international tribunals, domestic prosecution and truth commissions – this model did not pay sufficient attention to issues of truth and reconciliation. To this, Harrel juxtaposes

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<sup>17</sup> Waldorf, 'Mass Justice,' 85.

<sup>18</sup> Waldorf, 'Mass Justice,' 74.

<sup>19</sup> Waldorf, 'Mass Justice,' 74.

<sup>20</sup> Waldorf, 'Mass Justice,' 78.

<sup>21</sup> Waldorf, 'Mass Justice,' 81.

<sup>22</sup> Waldorf, 'Mass Justice,' 85.

*Gacaca* as a 'communitarian restorative' model that utilises justice to facilitate reconciliation. The gamble of *Gacaca* is the hope that the Rwandan communities would accept this initiative to pursue community reconciliation peacefully and truthfully.<sup>23</sup>

These observations, however, were also based largely on speculation. In a review of this study, Phil Clarke pointed out that Harrel's 'investigation' is based largely on a single visit of ten days to Rwanda and thirteen interviews conducted during this time, mostly with functionaries of western NGOs and with government officials. He notes that Harrel failed to attend test-run *Gacaca* sessions then under way in prisons and in selected communities.

The challenge in analysing the implications and consequences of *Gacaca*, it would seem from this sample of commentators, both positive and negative, is to steer between an *a priori* rejection of its informal, localised justice and, alternatively, the *a priori* affirmation of *Gacaca* as a new model for restorative and transitional justice.<sup>24</sup> It is thus important to determine how *Gacaca* has fared during its implementation phase.

### 5.3. *Gacaca as Measure against Cultural and Structural Violence*

Reconciliation, for our purpose, involves the building of positive peace through the removal of violence in all its forms, direct/personal, structural and cultural. Accepting that physical violence *within* Rwanda has largely been stopped,<sup>25</sup> our concern is with the conceptualisation and analysis of structural as well as cultural violence. In previous chapters I identified 'reconciliation with history' and 'building the rule of law' as the two major goals of reconciliation-through-transitional-justice in Rwanda. We now turn to *Gacaca* in order to determine some of its consequences for these goals.

I attended a *Gacaca* court hearing, on 30 November 2008 in the Kimisagara Sector in Kigali, of a Category 1 accused, Narcisse Bitenderi (two other accused were absent). The hearing lasted from 09.30 until 20.00 in the evening. It was the sixth session of this particular case, which, along with a number of other Category 1 cases, had been referred from the national

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<sup>23</sup> Paul Harrel, *Rwanda's Gamble: Gacaca and a new Model of Transitional Justice* (New York: Writer's Club Press, 2003).

<sup>24</sup> Similarly, Clarke argues for 'qualified optimism' as opposed to the 'extremely pessimistic' assessments by human rights agencies on the one hand and 'extremely optimistic' assessments on the other. In some areas, there are signs that *Gacaca* will achieve 'impressive results, whereas in other areas, it faces 'serious problems'; see Clarke, 'The Rules (and Politics) of Engagement,' 301.

<sup>25</sup> Extensive physical violence related to the aftermath of the genocide has continued to this day in the neighbouring DRC, but this exceeds the limits of my discussion.

courts to *Gacaca* in order to expedite efforts to eradicate the backlog of genocide cases nationally.<sup>26</sup>

Bitenderi was accused of 'masterminding' the genocide in the area where, that day, he was standing trial. Evidence was provided by a string of witnesses, who claimed that he was spotted giving orders at the roadblocks where fleeing Tutsis were massacred; that the radical Hutu party, the CDR had a flag hung outside his house; that bodies were discovered in the septic tank behind his house; and that he regularly attended the meetings between the CDR and MRND (D) parties where the genocide was planned. Throughout the day he steadfastly denied all knowledge of the crimes, or even of knowing that there was genocide underway at the time. He said he never attended the road blocks, did not see any weapons in the streets and did not have a CDR flag in front of his house – and although he had a CRD membership card, he claimed that he had not been a member of the party, and that the card was merely kept as a convenient way 'to get what he needed.'

After some six hours of testimony, during which the accused actively participated, cross-examined the witnesses and made regular statements, the presiding *Gacaca* judge called the meeting to order and proceeded to read the minutes of all previous meetings related to this case. This lasted for more than an hour. Once this was completed, the accused stepped forward to challenge sections of the minutes, which were amended to his satisfaction. The accused, together with the judge, then signed the minutes as a true reflection of what had transpired during the hearings.

The hearings adjourned at 15.45, when the panel of judges retreated to deliberate. At 18.25 they re-entered the courtroom. After the judge inquired as to the whereabouts of the accused (who seemed to have left already), the verdict was read out: Bitenderi was guilty as charged. Since this was a Category 1 case, and the accused showed no remorse, the court sentenced him to 30 years in prison. He would, however, have the right to appeal the sentence in a higher-ranked *Gacaca* court.

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<sup>26</sup> Hironelle News Agency reported in January 2008 that the Rwandan Government had approved the widening of *Gacaca* jurisdiction to cover all genocide cases (including those in Category 1). Controversially, these cases also included rape cases. This, gender activists argued, would expose rape victims unduly to community pressures, including possibly those of the perpetrators; see Hironelle News Agency, 'Rwanda/Gacaca – 1994 Genocide: *Gacaca* Courts Will Start Trying Rape Cases Next Month' (25 June 2008) [Electronic]. Available at <http://www.hirondellenews.com/content/view/2169/291/> [June2008].

It is important to emphasise that a single example such as this cannot serve as a basis for general conclusions about *Gacaca* as a whole. Yet this case does illustrate the measure to which retributive and reconciliatory considerations are intertwined within (at least this example of) *Gacaca*. Not only was the accused handed a severe punishment, but it was made clear that the punishment would be significantly reduced, should the accused have showed some measure of acknowledgment and remorse. Having failed to convince the judges of his contrition (mainly because he was not willing to acknowledge any complicity in, or even knowledge of, the genocide), he was sent to prison for 30 years.

The discussion now moves into a more general analysis of *Gacaca*, not just in terms of due process (as has been the case within much of the international commentary on *Gacaca*), but specifically also in relation to the transitional justice objective of reconciliation conceived as the removal of cultural and structural violence.

#### 5.3.1. *Gacaca*'s 'Little Narratives' as Contribution towards 'Reconciliation with History'

It is unlikely that the legacy of cultural violence, entrenched over many decades by successive colonial and post-colonial regimes, could have disappeared in a mere fifteen years. Indeed, we have seen that this legacy takes many forms; some inherited from the past, but others the result of post-genocide developments.

