



Extracted from *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*

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International IDEA, Strömsborg, 103 34 Stockholm, Sweden
Phone +46-8-698 37 00, Fax: +46-8-20 24 22
E-mail: info@idea.int Web: www.idea.int

CHAPTER 2

CHAPTER 2

The Gacaca courts in Rwanda

*Bert Ingelaere**

1. The Rwandan conflict

Before 1994, Rwanda was an almost unknown country hidden in the heart of Africa. On 6 April 1994, however, the aircraft carrying the then President Juvénal Habyarimana was shot down over the skies of the capital, Kigali. This signalled the start of a campaign of genocidal violence against the Tutsi minority ethnic group and the so-called ‘moderate’ Bahutu belonging to the majority ethnic group but opposed to the regime in place. In the space of 100 days, approximately 800,000 people died. These tragic events shocked the world and placed Rwanda on the global map. The Rwandan genocide took place in the context of a civil war and an attempt gone awry to introduce multiparty democracy. It was the violent apex of a country history marked by sporadic eruptions of ethnic violence as a consequence of the struggle over power (and wealth) over the course of time—a struggle grafted on to the Hutu–Tutsi ethnic bipolarity that marks the Rwandan socio-political landscape. The Bahutu are the majority ethnic group with approximately 84 per cent of the population, 14 per cent of the population are Batutsi and 1 per cent are Batwa.¹

1.1. *The distant origins of the conflict (up to 1962)*

There is no general consensus on Rwandan history in pre-colonial times. There are two main interpretations of this period. One was propagated by the former (Hutu) regime, especially during the 1994 genocide; the other is supported by the current regime. Selectivity in the use of the available sources and the nature of the interpretation given to

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¹ The author has used the forms ‘Bahutu’ and ‘Batutsi’ rather than ‘Hutu’ and ‘Tutsi’ as being more faithful to the original language. Muhutu and Mututsi are the respective singular forms. The roots, ‘Hutu’ and ‘Tutsi’, have been preferred for the adjectival form.

crucial ancient institutions which structured the interaction between the different social groups, such as clientship (*ubuhake*) and forced labour (*uburetwa*), defines the reading of history. This section briefly sketches the main threads of these readings of history. The truth, as always, probably lies in between.

Before independence in 1962, the country was a kingdom. A Tutsi king (*mwami*) and aristocracy ruled over the masses, who were predominantly Bahutu. A central kingdom was engaged in the continuous endeavour to conquer and control surrounding territories in order to exploit the Hutu population. The Batutsi were pastoralists rearing large herds of cattle. They invaded the region centuries ago and managed to subjugate the Hutu population of agriculturalists, tillers of the soil. The Bahutu had equally, although earlier, migrated to the region that became known as Rwanda. But, while the Bahutu had come from other regions in the centre of Africa and were considered to be descendants of the Bantu race, the Batutsi were thought to originate from the North, being of Semitic or Hamitic origin. The Batwa were considered to be the original inhabitants of the region. This is one reading of the past.

Another version of this pre-colonial history, currently in vogue in Rwanda, rather than emphasizing the distinct geographical and racial origins of the groups inhabiting the country, stresses the unity of the people of Rwanda—the *banyarwanda*—and Rwandan citizenship based on a common thread—‘Rwandanicity’ (*Ubanyarwanda*), or ‘Rwandaness’. Hutu and Tutsi were originally not racial categories, but socio-economic classes. *Abatutsi* (in the plural) was the name given to wealthier persons possessing cattle. Poorer families, with only little or no land, and no cattle, were referred to as the *abahutu*. Mobility was possible. A family obtaining cattle became ‘tutsified’; those losing status degraded into a situation of ‘hutuness’. Colonialism then further ‘created’ ethnic groups out of a perfectly harmonious society whose only divisions were socio-economic ones.

Less controversy surrounds the impact of colonialism on the social fabric of Rwandan society. The impact was decisive, but the idea that it also sowed the seeds of the genocide that was to happen is contested by some, while it is assumed by others. Rwanda was first colonized by Germany (1897–1916) and in 1919 it became officially a colony of Belgium. Several far-reaching reforms, and especially the method of indirect rule employed by the Belgian colonizer, were to alter Rwandan society. In line with the anthropological ideas of the time, the Belgians believed in the classification of races according to superior and inferior beings. They came to the conclusion that the Tutsi ‘race’ was more fit to rule than the Bahutu, who were inferior creatures only apt to be governed and to do manual labour. They used the Tutsi rulers to implement their colonial policies. The Tutsi power-holders adapted to this new situation easily since not only was alignment with the colonial ruler a prerequisite for staying in power, but it also sharply increased this power, their control of the (Hutu) population and, subsequently, their wealth. Racial identity—ethnicity—became institutionalized, for example, through the introduction of the ethnic identity card.

The year 1959 was marked by a social revolution—an event unimaginable a few years before—that became known as the ‘Hutu revolution’. In a wave of successive events between 1959 and 1962, local Tutsi rulers were ousted from their communities (on their hills) and replaced through elections by ‘burgomasters’, predominantly of Hutu origin. Grégoire Kayibanda, a Muhutu, became the first president of Rwanda. These events were accompanied by violence against the Tutsi rulers and their families, and a first wave of Batutsi sought refuge in neighbouring countries. A second and larger wave followed in 1963–4, when the Batutsi of the first wave had regrouped and attacked Rwanda from Burundi and Tanzania. A significant number of Batutsi were killed in reprisal attacks and even more left the country as refugees. These attacks and the violent reaction of the Rwandan regime foreshadowed what was to happen 30 years later. The descendents of these refugees would form the bulk and backbone of the Rwandan Patriotic Front (RPF) and its military wing the Rwandan Patriotic Army (RPA) that attacked Rwanda in October 1990, seeking an armed return to their country.

1.2. Bahutu and Batutsi under the Habyarimana regime

The ideological underpinnings of the Rwandan republics (1962–73, under President Kayibanda, and 1973–94, under President Habyarimana) ‘constituted both a reversal and a continuation of [these] long-standing psychocultural images’ (Uvin 1998: 33) of the foreign, racially superior Tutsi pastoralist and native, subaltern Hutu cultivator which had been reinforced under colonial rule. Bahutu and Batutsi remained distinct categories after the social revolution, but Batutsi now became the inferior creatures in a newly regained ‘natural order’ of Hutu homogeneity. These ideas were institutionalized through a policy of ethnic quotas by which Batutsi were allocated 9 per cent of government positions (with no real power) and the same percentage of places in schools and at universities. But, despite these crippling opportunity constraints, the ordinary Tutsi population inside Rwanda lived without overt physical targeting during the height of the Second Republic.

A second legitimization strategy was based on the intertwined notions of ‘development’ and ‘peasantry’. The image of Rwanda as an autarkic nation of peasants valuing ‘manual labour’ reverberated through Habyarimana’s speeches. The single political party was denominated the National Revolutionary Development Movement (Mouvement Révolutionnaire National pour le Développement, MRND), while the parliament was the National Development Council (Conseil National du Développement, CND). The president was the key political actor, but he exercised power together with an oligarchy of northern Bahutu, members of his and, mostly, his wife’s clan. They constituted what became known as the Akazu (little house), controlling the state and its (monetary) privileges. The entire system was directed towards the maintenance of the status quo. In the pyramidal, hierarchical state structures, chains of command went deep into rural life. These institutional structures were to play an important role in mobilization and generating momentum during the 1994 genocide.