The question is about the implications and consequences of *Gacaca*, in years to come, on these residual forms of *cultural violence* in post-genocide Rwanda, and to what extent the proceedings of these community courts are able to promote a 'reconciliation with history'. Following on from our discussion in Chapter 3, there are two main parts to this question, namely, the significance of the *Gacaca* hearings for popular appropriation of the 'official narrative' of the genocide and Rwanda's new monumental history on the one hand, as well as, on the other hand, the openness of the post-genocide 'official narrative' potentially to incorporate the multiple personal narratives of ordinary Rwandans, not least those of particular victims and perpetrators.

Earlier we identified two major modes of continuing cultural violence in Rwanda, namely the denial of opposing viewpoints in and through the 'official narrative' of the genocide as well as the exclusion of the multiple and diverse experiences and perspectives of local rural

and peasant communities at grassroots level. Taken at face value, it might appear that there is an overt acceptance of the 'official narrative' by many Rwandans; even so, there are questions about the extent to which ordinary Rwandans, with their contested history of Hutu and Tutsi identities, have developed a shared understanding of, and approach to, dealing with the past that would allow not only for common ground and agreement but also for disagreement flowing from different opinions and perspectives.<sup>27</sup> At the same time, questions remain about the extent to which rural peasants are being empowered by the *Gacaca* process to contribute to reconciliation in the post-genocide society.

The first issue thus concerns the danger of renewed hegemony, and accompanying cultural violence, through the official narrative, emphasised by the fact that Rwanda's government-sponsored programmes have sought to discourage engagement with historical inquiry and debate beyond the 'official narrative' on the grounds that competing histories and views would re-ignite the conflict.<sup>28</sup> In this vein, it seems that 'reconciliation with history' is equated by Rwandan authorities as the uncritical acceptance of the *official* version of events.

Hutu historical revisionism – another source of cultural violence – is, of course, comprehensively rejected by the RPF 'official narrative' at the level of the macro-debates about Rwandan history. Hutu historical revisionism has, in these debates, been described as 'genocide laundering'.<sup>29</sup> Popular amongst various exiled Hutu groups based in South and North Kivu provinces in the DRC, such as the *Forces Armées Rwandaises* (FAR), as well as among the *Rassemblement Républicain Pour La Démocratie au Rwanda* (RDR), based in France, the aim of these discourses are to minimise the Hutu-driven / Tutsi-directed genocide and place maximum blame on the RPF and its massacres, as provoking the mass killings by the government. Writes genocide survivor Tom Ndahiro: 'This historical account interprets the RPF invasion of Rwanda as the cause of all "violence" in Rwanda, deflecting blame for the genocide from the Habyarimana regime and its extremist ideologues.'<sup>30</sup>

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<sup>27</sup> In this regard, Mamdani finds evidence that Tutsis are still more likely to downplay or deny ethnic differences, whereas Hutus more often argue that real differences remain; see Mamdani, *When Victims become Killers*, 43. Similarly, Prunier refers to the 'heavy bombardment with highly value-laden stereotypes for some sixty years ended by inflating the Tutsi cultural ego inordinately and crushing the Hutu feelings until they coalesced into an aggressively resentful inferiority complex'; see Prunier, *The Rwanda Crisis*, 9.

<sup>28</sup> See the discussion on this in section 3.3.1., p. 42f.

<sup>29</sup> See Tom Ndahiro, 'Genocide-Laundering: Historical Revisionism, Genocide Denial and the Role of the *Rassemblement Républicain Pour La Démocratie au Rwanda*', in *After Genocide – Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, ed. Phil Clarke and Zachary D. Kaufman (New York: Columbia University Press, 2009), 101f.

<sup>30</sup> Ndahiro, 'Genocide-Laundering,' 110–111.

Indeed, even if there is a case for more acknowledgment by the RPF of atrocities committed by its own ranks, it is clear that RPF atrocities never amounted to anything like a 'counter-genocide'. President Kagame is correct when he says that 'in 1994 there was, on the one side, a government-sponsored genocide with perpetrators using the state machinery at their disposal, and on the other side, the RPA fighting to stop the genocide'.<sup>31</sup> However, what matters for this discussion, is not so much the comparative scale of past atrocities committed by Tutsis and Hutus, respectively, but the significance of the official RPF narrative in contestation with Hutu historical revisionism as a potential source for ongoing and future cultural violence. In this regard, the 'official narrative' cannot provide the solution as an alternative to Hutu revisionism of its own accord.

In relation to the *Gacaca* process, the important issue here is whether there is evidence that the hearings were structured to exclude testimony diverging from the 'official narrative' or to suppress this when it occurred.

A notable feature of *Gacaca* – with major implications for its potential to challenge cultural violence – is its exclusive focus on the crime of genocide, to the exclusion of other, equally deadly if less numerous, political atrocities. In so far as the 'official narrative' conceives of the genocide in terms of Tutsi victims only, this of course excludes other (non-Tutsi) victims of mass killings, including possible Hutu cases. This means that the *Gacaca* process, at the macro-level, does not challenge the perceptions engendered by the 'official narrative' which ethnicises guilt and victimhood. 'If, as claimed by the UN-commissioned Gersony Report, between 25,000 and 45,000 Hutu were massacred by the RPA in only three *communes* of Rwanda between the months of April and August 1994, how many were similarly killed in the whole of Rwanda during the same period?' asks Lemarchand.<sup>32</sup> 'Again', he continues, 'the systematic extermination by Rwandan troops in the eastern DRC of tens of thousands of Hutu refugees ... has been virtually "airbrushed out of history"'.<sup>33</sup>

Unfortunately, as a result of operating within the confines of this historical framework, the *Gacaca* hearings do not allow victims of such war crimes and crimes against humanity to

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<sup>31</sup> Paul Kagame, 'Preface', in *After Genocide – Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, ed. Phil Clarke and Zachary D. Kaufman (New York: Columbia University Press, 2009), xxiv.

<sup>32</sup> Lemarchand, 'The Politics of Memory,' 71.

<sup>33</sup> Lemarchand, 'The Politics of Memory,' 71.

bring their cases to its chambers, only those related to genocide. Crimes committed on the side of the RPF are therefore not acknowledged, and historical perspectives that accommodate this reality ignored. *Gacaca* represents, in this regard, an opportunity lost.

Yet, there is more to the process than its implications for the macro-debates about history. A second area concerns the empowering effect it may have on ordinary citizens to participate in shaping historical debates. Some have questioned the wisdom of exposing a deeply traumatised population to intense public engagements and dialogue.<sup>34</sup> Time will tell. Yet, on the basis of the most extensive field work done to date on *Gacaca*,<sup>35</sup> Clarke concludes: 'What distinguishes *Gacaca* from transitional justice institutions used elsewhere, is the central role played by the general population in all facets of its daily operations. The spirit of *Gacaca*, which is enshrined in the *Gacaca* Law and ... resonates throughout the general population, is the notion that the population must feel a sense of ownership over *Gacaca* and must be its primary actor.'<sup>36</sup> This observation was confirmed by my impressions of the *Gacaca* hearing in Kimisagara. In similar vein, Alice, a *Gacaca* judge in the Buhoma district of Ruhengeri province, is quoted as saying: '*Gacaca* is important because it brings everyone together, to talk together. When we come together, we find unity ... Sometimes there is even too much talking and I have to slow the people down.'<sup>37</sup>

To what extent is this support for *Gacaca* hearings prevalent across Rwanda? Certainly in advance local communities had positive expectations of the *Gacaca* process. During a survey conducted in four Rwandan communities (Ngoma, Mabanza, Buyoga and Mutura) in February 2002, respondents overwhelmingly indicated that they expected transitional justice mechanisms, including *Gacaca*, not simply to punish the guilty, but also to reveal the truth about what happened, free the innocent, help to rebuild the community and recognise the suffering of the community.<sup>38</sup> More comprehensive empirical research still needs to be done now that *Gacaca* is approaching its conclusion, but reports by Longman *et. al.*, cited above,

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<sup>34</sup> E.g. Waldorf, 'Mass Justice', 74.

<sup>35</sup> Field work included 100 interviews with confessed *génocidaires* in *ingando*, and a further 250 interviews with survivors, the general population, Rwandan government officials and NGO workers; see Clarke, 'The Rules (and Politics) of Engagement,' 301.

<sup>36</sup> Clarke, 'The Rules (and Politics) of Engagement,' 303, 304.

<sup>37</sup> Clarke, 'Hybridity,' 137.

<sup>38</sup> Timothy Longman, Phuong Pham and Harvey M. Weinstein, 'Connecting Justice to Human Experience: Attitudes towards Accountability and Reconciliation in Rwanda' in *My Neighbor, My Enemy*, ed. Eric Stover and Harvey M. Weinstein (Cambridge: Cambridge University Press, 2004), 222.

show that the project has provided, at least for some, the opportunity of a public voice, perhaps for the first time since the 1994 genocide.

Based therefore on available evidence, and extrapolating from there, one can conclude with Clarke that it seems indeed that the *Gacaca* courts have developed a capacity, currently not replicated in any other format in Rwanda, to facilitate 'communal dialogue and cooperation, which are crucial to fostering reconciliation after the genocide'.<sup>39</sup> Certainly the process enabled large numbers of rural peasants the opportunity to make their views on the past, and not least the genocide, heard. *Gacaca* is empowering rural Rwandans to participate in community dialogues about the past and about ways to move forward, at a scale and in numbers that has never been seen in Rwanda or, in fact, anywhere else in the world.

*Gacaca* offers therefore a unique opportunity for ordinary Rwandans to recall, narrate and record their individual and communal accounts of the genocide. Tutsis and Hutus carry, amongst themselves, a range of different experiences, memories and historical frameworks. Not all Tutsis, for example, share the same perspective on the genocide: the 'returnee' exile Tutsis who fought their way to liberation under the banner of the RPF have expressed divergent views on a number of issues compared to those of the local Tutsi civilians who survived the genocide as its main targets inside Rwanda, as the stand-off between various victim organisations and the government testifies.<sup>40</sup> At the same time Hutus too have different stories among themselves, some as *génocidaires*, but others as victims of the genocide when they sided with their Tutsi neighbours, and still others who stood by paralysed, or fled into the DRC jungle pursued by the RPF. Could these many and diverse 'little narratives' begin to unravel and challenge those aspects of living and popular memory which the 'official narrative' of memory excludes and silences?

'Critical' history, in one of the senses I have identified in Chapter 3, seeks to provide precisely this kind of space for the many and diverse 'little narratives' to emerge. Giving public recognition to such 'little narratives' not only ensures that historical events are seen from a more personalised lens, but also serves to illustrate the radical differences *within* the broader ethnic/racial categories through which the genocide was structured. In this way,

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<sup>39</sup> Clarke, 'The Rules (and Politics) of Engagement,' 300.

<sup>40</sup> For a fuller account of the tensions within the 'Tutsi' group, see the discussion in section 4.3.1., specifically pages 65–67.

recording the 'little narratives' would not only acknowledge divergent perspectives, it also challenges the sole claim of the 'official narrative' on historical truth, thereby rendering historical engagement more open-ended, less threatening and thus more likely to further 'reconciliation with history'.

Through *Gacaca*, millions of Rwandans are effectively engaging with their national history in a multitude of ways. As a dynamic, ever-evolving institution that takes different shapes in different parts of the country, *Gacaca* could thus engage citizens in ways that may also challenge certain ongoing forms of cultural violence in society, such as genocide denial on the one hand, but also the silencing of experiences, memories and historical perspectives of ordinary Rwandans.<sup>41</sup>

Literally millions of personalised *Gacaca* testimonies cannot just be rejected by revisionists in the same ways that the 'official narrative' is dismissed. A particularly powerful antidote to revisionism is therefore provided by the confessions of former *génocidaires*, often obtained through *Gacaca*'s system of plea bargaining based on remorse and much-reduced punishments (often community service instead of incarceration). To gather, for posterity, such a massive record of victim testimonies will go some way not only towards disabling revisionism but also in helping to develop a general resistance against the forces stoking renewed forms of 'cultural violence', and thereby helping to shape a 'modicum of agreement' about the Rwandan past.

### 5.3.2. Fighting Impunity but Ethnicising Guilt: *Gacaca*'s mixed Contribution to the Rule of Law

*Gacaca* offers an unprecedented opportunity for ordinary Rwandans to participate in fashioning narratives of past atrocities, thus challenging ongoing forms and practices of cultural violence – and *thereby* furthering reconciliation. The question that concerns us in this section is how *Gacaca* relates to the quest to overcome structural violence associated with situations where, for example, the law would either fail to hold *génocidaires* accountable at all (impunity) or alternatively treat individuals differently based on their collective identities ('ethnicisation' of human rights)?<sup>42</sup>

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<sup>41</sup> Clarke, 'The Rules (and Politics) of Engagement,' 304.

<sup>42</sup> See the discussion in Section 4.3., p.65f.