1.3. Civil war, multiparty democracy and genocide (1990–4)

A range of factors initiated a political transition in Rwanda. A wave of democratization accompanied the end of the cold war; French President François Mitterrand obliged francophone Africa to democratize in order to secure a continuation of economic assistance; a drop in coffee prices on the world market and the introduction of a structural adjustment programme resulted in a socio-economic crisis; and in October 1990 Rwanda was attacked by the Ugandan-based and Tutsi-dominated RPF rebel force, demanding a return to their country of origin and a share in power. These circumstances pressured the Habyarimana regime to initiate liberal reforms. A revision of the 1978 constitution heralded a fundamental change: multiparty politics was endorsed and political parties blossomed. At the same time, an external politico-military movement, the RPF, was fighting its way into Rwanda, claiming a share in power and forcing the incumbents to the negotiating table.

Converting to multiparty politics after decades of single-party rule and undertaking institutional reforms while at the same time waging a war in an overpopulated country turned out to be a daunting exercise. Three political currents/actors were at play during this period of transition: the presidential movement, being the elite in power; the internal 'democratic' opposition constituted by the newly created political parties; and the RPF and its supporters as the armed opposition. The internal opposition forces drove the political and institutional reforms. A new constitution allowing political parties to organize was followed by the installation of a coalition government. The opposition forces used this access to the state apparatus to reform the political system further and undermine the incumbent regime. The Arusha Peace Agreement was signed on 4 August 1993 after a year of negotiations: internal reforms were supplemented by a negotiated settlement on power sharing between the three political currents and on the integration of the rebel forces into the national army. The agreement entailed not only the further disentangling of the MRND from the machinery of state; it also implied that the incumbent elite, with the president and the northern Akazu at the centre, saw its privileged position slip away.

The Arusha Agreement was never implemented. Despite the peace talks and the agreement, Rwanda had 'settled in a war culture' (Prunier 1998: 108). Violence had become a way of doing politics, not only on the battlefield but also in the streets of Kigali and in the hills in the countryside. With the opening up of the political arena, the newly established political parties started to recruit members. Rallies were organized in the countryside where inspiring speeches and free drinks were aimed to convince the peasants to adhere to this or that political 'family'. In this atmosphere the once well-oiled, but totalitarian, machinery of state quickly fell apart. In areas where the invested authorities were (politically) ousted from their communities this created a power vacuum. In particular, the youth wings attached to the political parties played an important role in the terror campaign. The Coalition for the Defence of the Republic (Coalition pour la Défense de la République, CDR) had its Impuzamugambi ('those with a single purpose'), the Inkuba ('thunder') were the youth wing of the Democratic Republican Movement

(Mouvement Démocratique Républicain, MDR), the Social Democratic Party (Parti Social-Démocrate, PSD) had its Abakombozi ('the liberators'), and the ruling party, the MRND, had the Interahamwe ('those who work together').

Later, with the war continuing, the political process more grim and the peace talks contested, some of these youth groups would turn into outright militia, trained and armed by the army. They would spearhead the genocide together with the army and a large part of the administrative personnel. The term Interahamwe was originally restricted to members of the youth wing of the MRND and the militia that grew out of it. However, after the genocide, all those who had participated or were suspected of participation in the genocide received the qualification 'Interahamwe', even if they had never been an 'official member'. The expression was inflated.

While the insecurity caused by the political parties affected all ordinary citizens during these years of turmoil, the Batutsi were those most often targeted. They were called *ibiyitso*, accomplices of the rebel force, because of their alleged connection in conspiracy with the RPF—for one single reason: they were of the same ethnic identity which dominated the rebel group. Immediately after the start of the war in October 1990 a significant number of Batutsi were arrested throughout the country and locked up for a period. At regular intervals, and often in retaliation for RPF attacks or advances, massacres of Tutsi civilians were instigated. This not only echoed the 1963–4 revenge killings; it also 'established patterns for the genocide of 1994' (des Forges 1999: 87).

Although a peace agreement had been signed, President Habyarimana, under severe pressure from the hardliners, had no intention of implementing it. He referred to the agreement in a speech as a mere 'scrap of paper'. Preparations for a resumption of war were being made, on the side of the RPF as well. Both sides were engaged in destabilizing and terrorist activities and political assassinations. By early 1994, the enemy had been identified. Through intensive media and government propaganda, the enemy threatening the rule of the *rubanda nyamwinshi* (the great majority) became a threat to the rule of the Hutu ethnic majority. The (perceived) danger therefore was coming not only from outside, through the invasion, but also from within, from every single Tutsi citizen living in Rwanda, and by extension through every single Muhutu who was not in favour of the status quo of the reigning *rubanda nyamwinshi*. Stories and reports of the RPF massacring Bahutu along its way into Rwanda stirred the imagination and strengthened the fear. Thus it was felt/perceived that the threat had to be eliminated. The slogan 'Hutu power' (*Hutu pawa*) found its way through the hills; Batutsi were stigmatized as *inyenzi* (cockroaches).

In this highly explosive atmosphere, Habyarimana's aircraft was shot down when approaching the airport in Kigali as he was returning from a regional summit meeting in Tanzania. That same night, of 6 April 1994, a massive extermination campaign started. Events moved rapidly in the capital. Some rural areas reacted spontaneously to the call for action; others resisted for a long time and outside force was necessary in order to start the killings. The militia, the army, police forces and the bulk of the state personnel drove the killings throughout the country.

It is important to note that Bahutu who were not in favour of the genocidal campaign or were vehemently opposed to the Habyarimana regime, or were in some way connected to Batutsi, also became victims of the violence. What is puzzling, however, is the high level of involvement of ordinary citizens, the Hutu peasantry, who became involved in the genocidal campaign to track down, pillage and eventually kill their Tutsi neighbours.

1.4. The causes and dynamics of the conflict: the main paradigms of interpretation

A consensus has arisen in the vast literature available on the Rwandan tragedy on the fact that the genocide had little to do with apolitical 'tribal warfare' between ethnic groups. Nevertheless, the main paradigm used by observers to interpret the 1994 genocide is the ethnic character of the conflict: the majority ethnic group—the Bahutu—attempted to achieve the complete extermination of the minority ethnic group—the Batutsi.

Other paradigms focus on elite manipulation; ecological resource scarcity; the socio-psychological features of the perpetrators; and the role of the international community (Uvin 2001).

The 'elite manipulation paradigm' explores the desire of the Rwandan elite to stay in power. The RPF invasion and the following war, the international power-sharing agreement and the pressure for democratization followed by the birth of the political opposition all threatened the monopoly of power and the privileges of Rwanda's elite. This elite was ready to use all means to survive politically and keep a hold on the privileges associated with state power. This 'elite manipulation paradigm' fits neatly with the 'socio-cultural features of Rwandan society paradigm'. A powerful elite, desperate to stay in power, makes use of the highly centralized state structure, with command lines that go deep into rural life, to mobilize an 'obedient', 'conformist' and 'uncritical' army of peasants, even if this means slaughtering their neighbours.

Another paradigm focuses on the importance of 'ecological resources'. The argument is that Rwanda's resource scarcity, combined with the highest population density in Africa and high population growth rates, was fertile soil for genocidal violence.

The role of the international community has also received a great deal of attention in the past few years. The focus is mostly on the months preceding and during the genocide. The argument is that the nature of the (in)action of international stakeholders paved the path towards genocide, either intentionally—implicitly—or unintentionally. It is also argued that the long-standing presence of the international community in Rwanda in the form of development enterprise fuelled the momentum of the genocide through its apolitical and socially and culturally ignorant presence in the country.

Macro-level paradigms for explanation fail to capture the dynamics and experience of violence at the local level. Apart from the need to understand the general causes of the

conflict in order to prevent a recurrence, it is equally important to explore the conflict dynamics at the lowest levels of society. We have already mentioned the degree of involvement of ordinary citizens in the looting and killing. It is important to understand the unfolding of the genocide in small, face-to-face communities, since the bulk of the transitional justice work is being done at this level through the Gacaca courts. The court system is designed to operate at the lowest units of society, as we argue below. Comparative micro-analysis of the genocide demonstrates that the violence unleashed at the macro level was appropriated and fundamentally shaped by the micro-political matrixes and social formations in which it took hold. Genocide, although shaped from above, was significantly reshaped in a highly differentiated terrain of local social tensions and cleavages, regional differences and communal or individual particularities. The genocidal violence reflected both the goals of the supra-local forces and factors—mainly the Hutu–Tutsi cleavage mobilized by political actors for political purposes—and their local shadows—struggles for power, fear, (intra-group) coercion, the quest for economic resources and personal gain, vendettas and the settling of old scores (Ingelaere 2006).

1.5. Post-genocide Rwanda

The RPF took over power on 4 July 1994 and ended the genocide. The defeated government and its armed forces fled to the neighbouring Democratic Republic of the Congo (DRC) and a large part of the population followed. The consequences were felt way beyond the Rwandan borders and caused regional instability and insecurity for years to come. Although the genocide machine came to a halt after 100 days in July 1994, violence remained the order of the day. Fieldwork in Rwanda reveals that Rwandans have known a decade of violence between 1990, with the start of the civil war and the introduction of multiparty politics, and the end of the 1990s, when overt hostilities on Rwandan soil ceased. From 1996 onwards, after the violent dismantling of the camps in the DRC, the defeated government forces and the Interahamwe militia attacked northern Rwanda from their basis in the DRC. This came to be known as the war of the infiltrators (*abacengezi*), in which hundreds—most probably thousands—of civilians were killed. Since it was difficult to distinguish infiltrators from civilians, the RPA gradually resorted to brutal counter-insurgency strategies to pacify the region.

The RPF as the military victor was able to set the agenda for post-genocide Rwanda without much constraint. President Paul Kagame has repeatedly indicated that he ‘wants to build a new country’—a wish that needs to be taken literally. Liberation from a genocidal order is one of the underlying ideological vectors and legitimization strategies. A bold social engineering campaign has been instituted in the post-genocide period in order to translate into practice the vision incorporating the following set of ideas. The RPF can be seen as aiming to create the *true* post-colonial Rwanda. The colonial powers distorted the essence of Rwandan culture and this colonial mindset sustained the first two republics. Rwandanness or Rwandanicity, not ethnicity, should define relations between state and society. Building or (re-)establishing this unity of Rwandans goes together with eradicating the ‘genocide ideology’. Reconciliation, an element that had

begun to dominate the post-1994 ideological framework by the end of the 1990s, is also couched in terms of unity, while the overall objective of justice for genocide crimes (in the sense of accountability) has been one of the cornerstones of the regime. Home-grown traditions derived from the Rwandan socio-cultural fabric need to replace imported, divisive practices. Gacaca is one of them. These institutions are seen as part of what is called ‘the building of a democratic culture’ that is in essence conceived as being ‘closer to the consensus-based type of democracy’ (Rwanda 2006a: 151).

The Gacaca courts are part of the policy of creating a true post-colonial Rwanda and restoring unity. Home-grown traditions need to replace imported, divisive practices.

The choice and installation of the Gacaca courts fit perfectly into this vision. They are a home-grown, almost pre-colonial resource; the courts are meant to fight genocide and eradicate the culture of impunity, and they need to reconcile Rwandans by (re-)enforcing unity.

2. The ‘old’ and the ‘new’ Gacaca

The Gacaca court system as it currently functions in Rwanda is often referred to in terminology and descriptions as if it were identical, or at least similar, to the ‘traditional’ conflict resolution mechanism known as the Gacaca. However, the relation between the ‘old’ and the ‘new’ Gacaca is not one of identity, and not even one of gradual continuity. There is a difference in kind. An essential change marks the installation of the Gacaca courts after the genocide. The resemblance lies in the name, a similar orientation in the most general sense, and common features, but one needs to look beyond these most visible elements of similarity to understand the true nature of the ‘old’ and the ‘new’ institution and capture the rupture with the past. The ‘new’ Gacaca courts are in the truest sense an ‘invented tradition’. While any ‘traditional’ institution transforms over time due to social change in general, discontinuity prevails in the case of the Gacaca. State intervention through legal and social engineering has designed and implemented a novelty, loosely modelled on an existing institution.

This section will therefore not focus on the ‘gradual’ evolution of the Gacaca, but will first highlight what is known about the ‘old’ institution, focusing on it at close range at different periods, and then turn to the system that is dealing with genocide crimes. The distant history of the Gacaca suffers from the same problem as that highlighted above related to Rwanda’s ancient history in general. There are not many sources available and opportunities for twisting or manipulating the evidence are rife. We summarize the main threads of the ancient institution and its gradual change over time

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by relying on the few written sources that are available. These sources are complemented by information disclosed by older people during interviews collected during fieldwork in all the regions of Rwanda.

Our understanding of the Rwandan context and the functioning of the Gacaca court system is based on 18 months of fieldwork, carried out between July 2004 and April 2007, in several rural Rwandan communities. Through a range of methods—(participant) observation, life-story interviews, semi-structured interviews, group discussions and survey questionnaires—the author and his Rwandan collaborators consulted approximately 1,300 ordinary Rwandans, predominantly peasants. We observed over 280 Gacaca sessions (700-plus trials) in ten communities located in different regions of the country, and resided for longer periods in the communities in order to understand the Gacaca process in the economic and socio-political context of the localities.

2.1. The Gacaca as ‘traditional’ dispute settlement mechanism

To fully understand the origins and purposes of the ancient practice of *gacaca*, it needs to be placed in the cosmology of the Rwandan socio-political universe of the time. The extended lineage or family (*umuryango*) was the main unit of social organization. It encompassed several households (*inzu*), the smaller lineages and units of society. Age and sex defined status within the lineage. Only aged and married men without parents were independent; all others, and especially women, were dependent upon them. The *inzu* lineage head was responsible for the observation of the ancestral cults, arranged marriages, paid or received debts and controlled the collective title on land or cattle. The lineage was the primary source of protection and security. A person had no autonomous existence; the family unit was the guarantor of security.

Political structures were superimposed over the lineages. Around the 17th century, Rwanda consisted of several smaller territories governed by kings. The king (*mwami*) at one and the same time governed things profane and the link with the supernatural. He embodied power, justice and knowledge: judicial and political powers were not separated. The *mwami* was the ultimate arbitrator, assisted by the *abiru*, the guardians of tradition. However, a popular saying goes: ‘Before something is heard by the *mwami*, it needs to be brought before the wise men’. This refers to the fact that problems were addressed first at the lowest units of society, by the lineage heads. In practice this happened in what came to be known as *gacaca* gatherings.

It has become common wisdom that the word ‘*gacaca*’ means ‘justice on the grass’. In fact, the name Gacaca is derived from the word ‘*umugaca*’, the Kinyarwanda word referring to a plant that is so soft to sit on that people preferred to gather on it. These gatherings were meant to restore order and harmony. The primary aim of the settlement was the restoration of social harmony, and to a lesser extent the establishment of the truth about what had happened, the punishment of the perpetrator, or even compensation through a gift. Although the latter elements could be part of the resolution, they were

subsidiary to the return to harmony between the lineages and a purification of the social order.