The latter challenge is particularly important in crimes where large numbers of perpetrators participated in mass atrocities and genocide. To expect the nation to 'move on' without taking any action against thousands of perpetrators, would amount to accepting impunity as the basis for a post-genocide dispensation. However, to pronounce the entire Hutu group either 'guilty' or 'blindly obedient' would likewise be over-simplistic and feed into the 'ethnicization of guilt' and the racist stereotyping of Hutus.

Thus it will be important to evaluate not only the fact *whether Gacaca* delivers accountability (thus challenging impunity), but indeed *how Gacaca* attributes accountability in local community contexts. This is all the more important given that, historically, impunity and not the rule of law had often been institutionalized in Rwanda.

Evidently a major issue is the fact that the mandate of *Gacaca* excludes relevant mass killings which are not deemed to be part of the 1994 genocide. The result has been that RPF crimes have remained largely unaddressed. This both restricted the official acknowledgement of victims of the genocide to Tutsis only, excluding Hutus as genocide victims, and it also precluded investigations of Tutsis as perpetrators, limiting that to Hutus.<sup>43</sup> This selective focus of the *Gacaca* hearings thus effectively strengthened the culturally violent notion that genocide crimes could be accounted for on an ethnic basis. Although it is true that the genocide was an attempt by *radical* Hutus to kill as many Tutsis as possible, it is not true that these genocide crimes were the only ones that were committed, or that genocide was the result only of these 'bad leaders'. Genocide violence was, according to the best available analyses, the culmination of a complex mix of cultural, structural and direct violence against *both* ethnic groups *throughout* Rwanda's history.<sup>44</sup> By reducing the causes of genocide to Hutu leadership and its ideology, *Gacaca* has arguably helped to mask rather than highlight the complex and entwined legacies of 'structural' (and 'cultural') violence embedded in Rwandan history.

Consider what, counter-factually, the consequences and implications might have been if *Gacaca*, as the flagship reconciliation effort of Rwandan transitional justice, had been more inclusive in its focus on the mass killings, and had done so in an impartial way, including both RPF atrocities and Hutu victims. Arguably, the symbolism of addressing crimes on

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<sup>43</sup> See the discussion in Section 4.2, p.59f.

<sup>44</sup> See Mamdani, *When Victims become Killers*, 76-234; and Strauss, *The Order of Genocide*, 153-175.

both sides of the historical Hutu–Tutsi divide would have made an important impact at community level, enabling post-conflict reconciliation instead of reinforcing the traditional associations that bind perpetrators so closely and exclusively to Hutus and victims so intimately to Tutsis. Yet, *Gacaca*, in line with its ‘official narrative’, has not been structured in this way, thereby diminishing its own potential to help disassociate human rights terminology from historic ethnic divisions.

Moreover, the *Gacaca* hearings have also been marked by procedural flaws. Some of the commonly-listed objections to the lack of due process result from the general lack of capacity to test testimonies in *Gacaca*. Judges are community members who have received minimal training. Given the incentives for witnesses to provide false testimony, such as the opportunity to retaliate against a fellow community member for whatever reason or out of a sense of vengeance, more experienced judges would have been a significant advantage. Similarly, confessions by alleged *génocidaires* are not readily verifiable. The inclusion of sexual crimes such as rape under *Gacaca* jurisdiction following the January 2008 legislation raises additional concerns of whether *Gacaca* would be able to provide adequate witness protection – despite the provision for *in camera* testimonies.

In addition to these shortcomings, one could list accounts of intimidation of victims, revenge killings and political interference. An important issue is the absence of reparations to genocide survivors. The Rwandan government has thus far failed to implement the provision for a ‘Compensation Fund for Victims of Genocide and Crimes Against Humanity’ contained in the 1996 Genocide Law and also in the 2001 *Gacaca* Law. Despite the creation of an urgent interim fund (the *Fonds d’Assistance aux Rescapés du Genocide* [FARG]), the government’s actions in this regard may be deemed inadequate. Waldorf claims that the fund resulted in ‘leaving the community service component as the only way to compensate survivors’.<sup>45</sup> The aim of FARG is to provide basic health and educational services to survivors of the genocide.<sup>46</sup>

Given this list of criticisms, one is tempted to ask what, if anything, could be an alternative to *Gacaca* as an attempt to address accountability for the genocide at the level of local communities? Waldorf counters that no such alternative exists, that community-level

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<sup>45</sup> Waldorf, ‘Mass Justice,’ 56.

<sup>46</sup> For an evaluation of reparations in Rwanda, see Rombouts, *Victim Organisations*, 365–479.

accountability in the wake of genocide of the magnitude witnessed in Rwanda is, firstly, an impossibly complex task and, secondly, prone to political abuse and thus victor's justice (by criminalising political and ethnic opponents and thereby reinforcing genocide fault lines, rather than overcoming them). He concludes that any such attempt to establish accountability at the level of local communities is not only bound to be biased, but would also be counter-productive in terms of reconciliation. Instead, the post-genocide state should content itself with international justice mechanisms: it should prosecute the main culprits and prioritise material reparations to victims, while at the level of local communities it should let grass-roots 'bygones be bygones', hoping, so it seems, that the population will work things out for themselves: 'The overarching lessons for transitional justice are that successor regimes should resist the temptation to co-opt or control local justice and to expand local justice's jurisdiction to reach genocide, crimes against humanity and war crimes'.<sup>47</sup> In short, Waldorf suggests that, since community justice fails to overcome impunity in the ways listed above, asking communities to 'forget' the past is probably the best way forward.

This argument is misconceived on at least two levels: the assumption that no process is better than a flawed process, but also in terms of the benchmarks against which it critiques *Gacaca*. Firstly, it is important to acknowledge the need for accountability in the wake of genocide, lest the structurally violent option of impunity is to be adopted as a hallmark of the post-genocide dispensation, with potentially catastrophic results, for transitional justice efforts, as well as the ultimate aim of reconciliation between Hutu and Tutsi. The building of the rule of law would consequently be seriously undermined and thereby the possibility of overcoming structural violence.

It is also important at local, community-level, because in Rwanda's post-genocide communities, victims and perpetrators continue to live in a fragile truce. Waldorf's claim that the communities may work out a fragile *modus vivendi* illustrates precisely the point – genocide left survivor communities vulnerable and brittle. It is therefore vital to find ways to support and strengthen whatever modes of coexistence may have emerged – not least through finding ways to build the rule of law. This, in turn, will not be possible without some form of accountability for the crimes during genocide – implemented and performed at

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<sup>47</sup> Waldorf, 'Mass Justice,' 9.

community-level where it can have an impact on how victims and perpetrators work out the terms of the post-genocide reconciliation process.