Colonialism had a decisive impact on Rwandan society as a whole, and thus on the Gacaca as well. During the colonial period, a Western-style legal system was introduced in Rwanda but the Gacaca tradition kept its function as a customary conflict resolution mechanism at the local level. The colonial powers' stance towards Rwandan society was marked by indirect rule: indigenous institutions maintained their functions. However, despite the policy of indirect rule, the presence of the colonial administrators altered and weakened that which existed before their advent. At the judicial level, this is most obviously visible through the introduction of written law and a 'Western' court system imposed over the 'traditional' institutions. The latter continued to function but were hierarchically inferior to the new system. Serious cases such as manslaughter were now to be handled in the Western-style courts. Similarly, the king lost his unique position as cornerstone of the traditional institutions, and hence he and his chiefs gradually lost authority and legitimacy in the execution of judicial powers. This also implied that the legitimacy of the Gacaca courts waned.

Colonialism had a decisive impact on Rwandan society as a whole, and thus on the Gacaca as well. A Western-style legal system was introduced but the Gacaca tradition kept its function as a customary conflict resolution mechanism at the local level. It represented both the justice of proximity and a handy mechanism to relieve the pressure on the ordinary court system.

After independence, Gacaca gradually evolved into an institution associated with state power as local authorities were supervising (or taking on the role of) *inyangamugayo* (local judges). As the modern state became more powerful, it gradually absorbed the informal and traditional. In that way the institution of Gacaca evolved towards a semi-traditional or semi-administrative body. Some new elements came to the fore: certain fixed

procedures were followed, notes were taken, meetings were held on fixed days and so on. The institution functioned as a barrier so that quarrelling parties would not immediately (have to) resort to the formal court system at the provincial level (*court de canton*). If possible a dispute was settled at this lowest unit of society, as happened with the majority of cases. If necessary the case was forwarded to the higher court. Gacaca represented both the justice of proximity and a handy mechanism to relieve the pressure on the ordinary court system. Despite the introduction of some formal elements and its instrumental relation with the overarching judicial structures, the conciliatory and informal character of the Gacaca remained the cornerstone of the institution since decisions were to a great extent not in conformity with written state law (Reyntjens 1990: 36).

It is interesting that the Gacaca as it existed after independence still exists today, although it is no longer called the Gacaca. It can be said still to exist in two senses. First, on several occasions during the fieldwork we observed local authorities trying to solve the problems of the inhabitants in their locality. In fact, it is one of the most important tasks of the local administrators. Some referred to their activities as a sort of Gacaca. But even the

role local authorities play in the resolution of these local disputes had greatly diminished with the installation of the Abunzi, a committee of mediators, by the end of 2004. From observation of the type of disputes it settles, the sort of penalties it can impose and the style of mediating, in its features and scope this activity resembles the Gacaca as it existed before the genocide. However, this mediation committee has been almost totally formalized and incorporated into the machinery of state power as well. As with the modern Gacaca courts, the Abunzi function according to codified laws and established procedures; but their decisions are still often inspired by custom.

2.2. (Re-)Inventing Gacaca

The possibility of using the Gacaca emerged in the immediate wake of the genocide, as a United Nations High Commissioner for Human Rights (UNHCHR) report reveals (UNHCHR 1996). These reports are the result of the research and reflection of a number of Rwandan researchers and professors working at different institutions. Not only did they investigate the nature of the ancient Gacaca, but fieldwork also established that the Gacaca was already functioning in its semi-traditional way in some areas immediately after the end of the genocide. This was initiated either by the population or by the administrative authorities. A letter from the prefect of the province of Kibuye dated November 1995, appended to the UNHCHR 1996 report, reveals that in some areas the administrative authorities took the initiative to support and widely instigate the functioning of the Gacaca practice they found in some localities. The minutes of a meeting between the population of a community and a representative of the Interior Ministry in March 1996 is proof of the fact that the government condoned the informal or semi-traditional functioning of the Gacaca. This support was informal, since it was not part of official policy, and it had no legal and institutional framework. It seems clear that the Gacaca mostly functioned as it did before the genocide, meaning that it dealt with minor disputes within the population.

The spontaneous emergence of the Gacaca activities and the gradual support for Gacaca by the authorities was clearly motivated by the fact that the ordinary justice system was virtually non-existent after the genocide. The Gacaca had to do what it did before—relieve the pressure on the ordinary courts. These were now not working slowly, as they did before, but not working at all. Once they started to work, they were quickly overloaded with the cases of genocide suspects who were filling the prisons.

After the Rwanda genocide, the Gacaca was already functioning in its semi-traditional way in some areas, condoned by the government. The ordinary justice system was virtually non-existent.

A new element came into play in the practice of *gacaca* in the post-genocide era—genocide-related offences and the consequences of the genocide. Crimes related to property, the main focus of the ‘ancient Gacaca’ but now committed during the genocide—the destruction of houses, the theft of cows and household utensils, the

appropriation of land and so on—were brought before the *inyagamugayo* and the local authorities. Observation of current Gacaca court activities reveals that in cases of accusations of looting, offenders might dig up documents dating back to the years immediately after the genocide to prove that they had already restored the property they looted or reimbursed the damage they had done. The initial settlement was often struck in the context of such a (semi-)informal Gacaca meeting with the authorities often initiating the action, supervising it and providing proof (the documents used in the cases brought for the current Gacaca courts) that compensation had been paid.

A new element came into play in the Gacaca practice in the post-genocide era—genocide-related offences and the consequences of the genocide.

The 1996 UNHCHR report states that it was an absolute taboo to talk about killings during the Gacaca sessions in those initial years after the genocide. People found tackling these crimes too sensitive a matter. Neighbours and family members seem to

have covered up for those who might have taken part in the killing. However, the letter of the prefect of Kibuye mentions that the Gacaca meetings should collect the names of those implicated in the violence. Consultations in other communities where the Gacaca functioned at that time also established that people thought it should function as a mechanism to restore order and harmony in society, and reconcile families and neighbours.

In the light of the observations made of the practice of *gacaca* they found existing in the years 1995–6, reflection on the origins and nature of the ancient Gacaca and the nature of the genocidal violence, the authors of the UNHCHR report concluded that the Gacaca institution could play a role in dealing with the genocide-related crimes. They made a number of recommendations (see box 2).

Box 2: The role of the Gacaca in Rwanda: recommendations of the UNHCHR

- The violence experienced during the genocide and massacres was of such a gravity that it simply cannot and should not be handled in the Gacaca.
- Gacaca could function as a sort of truth commission with two aims. On the one hand, collecting facts about the atrocities experienced in local communities. Information would be forwarded to the classical tribunals. On the other hand, as a space to reunite Rwandans and to debate the common values they share, a mechanism that helps people to live together and be reconciled.
- Caution should be exercised against too much government intrusion, and the institution should not be subverted into becoming a formal tribunal.

Source: United Nations High Commissioner for Human Rights (UNHCHR), *Gacaca: Le Droit Coutumier au Rwanda* (Kigali, 1996), *passim*.

It is clear that the recommendations of the UNHCHR report were never seriously considered, let alone followed. In 1999, after a period of reflection and a round of

consultation, a commission established by the (then) Rwandan President Pasteur Bizimungu proposed to modernize and formalize the ‘traditional’ dispute resolution mechanism in order to deal with the approximately 130,000 persons imprisoned for offences related to the genocide at that time—a task the ‘ordinary’ justice system could not accomplish in a satisfactory way. This commission was the result of and worked in the context of the so-called Urugwiro meetings which took place between May 1998 and March 1999. Every Saturday, a meeting was held at the president’s office with ‘representatives of Rwandan society’ to discuss serious problems facing the Rwandan people. Proposals for solutions were debated. The question of justice and dealing with the genocide was given a prominent place on the agenda. The possible use of Gacaca was discussed. Serious reservations were expressed by some of the participants, but countered by arguments in favour by the proponents. Box 3 summarizes the main arguments of both sides found in the resulting report (Rwanda 1999).

Box 3: The arguments for and against the use of Gacaca made during the reflection meetings with the President, 1998–9

Arguments against

- Trying crimes of genocide and massacres in Gacaca would minimize the seriousness of these crimes.
- Can ordinary people who are not educated and acquainted with judicial procedures take care of these serious offences themselves?
- Family relations and friendships would render the trials partial. It would be very difficult to make people tell the truth, and in some parts of the country there would be nobody left to testify.
- It would be better if the Gacaca were used as an investigative mechanism, providing the classical courts with information.
- Trials by the Gacaca of accusations of genocide and massacres would create new conflicts and tensions in the local population.
- Would the Gacaca be in accordance with international laws?

Arguments in favour

- Letting Gacaca courts deal with genocide crimes does not imply a trivialization. On the contrary, it would make people deal with the crimes of genocide and other crimes against humanity at the level where they happened. The building of a new Rwanda needs to be done by every Rwandan.
- People are not so uneducated that they cannot be educated. The Gacaca system should be explained to the population and those responsible trained and assisted by lawyers.
- The danger that the truth might not surface and that partiality might prevail is real, but other participants can give contradictory evidence. This will make it possible to counter these tendencies.
- Gacaca would not only investigate but also punish. A truly participatory form of justice would give power to the population to deal with the violence experienced in their midst. After its use for genocide-related offences, it would be turned into a system dealing with common crime.
- Gacaca would accelerate the process of dealing with the backlog of genocide-related cases; it would stop the culture of impunity by singling out those who actively participated in the killings.
- The crime of genocide is an exceptional crime and needs an exceptional solution to deal with it.

Source: Rwanda, *Report on the Reflection Meetings Held in the Office of the President of the Republic from May 1998 to March 1999* (Kigali: Office of the President of the Republic, 1999).

The report makes clear that the idea of unity was being widely debated and propagated, and the focus lies on the need to rebuild the country. However, a common theme underlying the discussions in those years, as the report also makes clear, is the objective of eradicating the culture of impunity—a quest for accountability. The word ‘reconciliation’ is hardly mentioned, especially not in the section on justice. The notion of reconciliation or restorative justice that is currently attached to the Gacaca court system only surfaced in the years that followed, and the Urugwiro meetings may have been the breeding ground for its introduction in public discourse. But the Gacaca court system was initially

The Gacaca court system was initially conceptualized in an atmosphere where the objective of accountability dominated. The notion of reconciliation or restorative justice that is currently attached to the Gacaca court system only surfaced in the years that followed.

conceptualized in an atmosphere where the objective of accountability dominated. The report notes that the use of community service as an alternative penalty should be examined but in such a way as to avoid ‘disturbing the government’s policy of eradicating the culture of impunity’ (Rwanda 1999: 57). It mentions that the name ‘Gacaca jurisdictions’ should be used to suggest that the Rwandan heritage is a

source of inspiration for the new court system which nevertheless has the same competence as the classical courts (‘jurisdiction’). The blueprint of that type of Gacaca can be found in the report of the Urugwiro meetings. It is the embryo of what was later codified in law, implemented and constantly adapted.

2.3. The design and practice of the Gacaca court system

The actual experience, functioning and outcome of the Gacaca courts—their scope and limitations—are in the first place defined by the way they were conceived before implementation. As is explained above, the court system was conceived during the Urugwiro meetings and has undergone several modifications in the course of time based to a certain extent on the findings from the pilots in 751 localities which started in 2002. Here we focus on the features of the system since its nationwide implementation in 2005.

The Gacaca courts are Rwanda’s main transitional justice instrument. They fit into the underlying stated objective of accountability with overtones referring to reconciliation.

The Gacaca courts were installed to prosecute and try the perpetrators of the crime of genocide and other crimes against humanity, committed between 1 October 1990 and 31 December 1994. The Gacaca process has five goals—to:

- establish the truth about what happened;
- accelerate the legal proceedings for those accused of genocide crimes;
- eradicate the culture of impunity;
- reconcile Rwandans and reinforce their unity; and
- use the capacities of Rwandan society to deal with its problems through a justice based on Rwandan custom.

To facilitate the process, three fundamental principles, or cornerstones, were incorporated into the genocide and Gacaca legislation. On the one hand, there is a popularization or decentralization of justice by installing numerous courts in every administrative unit of society. This procedure is modelled on the traditional Gacaca with lay persons presiding as judges and the active involvement—not only the physical presence—of the entire population as a ‘General Assembly’. On the other hand, there is the principle of plea bargaining to increase the amount of evidence and available information. Plea bargaining was instituted to facilitate the collection of evidence. A defendant must give as much detail as possible of the offence (how, where, when, victims, accomplices, damage, etc.) and apologize in public in order to have his confession accepted and his sentence reduced. Through a presidential decree of 2003 one could, in principle, have one’s sentence reduced by revealing information about crimes committed. A confession considered as complete and sincere, accompanied by a request for pardon, was the prerequisite for provisional release from prison. This fuelled the confessions in the prison Gacaca which started as early as 1998.

Motivation to confess originates in the pressure of the state through awareness campaigns, but it also has a strong religious undertone. Although a significant number of detainees have made ‘total’ confessions, there is a general perception that these testimonies are only partial, admitting minor crimes, and blaming some people for complicity—mostly those already deceased or ‘disappeared’ after the genocide—while keeping silent on the involvement of others.

These two cornerstones facilitate the surfacing of the truth, which subsequently functions as the basis of the entire transitional justice framework in post-genocide Rwanda. The truth is the information needed to identify the nature of guilt or innocence, to conduct trials of accused persons, to disclose locations in order to exhume victims, to identify the modalities of reparation, to generate knowledge of the past in general and to reconfigure and re-establish social relations.

The surfacing of the truth is the basis of the entire transitional justice framework in post-genocide Rwanda.

A third crucial feature is the principle of categorization by type of offence. Suspects of genocide crimes and crimes against humanity are prosecuted in a system of parallel courts. Those identified as the persons most responsible and the orchestrators of the violence are tried by the ordinary courts, while others are judged by the Gacaca courts. Suspects are therefore categorized in three categories according to the crime(s) they have committed. The category determines which court should prosecute and the range of penalties applicable. The penalty varies not only according to the seriousness of the offence but also according to whether the perpetrator has confessed the crime(s) and when he made a confession. A new organic law came into effect in March 2007, modifying the 2004 law (see table 1). The changes cannot be applied retroactively.

Three fundamental principles, or cornerstones, were incorporated into the genocide and *gacaca* legislation—the popularization or decentralization of justice by installing numerous courts in every administrative unit of society; the principle of plea bargaining to increase the amount of evidence and available information; and the principle of categorization by type of offence.

Table 1: The Gacaca court system in Rwanda: categorization and sentencing

(a) June 2004–March 2007

	Cat. 1	Cat. 2, 1st & 2nd	Cat. 2, 3rd	Cat. 3
Crime	1. Planners, organizers, supervisors, ringleaders 2. Persons who occupied positions of leadership 3. Well-known murderers 4. Torturers 5. Rapists 6. Persons who committed dehumanizing acts on a dead body	1. 'Ordinary killers' in serious attacks 2. Those who committed attacks in order to kill but without attaining this goal	3. Those who committed attacks against others, without the intention to kill	Those who committed property offences
Court	Ordinary court	Sector Gacaca	Sector Gacaca	Cell Gacaca
Sentence	Death penalty or life imprisonment	25–30 years	5–7 years	Civil reparation
<i>Without confession</i>				
<i>Confession before appearance on the list of suspects</i>	25–30 years	7–12 years*	1–3 years*	Civil reparation
<i>Confession after appearance on the list of suspects</i>	25–30 years	12–15 years*	3–5 years*	Civil reparation
<i>Accessory sentence</i>	Perpetual and total loss of civil rights	Permanent loss of a listed number of civil rights	/	/

* Commutation of half of sentence to community service on probation.