In Rwanda, courts of law did not (and could never) deliver justice and accountability at community level – if only for the sheer number of cases. This leads one back to the position that alternative accountability mechanisms had to be found, i.e. to improvise some type of quasi-legal accountability system such as *Gacaca*. Facing this challenge, Rwanda opted not to impose a novel legal system on communities, but to build on the platform and credibility offered by a well-known traditional institution of local justice, and to adapt this as a tool for the establishment of accountability for genocide.

Secondly, applying only legalistic procedural criteria to the *Gacaca* process is to misunderstand its mandate and goals. In a deliberate attempt to bolster community ownership and participation, the founding legislation prohibited the involvement in *Gacaca* of professionals such as judges, lawyers, politicians and the clergy. This means that there was a deliberate and calculated compromise of judicial rigour in order to achieve other, more reconciliatory outcomes. This latitude implies, amongst others, that communities have to determine the balance between the retributive and restorative justice considerations in attributing accountability. *Gacaca* has been adapted by different communities to fulfil varying needs, including truth-telling: ‘... different participants can interpret *Gacaca*’s *raison d’être* in a multitude of ways; in this particular instance, it could serve as a forum for the broad search for the truth, a realm of truth-recovery within the limits of healing, a means for pursuing some form of retributive or deterrent justice or as a facilitator of long-term healing.’<sup>48</sup>

In what follows, I will further examine some of the implications and consequences of *Gacaca*’s for attempts to build the rule of law at community-level (as a means to overcome structural violence associated with post-genocide impunity) could be assessed. More specifically, I will look at how *Gacaca* combines retributive and restorative dimensions of justice to fashion some sense of accountability suited to addressing the complex crime of genocide with its multiple levels of accountability – and in so doing helping to ameliorate the effects that structural violence inherent in Rwanda’s criminal justice system may have on brittle communities of victims and perpetrators seeking to reconcile after genocide.

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<sup>48</sup> Clarke, ‘Hybridity,’ 131-134.

### 5.3.3. Combining Restorative and Retributive Justice to build the Rule of Law at Community Level

When the role of *Gacaca* in Rwanda's communities is evaluated, it should, first of all, be remembered that *Gacaca* was meant as a solution to logistical challenges posed for Rwanda's criminal justice system in having to deal with accountability for mass participation in genocide. *Gacaca* was conceived primarily as an answer to the lack of capacity of the criminal justice system to deal with the aftermath of genocide.<sup>49</sup> *Gacaca* was, after all, meant to ease the burden on normal courts by dealing with those in detention awaiting trial. At the heart of the debate about the legal standing of *Gacaca* is the question therefore whether the Rwandan authorities 'prioritised expediency at the expense of due process and fairness'.<sup>50</sup> Commentators differ. Waldorf, as we have seen, answered this question in the affirmative and for this reason concluded that the *Gacaca* model is problematic. Other commentators such as Clarke, Drumbl and Wierzynska have evaluated the *Gacaca* process more positively as a quasi-judicial strategy to achieve more holistic outcomes than that of an inevitably limited number of regular criminal prosecutions.<sup>51</sup> For the same reasons, Sarkin advocated a South African-style Truth and Reconciliation Commission for Rwanda instead of *Gacaca*.<sup>52</sup>

In this section I first look at *Gacaca's* benefits towards the goal of fighting impunity by strengthening the rule of law in its traditional, retributive sense within Rwandan communities (as a quasi-legal complement to the national courts). I identify three areas of direct benefit – the third of which leads to an analysis of *Gacaca's* contribution to the rule of law through those dimensions of its work more akin to restorative justice.

Firstly, then, it is hard to argue with the obvious relief that the *Gacaca* process did provide to Rwanda's criminal justice system since it commenced operations. By mid-December 2007, Hirondelle reports, around one million people had appeared before *Gacaca* courts. Some 800,000 had been convicted, according to the SNJG, the governmental body charged with

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<sup>49</sup> See Jeremy 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,' *Journal Of African Law* 45: 2 (2001): 143–172 [Electronic]. Available at: [http://journals.cambridge.org.ezproxy.uct.ac.za/download.php?file=%2FJAL%2FJAL45\\_02%2FS0221855301001675a.pdf&code=ad50c46a1b94f8256dc05fe2f918880a](http://journals.cambridge.org.ezproxy.uct.ac.za/download.php?file=%2FJAL%2FJAL45_02%2FS0221855301001675a.pdf&code=ad50c46a1b94f8256dc05fe2f918880a) [January 2008].

<sup>50</sup> Sarkin, 'The Tension Between Justice And Reconciliation In Rwanda,' 164.

<sup>51</sup> Clarke and Drumbl's arguments have already been discussed and Wierzynska's will be analysed in the next paragraph.

<sup>52</sup> Sarkin, 'The Tension Between Justice And Reconciliation In Rwanda,' 166.

overseeing these courts.<sup>53</sup> From these statistics alone, it is clear that *Gacaca* enabled the Rwandan criminal justice system to deal with a vast case load of alleged *génocidaires* and accomplices, which it would never have been able to do in a more formal court setting. This, I would argue, was a significant contribution towards providing some form of accountability for the genocide, involving significant numbers of the population as perpetrators. Without this form of accountability, the result would indeed have been a very serious case of effective impunity, amounting to an ongoing form of structural violence in Rwanda's criminal justice system.

Secondly, as a state-initiated public process designed, in principle, to achieve accountability, *Gacaca* has undoubted community-level influence. Hence, it is reasonable to conclude that, despite its structural and procedural shortcomings (the most important of which is that it does not prosecute RPF atrocities or war crimes), *Gacaca* must lead local community members to a deepened appreciation of the significance of justice – both in its retributive and restorative senses. In this regard, it is relevant that the *Gacaca* courts have the ability to mete out stiff sentences (albeit with an option of appeal to higher courts), but also the possibility to reduce or commute these sentences, should the perpetrator show signs of remorse or rehabilitation. Mark Osiel has argued that public demonstrations of retributive justice through criminal trials may serve significant functions of social and moral education. Osiel claims that public criminal trials 'when effective as public spectacle, stimulate public discussion in ways that foster the liberal virtues of toleration, moderation, and civil respect'.<sup>54</sup> Osiel concludes that, despite the obvious dangers of political manipulation, and regardless of the procedural shortcomings of a particular process, 'courts in such societies might make full use of the public spotlight trained upon them at such times to stimulate democratic deliberation about the merits and meaning of liberal principles'.<sup>55</sup> It is possible to make a similar argument to that of Osiel, about the influence of *Gacaca* in stimulating discourse and discussion about community-level application of accountability for mass atrocities, thereby not only fostering a greater grass-roots appreciation for the rule of law, but also more social solidarity about these matters across the Hutu and Tutsi divides.

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<sup>53</sup> Hirondelle News Agency, 'Rwanda/Gacaca.'

<sup>54</sup> Mark Osiel, *Mass Atrocity Collective Memory, and the Law* (New Brunswick, New Jersey: Transaction Publishers, 1997), 2.

<sup>55</sup> Osiel, *Mass Atrocity*, 300.

Thirdly, the system of grading accountability for the genocide in different categories with different levels and types of punishment attached to them – or what I will term ‘stratified accountability’ -- may produce an increased understanding of the complex relation between individual and collective accountability for the genocide. This is the more likely in view of the fact that *Gacaca* traditionally had the role of finding appropriate ways to mediate between individual guilt and community interest. This aspect has not changed in its modern incarnation. *Gacaca* provides communities with an unparalleled opportunity to discuss, analyse and make a range of nuanced findings about levels of accountability during the genocide, always with an incentive to reintegrate those found guilty, and to pay reparations to those who suffered, if at all possible.

*Gacaca* has thus succeeded in breaking new ground by implementing a nuanced system acknowledging different levels of accountability at community level (according to the different categories of crimes as explained earlier)<sup>56</sup>, thereby finding ways not only to differentiate between the more and the less guilty within the Hutu group, but also to reintegrate, through deliberately restorative measures, the less serious and more contrite perpetrators back into communities. At the same time it retained the power to punish the more serious and less contrite perpetrators harshly.

From this observation one could therefore conclude with Clarke that *Gacaca* was able to ‘achieve legal outcomes, especially punishing genocide perpetrators, in ways that facilitate important non-legal results, such as rendering a relatively sophisticated understanding of the relationship between individual and collective accountability, as well as to set in motion a process of beginning to restore fractured individual and communal relationships. The dominant discourse lacks an appreciation of this crucial hybrid approach to post-genocide accountability.’<sup>57</sup>

The Rwandan authorities, so it seems, accepted the merits of both formal criminal justice procedures and more informal quasi-judicial forms of local community justice, and found a way to integrate them into one hybrid system. We may note that a growing number of commentators point to the need for complementary forms of justice in post-conflict contexts and during periods of political transition. Morris, for example, calls for ‘stratified-concurrent

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<sup>56</sup> See Section 4.1

<sup>57</sup> Clarke, ‘Hybridity,’ 164.

jurisdiction', and sees Rwanda as a good example of such an approach.<sup>58</sup> Clarke identifies 'hybridity' or 'legal pluralism', where 'two or more legal systems coexist in the same social field', as an increasingly common theme in transitional justice and post-conflict reconstruction.<sup>59</sup> This is because 'hybridity' facilitates 'holism', which provides 'multiple political, social and legal institutions, operating concurrently in a system maximising the capabilities of each'.<sup>60</sup>

The second dimension of *Gacaca's* transitional justice methods and aims, namely, to facilitate processes of restorative justice<sup>61</sup> stands alongside that of retributive justice. I do not propose a protracted discussion on the relative merits or demerits of restorative and retributive modes of justice. Suffice to say that an array of institutions and approaches covering both restorative and retributive dimensions of justice would be able, at least in principle, to contribute better to the reconstruction of the whole society than a single-minded focus on retributive justice only. Where perpetrators, victims and bystanders are required to live side by side, a strategy that makes provision for the needs for atonement, 'integrative shaming' and reintegration (while also catering for punitive needs) is well suited.<sup>62</sup>

*Gacaca*, despite its procedural shortcomings when measured by strictly legal standards, does have restorative justice features and functions that benefit communities. 'Criminal trials may offer the lure of the easy solution to the complexities of mass atrocity', Drumbl writes, but are, on their own, inadequate to address the needs of Rwanda's 'highly interdependent, dualist society', which saw such 'widespread level of public participation' in the genocide.<sup>63</sup>

Earlier, it was explained that for those perpetrators who show little or no remorse, particularly for graver offences such as murder and rape, *Gacaca* is able to mete out prison sentences. However for lesser crimes such as property crimes, or for perpetrators who convince the communal gathering that they are remorseful and rehabilitated, the option is

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<sup>58</sup> Morris, 'The Trials of Concurrent Jurisdiction,' 367.

<sup>59</sup> As quoted by Clarke, 'Hybridity,' 101.

<sup>60</sup> Clarke, 'Hybridity,' 101

<sup>61</sup> For our purposes, restorative justice comprises a notion of justice that is based on a view of crime, not as the transgression of rules, but as the violation of the victim. Consequently, restorative justice's primary aim is not the punishment of the wrongdoer, but the restoration of the dignity of the victim. To this end, restorative justice often entails mediation efforts between victims and perpetrators in order to enable victims to reach some form of psychological closure.

<sup>62</sup> Drumbl, 'Punishment, Post-Genocide,' 1323.

<sup>63</sup> Drumbl, 'Punishment, Post-Genocide,' 1323.

open of a restorative process where punishment is reduced, or commuted to community service (such as helping to build public amenities, for example).<sup>64</sup>

Drumbl argues that in view of its effective uses of practices of 're-integrative shaming' *Gacaca* may turn out to be more effective than trials in advancing the objectives of post-conflict reconciliation. *Gacaca* is thus, over and above its functions as justice mechanism, also interpreted 'as a test-run of reconciliation'.<sup>65</sup> Reconciliation here is not interpreted in the romantic sense of complete restoration of a relationship between perpetrators and victims, but rather as 'practices involving honest, committed encounters with others, not least those with whom we disagree most.'<sup>66</sup> Engagement, in *this* sense, where individuals are able to tell their stories to one another, and then return to the same community as Rwandan citizens, is becoming a critical component of *Gacaca* as it is being practised.

It stands to reason that the particular 'mix' of retributive and reconciliatory elements in *Gacaca* would vary across the approximately 12,000 courts, and would be more or less appropriate to the conditions in different communities. However, it does also seem that, at least in this case, the ability to promote reconciliation (in the sense of reduced sentences and reintegration of perpetrators and victims into communities), but without relinquishing the option for punishment, provides *Gacaca* with the ability to adapt its strategy to varying needs in different communities. It also enables *Gacaca* to further a form of reconciliation that does not equal impunity (in that perpetrators face serious consequences if they do not cooperate) as well as a form of retribution that does not simply equate to victor's justice (in the sense that options exist to fast-track the reintegration of perpetrators into communities).