(b) March 2007 onwards

	Cat. 1	Cat. 2, 1st, 2nd & 3rd	Cat. 2, 4th & 5th	Cat. 2, 6th	Cat. 3
Crime	1. Persons who occupied positions of leadership 2. Rapists	1. Well-known murderers 2. Torturers 3. Persons who committed dehumanizing acts on a dead body	1. 'Ordinary killers' in serious attacks 2. Those who committed attacks in order to kill but without attaining this goal	Those who committed attacks against others, without the intention to kill	Those who committed property offences
Court	Ordinary court	Sector Gacaca	Sector Gacaca	Sector Gacaca	Cell Gacaca
Sentence	Death penalty or life imprisonment	30 years or life imprisonment	15–19 years	5–7 years*	Civil reparation
<i>Without confession</i>					

	Cat. 1	Cat. 2, 1st, 2nd & 3rd	Cat. 2, 4th & 5th	Cat. 2, 6th	Cat. 3
<i>Confession before appearance on the list of suspects</i>	20–24 years	20–24 years*	8–11 years*	1–2 years*	Civil reparation
<i>Confession after appearance on the list of suspects</i>	25–30 years	25–29 years*	12–14 years*	3–4 years*	Civil reparation
<i>Accessory sentence</i>	Permanent loss of a listed number of civil rights	No confession: permanent loss - Confession: temporary loss of a listed number of civil rights	No confession: permanent loss - Confession: temporary loss of a listed number of civil rights	/	/

* Commutation of half of sentence to community service on probation; one-sixth of the sentence is suspended and one-third of the sentence is served in custody.

Source: *Official Gazette of the Republic of Rwanda*: Organic Law no. 16/2004 of 19 June 2004, and Organic Law no. 10/2007 of 1 March 2007.

Since 2005, Gacaca meetings have been held in each of Rwanda's 9,013 cells and 1,545 sectors. A cell in Rwandan society coincides with a small face-to-face community, comparable to a neighbourhood in an urban setting. This is the lowest administrative level. A sector is like a small village and groups together several cells. In total there are 12,103 Gacaca courts established nationwide, presided over by 169,442 *inyangamugayo*, the local judges. These judges are elected among the populace and no legal training, experience or other education is required. The defining characteristic is that they must be 'persons of integrity'. Most of the Gacaca courts are situated in rural face-to-face communities, but they are installed in every administrative unit nationwide, and thus also in the cities. It is in an urban environment that the Gacaca process encounters the most problems regarding its most basic operational functioning. Migration, urban anonymity and individuality undermine the prerequisites of the Gacaca process—shared knowledge about the past and the fact of daily living together.

There have been two phases in the Gacaca process. During the first phase, which took place at the administrative level of the cell between January 2005 and July 2006, information was collected in every cell through confessions and accusations. In practice, four tendencies were observed. First, this phase was characterized by the extensive involvement of state authorities executing and supervising a task normally allocated to the judges. Second, it was only possible to collect testimonies *à charge*, or accusations. The population could only validate the information already collected or add some more incriminating testimonies. Testimonies *à décharge* (in defence of the accused) were not recorded and needed to be reserved for the trial phase, it was explained. Third, there was the possibility of idiosyncratic interpretation and application of the guidelines set out by the National Service of the Gacaca Jurisdictions (Service National des Juridictions Gacaca, SNJG) depending on the locality. This created an element of arbitrariness in a process that was supposedly applied uniformly. Fourth, according to estimates based on the pilot proceedings, only 5 per cent of the pending cases were the result of confessions.

There was therefore a shift from confessions—the plea-bargaining procedure installed to encourage the exposure of the truth about the past—to accusatory practices. This created a particular and unexpected atmosphere in the local communities and greatly increased the number of people accused.

At the end of the information collection phase, the categorization was done by the lay judges presiding over the Gacaca court of the cell. Their decision to place a person in a certain category is based on information gathered during the initial phase of the Gacaca process, which takes place at this lowest unit of society. Although the elected judges take the decision to categorize a person, the information and evidence on the basis of which this is done come from a confession of a perpetrator and/or through accusations from members of the ‘General Assembly’ of the court at this level, being the entire population of the cell. Statistics provided by the SNJG indicated that by the end of the information collection phase 818,564 persons would be prosecuted for genocide-related crimes nationwide. Of those persons, 44,204 are not in the country and 87,063 are dead. Estimates in 2004 based on the results during the pilot phase already indicated that approximately 750,000 people would stand accused. Table 2 shows the shares of each category.

Table 2: Genocide-related prosecutions in Rwanda: number of suspects in July 2006

Category 1	77,269
Category 2	432,557
Category 3	308,738
Total	818,564

Source: Rwanda, *Report on Collecting Data in Gacaca Courts* (Kigali: National Service of the Gacaca Courts, 2006).

In July 2006 the second phase (the trial phase) started. Trials for those placed in the second category take place at the sector level. The information collected in the previous phase is used to conduct the trials of the accused and those who have confessed. It should be noted that in several localities information collection had not been completed and continued while trials were being held. During the trial phase the elected judges at the Gacaca court of the sector summon the parties in the case—the accused or the person who has confessed, and the accuser or victim (often the accuser is the victim, but not always). Often the accused are living free in the community. Sometimes those accused during the information collection phase have been put in preventive detention on the orders of the *inyagamugayo* in order to prevent them from fleeing. They, together with those put in detention in the immediate aftermath of the genocide, are transported to their home villages. The judges read the compiled case files—the collected testimonies—aloud, and hear the parties and possible witnesses or other persons who wish to intervene. When the case has been sufficiently examined, they deliberate among themselves and pronounce the verdict in public.

The person convicted has the possibility to appeal. His /her case can be reviewed by the Gacaca appeal court of the sector, which is composed of another group of elected judges, residents of the same locality. If a person receives a prison sentence, he or she is immediately taken into custody; if they have already served the sentence decided upon while in detention awaiting trial, they are set free. Since mid-2007, with an overload of new prisoners congesting the prisons since the start of the Gacaca process, convicts have first had to serve a period of community service. This happens in work camps, but is envisioned to be decentralized to the level of the respective communities.

Monthly progress reports indicate that in this period (July 2006–February 2007) an average of approximately 10,000 persons a month were tried. Table 3 gives an overview of the trial activities between 15 July 2006 and the end of February 2007. After March 2007, the trial procedures were modified again.

Table 3: Activities during the Gacaca trials in Rwanda, July 2006–February 2007

No. of cases tried	No. of sentences pronounced	Prison sentence	Community service	Acquittals	Appeals	Changes of category
71,405	64,800	33,233	16,348	15,219	7,200	2,889

Source: SNJG Monthly Progress Reports (on file with author).