### 5.6. Conclusion

Judging by international commentary, *Gacaca* is either lauded as a unique and ground-breaking model of international significance for transitional justice, or derided as little more than an extension of the Rwandan official narrative and its quest to control all levers of power in the post-genocide society. On the latter analysis *Gacaca* would amount to little more than another instrument of structural violence, this time in the name of building the

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<sup>64</sup> In the session I attended, for example, both the judges and the witnesses consistently asked the accused whether he would acknowledge his complicity and whether he was sorry. His failure to do either, the judges eventually remarked, largely contributed to his being given the most severe sentence that the law allows.

<sup>65</sup> Clarke, 'Hybridity,' 152.

<sup>66</sup> As quoted by Clarke, 'Hybridity,' 161.

rule of law. On the former analysis, *Gacaca* may well be the most important milestone yet in overcoming structural violence and thus enhancing post-conflict reconciliation.

My conclusion, a mix of both sets of analyses, is that *Gacaca* offers both constructive prospects and alarming threats to Rwanda. While effectively countering genocide revisionism (with its implied cultural violence), it fails in effectively engaging with Hutu histories which can be differentiated from *génocidaires* ideology. This has negative implications for 'reconciliation with history' which must require an encounter between opposing histories, To the extent that *Gacaca* recognises only genocide as a political crime of the past, it confirms the basic tenets of the 'official narrative' and its 'denying-through-excessive-remembering'. However, to the extent that *Gacaca* enables genuine community-level participation and witness testimonies to emerge, it is contributing to the emergence of millions of 'little narratives', which have the potential to make a strong impact on any hegemonic claims which the 'official narrative' may harbour.

Based on this discussion, we can further conclude that the failure to address crimes committed by the RPF, as well as procedural deficiencies, are important shortcomings of *Gacaca*. However, I do not agree that we should reject *Gacaca* altogether since the structural violence associated with impunity (in not prosecuting genocide at community level) would be greater than these logistical and procedural shortcomings. Moreover, a strictly legalistic assessment of *Gacaca* fails to take account of equally valid social and political considerations (a point to which I return more fully below). However, the failure of *Gacaca* to address RPF crimes has a serious impact on its ability to overcome structural violence, replacing impunity with the 'ethnicization of guilt'.

At the same time this is not the whole story regarding *Gacaca's* potential impact on the quest to overcome structural violence. It can also be concluded that *Gacaca* serves as a way to *strengthen and expand justice and accountability capacities through alternative means, which includes quasi-judicial processes*. It does so by providing ways to expedite judicial proceedings and in the process freeing up courts of law to focus on common-law crimes instead – and doing so through proceedings with undoubted community-level impact. In restorative terms, *Gacaca* provides an elaborate system not only to determine levels of accountability, but also levels of contrition and remorse, thereby opening the possibility for radical reduction in punishment

and speedier reintegration of perpetrators into communities. Given the scope and nature of genocide violence, simply leaving communities to work it out for themselves, would have been tantamount to the entrenchment of existing forms of structural violence thereby paving the way for future rounds of direct violence. Something had to be done to render génocidaires accountable. *Gacaca*, though flawed in some respects, offered this opportunity and *in this way*, constituted a step towards the eradication of structural violence.

## Chapter 6: Conclusion

Rwanda is seeking to overcome the impact of the 1994 genocide and other mass killings through a comprehensive and an innovative set of transitional justice measures. This study provided an account and a critical analysis of these measures with a focus on the key objective for transitional justice, i.e. that of post-conflict reconciliation. The question therefore was: to what extent are Rwanda's transitional justice programmes improving the chances for post-genocide reconciliation conceived not only as 'negative peace' but rather as 'positive peace' involving also the removal of underlying conditions of cultural and structural violence, more specifically in such areas as that of dealing with conflicting versions of the past and establishing the rule of law?

As a critical analysis of Rwanda's approach to post-genocide transitional justice and reconciliation the study had to take account of Rwanda's own distinctive objectives and features without however necessarily endorsing these. In important respects Rwanda's domestic approach to transitional justice differs from the prevailing consensus in international human rights discourse and law. For that reason the study did not deal with the proceedings of the ICTR which are more closely associated with the international approach to transitional justice and human rights. On the other hand, this did not mean that the Rwandan approach to domestic transitional justice was analysed and assessed in relation to its own stated objectives only.

Building on Galtung's notion of 'positive peace', I developed a set of norms by which to assess Rwanda's transitional justice processes in terms of their contribution towards reconciliation. This was done by conceptualising reconciliation as the removal of lingering (or new) forms of structural and cultural violence in a post-conflict society. This was further explored in terms of Mamdani's notion of the need for 'reconciliation with history'. By contrast, Rwanda's 'official narrative' views reconciliation not as the removal of cultural and structural violence *as such*, but as the reconfiguration of racial and ethnic identities within a common framework of national belonging. Within this framework, the Rwandan objectives include the rebuilding of a strong state, based on a shared view of the past and its own conception of the rule of law, which may, or may *not*, adhere to international human rights norms and standards. On the basis of its high workload and the number of cases it has been

able to process, the government of Rwanda claims that the *Gacaca* process has been a success.<sup>67</sup>

My assessment of the implications and consequences of Rwanda's transitional justice measures, mainly *Gacaca*, therefore took into account both the extent to which these succeeded in countering structural violence in terms of the culture of impunity as well as the extent to which it succeeded in countering lingering forms of cultural violence (or contributed to new forms of cultural violence) with a view to the prospects for effecting 'reconciliation with history'.

My aim was to develop a normative framework that would take into account the need for both accountability and reconciliation in a post-genocide society. Galtung and Mamdani's distinctions helped in this regard. The resultant framework, conceptualised in terms of cultural and structural violence, overlaps with the international human rights standards in so far as the objective of establishing the rule of law is concerned. At the same time it expands this consensus in terms of incorporating reconciliatory/restorative aims. It also deepens the prevailing norms and standards, to the extent that it addresses, not only direct and structural violence, but also the mind-set, perceptions and belief systems which feed into, and constitute, cultural violence. Cultural violence is not frequently addressed within the frameworks of international human rights analyses, and it is also typically not recognised as an area of transitional justice. In this regard my own approach makes some contribution to developing an adequate normative framework against which to judge Rwanda's transitional justice measures aimed at post-conflict reconciliation, not only when measured against those standards developed by Rwanda itself, or by comparison to the framework offered by international human rights discourses in general but also in terms of these substantive components of a more holistic 'reconciliation with history'.