In theory, the trials phase would last until all cases had been dealt with. However, since early 2007, the government has started increasingly pressuring the judges to speed up their work. The end of 2007 was the (ambitious) deadline, and has already been postponed. In some places, however, Gacaca activities came to an end during the course of 2007. The new law makes it possible to install numerous courts in one locality instead of the single court that existed before. As 432,557 persons needed to be tried at a pace of 10,000 a month, it would take another three and a half years to complete the exercise. Since March 2007, therefore, approximately 3,000 courts have been added to the 12,103 already existing. Some sectors have up to 12 courts functioning at the same time. Initially, there was a fixed day in the week when Gacaca meetings were held but, to speed up the trials, many localities with a great number of cases were obliged to hold two a week. A Gacaca court examines between one and more than ten cases a day. Moreover, almost 80,000 persons were placed in the first category. These people need to be tried through the classical court system. This is almost as many as the number initially incarcerated and it would be a sheer impossibility for the ordinary courts to process them.

Property offences are handled in the Gacaca courts at the level of the cell. There are two possibilities at this level. First, the parties to the dispute, victim and offender, can arrive at an amicable settlement related to the type and amount of restitution. The judges then only supervise and ratify the agreement. Second, if there is no mutual understanding, a trial takes place with the same procedures as identified above. Finally, the judges come to

a decision on the nature of the restitution. It is important to note that for these offences restitution is not individualized; it is a family affair. This has no legal basis, only a customary basis.

The Gacaca process is very complex in the perception and experience of the ordinary Rwandans. Older people in particular can compare with the past since they may have had first-hand experience of the 'old' institution. They often refer to the Gacaca courts as 'an instrument of the state'. The current Gacaca is installed by the state with rules and people taking notes, while the traditional version was much more straightforward in its functioning and objective. The idea was to bring people together, talk about the problem or conflict in order to restore harmonious relations, and prevent hatred lingering on between families. Before, measures taken were mostly symbolic and restorative in nature through punishments that took the form of reparation for the harm inflicted, while the current courts aim at the punishment of individuals through prison sentences.

The difference between the old and the new Gacaca is not one of degree but a difference in kind. The current Gacaca is installed by the state with rules and people taking notes. The traditional version was much more straightforward in its functioning and objective. The idea was to bring people together, talk about the problem or conflict in order to restore harmonious relations, and prevent hatred lingering on between families. Measures taken were mostly symbolic and restorative in nature through punishments that took the form of reparation, while the current courts aim at the punishment of individuals through prison sentences.

Only when amicable settlements are made in property cases and when the judges thus function as a sort of supervising committee for the reconciliation attempt can the spirit of the older Gacaca be discerned.

The old Gacaca was mostly used for minor offences, although apparently it could also be used for cases of manslaughter. The arrival of colonialism may have had a modifying influence on the functioning of the Gacaca in that regard, by prohibiting its use for serious crimes. The current Gacaca has problems in establishing the truth, but an equally unaltered and traditional use of the Gacaca would have been inadequate to deal with the numerous problems related to the genocide. In the current Gacaca, the element of reconciliation between families (and individuals) is no longer at the centre of the institution or is even not present.

We have already mentioned that the difference between the old and the new Gacaca is not one of degree but in kind. The biggest resemblances between the current and the ancient Gacaca can be found on the level of the cell, where the

Gacaca courts are dealing with property offences. There are two possibilities—a settlement or a trial. Only when amicable settlements are made and when the judges thus function as a sort of supervising committee for the reconciliation attempt can the spirit of the older Gacaca be discerned.

2.4. Other transitional justice mechanisms and objectives

The Gacaca courts are Rwanda's main transitional justice instrument. They fit into the underlying stated objective of accountability with overtones referring to reconciliation, as we have argued above. Apart from the Gacaca courts, although in the background and at a much slower rate, other transitional justice strategies have been adopted, and different mechanisms have been installed. The main responsibility for achieving accountability had originally been placed on the ordinary Rwandan justice system. But the tribunals of first instance simply could not handle the vast number of cases. The classical justice system dealt with 10,026 cases between 1997 and 2004.

In November 1994, UN Security Council Resolution 955 established the International Criminal Tribunal for Rwanda (ICTR) to prosecute individuals responsible for crimes of genocide and other violations of international law in order to ensure that these kinds of gross violations of human rights would not go unpunished. The relation between the ICTR and the Rwandan Government has always been difficult, mostly because of the possibility that the tribunal might also investigate war crimes committed by RPF soldiers and their commanders. But the track record of the tribunal is also flawed. Its outreach towards ordinary Rwandans is virtually nil. On Rwandan soil the tribunal is portrayed and (thus) perceived as an instance of the Western way of doing justice—highly inefficient, time-consuming, expensive, and not adapted to Rwandan custom. As with the ICTR proceedings held outside Rwanda in Arusha, in neighbouring Tanzania, there have been other trials held in third countries. Based on universal jurisdiction laws, trials in Switzerland in 1999 and in Belgium in 2001, 2005 and 2007 have contributed to the quest for accountability.

On Rwandan soil the International Criminal Tribunal for Rwanda is portrayed and perceived as an instance of the Western way of doing justice—highly inefficient, time-consuming, expensive and not adapted to Rwandan custom.

Alongside this dominant 'punitive' approach, a more restorative component has been added by the establishment of the fund for the assistance of the survivors of the genocide (FARG). A fund especially preserved for the compensation of victims (Fonds d'Indemnisation, FIND) was also conceived but never became operational. Community service, which is closely connected with the Gacaca courts, also contributes to a more restorative and compensatory approach to the past.

A National Unity and Reconciliation Commission (NURC) was set up in 1999 with a mandate that can be summarized as 'promoting unity and reconciliation', most visible through the organization of the Ingando solidarity camps for reintegration and re-education. More important seems to be that the establishment of the NURC marked a shift away from an exclusively retributive approach to an additional reconciliatory element. Only in recent years has a discourse of reconciliation started to surface. Now every socio-political initiative, from poverty alleviation programmes to resettlement schemes to political decentralization, is framed in the language of 'reconciliation',

‘strengthening unity’, ‘empowerment’ and the ‘rebuilding of social relations’. Despite this change in atmosphere, the Gacaca courts have difficulty shedding the retributive approach to justice which lies at their core. As is indicated above, they were conceived in a time when the objective of (or the payment of lip-service to) reconciliation was not as prominent as it is today.

2.5. The main stakeholders and actors

A closer look at the list of participants in the Urugwiro meetings where the Gacaca court system was conceived reveals the involvement of members of the government, members of important state institutions, representatives of the army and the police, and representatives of the (tolerated) political parties. For the discussion on justice, members of the judiciary and some lawyers were also invited. Considering the final modality of the political transition—military overthrow—and the subsequent balance of power, with the RPF dominant in all domains of social and political life, it is no wonder that the discussion on the nature of justice in the aftermath of genocide and war was carried without many ‘alternative’ ideas and other projects for Rwandan post-genocide society. It was a discussion among peers, all the more so because of the absence of ‘civil society’.

There was no trace of members of civil society during the discussions, nor were they involved in the process whereby the Gacaca courts were conceived. This is hardly a surprise. Civil society was almost non-existent during the Habyarimana regime. What existed only added up in quantity, not in quality. A healthy civil society normally has a history to rely on and a socio-political environment in which it can thrive. The former is lacking in Rwanda because of the historical precedents of dictatorship, and the latter is lacking because of the deliberate choice of a new political elite. The minister of local governance, social affairs and development in the post-genocide regime, Protais Musoni, describes the Rwandan regime’s position on civil society succinctly: ‘There are two debates on the role of civil society organizations in developing countries by international scholars. On one side civil society is seen as a counter power to government, and on the other civil society is seen as an effective partner in service delivery and the development process. Rwanda favours the latter approach’ (Musoni 2003: 14–15).