### 6.1. *The Rwandan Approach to Transitional Justice and Cultural Violence*

In what ways did the Rwandan approach to transitional justice including the *Gacaca* hearings succeed in promoting 'reconciliation with history'? Our analysis found that *transitional justice processes in Rwanda* operate within the confines of this 'Rwandan narrative', namely, the reconfiguration of ethnic and racial identities prevalent during the genocide

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<sup>67</sup> IRIN, 'RWANDA: Reconciliation still a major challenge.'

within a framework of national belonging. A notable feature in this regard was identified as both the official narrative as well as *Gacaca*'s exclusive focus on genocide to the exclusion of other political atrocities. Just as the 'official narrative' conceives of the genocide in terms of Tutsi victims only, *Gacaca* in practice likewise excludes other (non-Tutsi) victims of mass killings, including possible Hutu cases. In this way, one important dimension of lingering cultural violence in Rwanda, namely the 'ethnicisation of guilt', is bolstered rather than challenged by both the official narrative and the *Gacaca* process through partisan avoidance of addressing RPF atrocities. To the extent that the official narrative as well as *Gacaca* serves to solidify the notion that to be Tutsi is to be a victim, and to be Hutu is to be a perpetrator, to that extent does this serve to consolidate the legacy of cultural violence. Historical frameworks that ascribes the guilt of the genocide to one ethnic group exclusively saddles all Hutus in the current post-genocide society with the immense historical burden of standing accused of having supported, if not committed, genocide. By strengthening the official narrative in this way, *Gacaca* will also lead to the sidelining of other historical perspectives, a feature that would further impede 'reconciliation with history'.

Yet, on the other hand and despite this important flaw, I also found that even within the ambit of the official narrative *Gacaca* is likely to counter cultural violence by acting as a powerful rebuttal, at a macro level, to 'genocide denialism', through the recording of victim and perpetrator narratives. Genocide denial constitute a form of cultural violence. To give victims the chance to have their narratives recorded – albeit as witnesses in the trials of perpetrators – and perpetrators to record their versions of the events is to create an archive that should limit the potential of 'genocide denialism' and its attendant forms of cultural violence from attracting any following in Rwanda. *Despite Gacaca* being framed by the official genocide macro-narrative, these 'little narratives' at the *Gacaca* hearings may thus be able to provide independently effective testimonies of the genocide mass killings. It is the weight of the cumulative 'little narratives' that could serve as an effective counter to revisionist 'genocide-denialism' and the attendant forms of cultural violence; it may also prevent these from serving as legitimations for renewed cycles of violence in Rwanda. In this way, the official narrative, as well as *Gacaca*, may have produced both intended and unintended consequences. Although it was surely the intention for transitional justice to involve the public, the extent to which this participation would serve to bolster a more open discourse about the past, could be construed as unintended. It could indeed be argued that

*Gacaca* was probably *intended* to function as a forum also for entrenching the official narrative at local community level. But by allowing testimonies at grass roots level the proliferation of “little narratives” may serve the *unintended* consequence of actually countering the thrust of the macro-narrative.

This broadening of public participation in interpreting the past, I found, would inevitably highlight a range of experiences, perspectives and patterns of identification within both the Hutu and Tutsi groups. This important, if *unintended*, consequence of *Gacaca* could counter, in ways set out above, cultural violence contained within Rwanda’s ‘official narrative’ – in ways yet unforeseen.

### 6.2. *The Rwandan Approach to Transitional Justice and ‘Structural Violence’*

In holding *génocidaires* accountable, Rwanda went one step further than holding perpetrators accountable in courts of law. Not only did it, together with the ICTR, seek to prosecute the *génocidaires* leadership, but through *Gacaca* the process was taken to rural communities which, previously, would not have enjoyed any significant level of access to justice.

That Rwanda’s transitional justice processes of bringing the *génocidaires* to justice both at the ICTR and through *Gacaca* indeed helped to eradicate a culture of impunity as a form of structural violence, is difficult to dispute. At different levels these prosecutions served to re-establish albeit in compromised (quasi-judicial) form in the case of *Gacaca*. Yet, they also contributed to the continuation of structural violence through the very attempts to overcome it. Although Rwanda categorise transitional justice participants in human rights terms, and not in the ethnic or racial terms of past divisions, I found that the historical framework offered by the Rwandan ‘official narrative’ introduced a danger of the ‘ethnicisation of guilt’. What happens to the rule of law in a context marked by an ‘official narrative’ that runs the risk of perpetuating a systematic ‘ethnicisation of guilt’? Can, in such circumstances, the form and substance of laws be separated? Transitional justice’s role, in such a context, begs careful scrutiny. Negatively, it may serve to legitimise forms of structural violence in the judiciary, not least by strengthening the formal judicial capacity without enhancing a substantive commitment to human rights. The consequences may be observed in the work of *Gacaca*, where transitional justice terminology relevant to the fair administration of justice

is subtly loaded with meaning relevant to past ethnic categories – i.e. ‘victim’ equals ‘Tutsi’ and ‘perpetrator’ equals ‘Hutu’.

*Gacaca* not only suffered from the ‘ethnicisation of guilt’, but also from important logistical shortcomings posing a threat to the fairness of its operations and a lack of an effective policy of reparations for victims. However, despite these shortcomings, and against a commentator like Waldorf, I would argue that *Gacaca* is still considerably ‘better than nothing’. Demonstrating community-level accountability is essential for reconciliation within the brittle conditions of post-genocide co-existence and co-dependence. Although some procedural criticisms are indeed valid, many others would fall away if *Gacaca* is adequately understood, not in terms of international judicial standards, but as deliberately quasi-judicial in order to integrate retributive and reconciliatory aims at community-level on a national scale.

Furthermore, as an exercise in retributive justice, *Gacaca* contributed to the overcoming of structural violence through the law in three distinct ways: by providing relief to an overburdened judicial system in its astounding ability to handle large numbers of cases, by extending access to genocide justice to community level (thus expanding judicial capacity through quasi-judicial means) and thirdly, by implementing a sophisticated system of ‘stratified accountability’, that not only provided for an understanding of the nuanced and complex grades of accountability for genocide crimes, but in doing so, also offered a way for the less serious criminals to be reintegrated into communities. *Gacaca* provided a way to strengthen and expand justice and accountability capacities through alternative means, which includes quasi-judicial processes.

The fact that *Gacaca* offers, in addition to the benefits listed above, the ability to balance retributive and restorative elements provides it with considerable flexibility in order to meet diverse needs in relation to building the rule of law (varying from ‘reintegrative shaming’ to incarceration or community service) in thousands of communities across Rwanda where victims and perpetrators continue to live together. There are indications that this flexibility has enabled *Gacaca* to develop a form of accountability uniquely adapted to the complex task of building community-level accountability after genocide.

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