Victims’ associations such as Ibuka, the umbrella association for genocide survivors, are the rare domestic voices to be heard. Their position is in general supportive of the Gacaca process but with critical interventions when problems arise, especially when genocide survivors are harassed as a result of their participation in the Gacaca process. Ibuka is also able to organize at the local level. We frequently observed meetings held by members of Ibuka to discuss the Gacaca proceedings in their localities. Ibuka representatives coming from outside the communities often advise or caution villagers who survived the genocide on their behaviour towards released prisoners or strategies to be adopted during the Gacaca sessions. These instructions do not always correspond with the government line on the Gacaca courts—which are also forwarded to the local level during numerous

sensitization campaigns—but they do not fundamentally question the framework within which the government policy is laid out.

The churches, long the sole possible environment in which counter-hegemony to the government could develop, are solicited to spread a positive image of the Gacaca process. The Catholic Church, the biggest religious institution, accepts the submissive part it has to play, most probably also because of the role some of its members played in the massacres.

Ibuka, the umbrella association for genocide survivors, is in general supportive of the Gacaca process but with critical interventions when problems arise, especially when genocide survivors are harassed as a result of their participation in the Gacaca process.

Foreign donor countries also have a high stake in the judicial activities in post-genocide Rwanda and the Gacaca court system in particular. Some even call the phenomenon in Rwanda ‘donor-driven justice’ (Oomen 2005). After an initial period of reluctance, most donors came to support the newly created Gacaca court system out of an awareness that it was the less bad of two possible options for tackling the past—on the one hand classical (retributive) justice which would not be able to manage and resolve that past, and, on the other hand, imperfect, unknown and revolutionary justice.

At the local level, we can identify several social groups that play a role in the Gacaca process. These groups are identity-based and often have different stakes in the Gacaca proceedings, and therefore also portray divergent stances towards the institution. The group formation on the periphery of the Gacaca arena is not simply ethnic. Since 1994, new identities have come into play. They are subcategories of the main cleavage dominating Rwandan society—the Hutu–Tutsi bipolarity.

The Batutsi can be divided into genocide survivors and ‘old caseload returnees’. The former lived in Rwanda before the genocide and survived the mayhem. The latter are either former refugees or descendants of the refugees who left Rwanda after the Hutu revolution. They often settled in cities after their return to Rwanda following the genocide. Others, ordinary peasants, mostly returned to their region of (family) origin. They only play a minor role in the Gacaca proceedings. They were not affected by the genocide in the locality where they currently live. Often they are among the Gacaca judges in their community or they might intervene in the proceedings by making some general comments.

The survivors, on the other hand, are the main stakeholders in the Gacaca process at the local level. They are almost always of Tutsi identity, with only a few exceptions. Fieldwork observations make it clear that there are, in general, three defining parameters necessary to be able to make a legitimate claim as a victim seeking justice for ‘wrong done’ in the Gacaca courts: one needs to have suffered persecution—not simply to ‘have lost’—between October 1990 and December 1994; persecution because of having a certain

The survivors often see the results of their testimonies in the Gacaca—imprisonment or community service in work camps—as being to the sole benefit of the state.

identity; or ‘identity-based’ persecution because of belonging to the Tutsi ethnic group, which currently makes one an officially recognized survivor. Survivors are the catalysts of the Gacaca proceedings in that they testify, make accusations and

provide information on the past. But, although they are knowledgeable about the events during the genocide in general, and more specifically about what happened to them personally, they survived because they were in hiding and thus their knowledge is limited. Their evaluation of the Gacaca courts is mixed. They see them as an opportunity to find more information on the locations where the bodies of deceased family members were thrown, or as a way to find some compensation in kind for the losses or to see those responsible for past crimes punished for their actions. However, they are also aware that their testimonies incriminating others cause ‘bad relationships’ with the families of the accused and imprisoned. They often see the results of their testimonies in Gacaca—imprisonment or community service in work camps—as being to the sole benefit of the state.

Among the Bahutu, four groups can be distinguished in a local community. First, there are the prisoners who are absent from daily village life and are only transported to the village when their own trial takes place. Their families are present, however, and approach the Gacaca courts as a means to get their loved ones set free. Second, a community also contains liberated prisoners who have confessed in prison and therefore been released. They are closely monitored by the authorities. Often they play an important role in the Gacaca proceedings by accusing fellow villagers, Bahutu who have never been imprisoned but were somehow implicated in the genocide. If their own confession is sincere and if they are personally convinced that revealing the truth about the past is a necessity, they function as expert witnesses and are often consulted by the *inyagamugayo*. However, their sincerity creates serious conflicts between them and those they accuse. Outright intimidation or more subtle means are employed to silence or to forge an alliance with them. The same tactics are used to influence the behaviour of the genocide survivors. Sometimes killings take place to get rid of witnesses. In general, the perception is that these released prisoners only made partial confessions in order to get out of prison, admitting minor crimes, accusing others of complicity—the deceased or disappeared—and keeping silent on the involvement of yet others. Two Hutu subgroups remain—those accused in the Gacaca and others who are not accused. The first subgroup live in fear of an upcoming trial with an unpredictable outcome. Those in the second group are relieved that they are not accused, but are very careful not to get into conflict with anyone since they are aware that current conflicts can be dragged into the Gacaca arena to be settled under the guise of an alleged genocide crime.

Initially, the *inyagamugayo* were, as tradition prescribes, ‘old and wise men’. After several months, however, a significant number of them had to be replaced because they were accused in the Gacaca themselves. By November 2005, 26,752 or 15.7 per cent of the judges had to be replaced because they were suspected. They were replaced by women,

younger people and genocide survivors. The Gacaca bench often contains a mixture of survivors (Batutsi) and ‘non-survivors’ (Bahutu). Sometimes the judges are only Hutu or only Tutsi. The ethnic composition of the bench is seen as a means to get a viewpoint passed. The judges received short training on the law and procedures. Every district (that is, approximately every ten sectors) has a coordinator to supervise the Gacaca activities. This is the person who can be consulted by the judges.

The local authorities generally do not play an overtly active role in the Gacaca proceedings but they are always present, together with some security forces, and they have received instructions from higher authorities that they need to monitor the Gacaca’s activities closely and write reports. Some strictly judicial tasks such as information collection have been assigned to the local authorities, with the population and the judges only playing a secondary role. They mobilize the population in sensitization campaigns and take notes on the attendance of the people living in their administrative area. Failure to participate in the Gacaca means either being fined or refusal of service delivery when contacting the local administration. In that sense the Gacaca is, paradoxically, a form of unpopular participatory justice, with large crowds of uninterested people physically present but psychologically absent or unsupportive of the activities. Those who speak are predominantly the judges, the survivors and a small group of liberated prisoners.

The Gacaca is, paradoxically, a form of unpopular participatory justice. Attendance is compulsory. The large crowds that attend are physically present but psychologically absent or unsupportive of the activities.

2.6. Life in the post-genocide era and the advent of the Gacaca courts

In the ten years between the genocide and the start of the Gacaca trials, victims and those who were involved in the violence but had no leading role during the genocide lived together again on their respective hills—not always as neighbours now, since survivors have often been grouped into resettlement sites, but still in the same vicinity. They therefore had to develop a way of life and ways in which to interact with each other. It is important to understand these strategies and tactics employed in daily life in the decade before the state-sanctioned installation of the Gacaca courts. It allows us to verify whether their arrival facilitated or disturbed a natural process of ‘dealing with the past’. Living together was not so much a personal choice, but a simple necessity.

This cohabitation was initially marked by mutual fear, diminishing progressively with the passing of time. After 2003, this fear intensified from time to time with every wave of liberation of detainees who had confessed in prison. Until 2005—the start of the Gacaca—the consequences of the genocide were mostly phrased in terms of material and human losses. Distrust between the different ethnic groups was present, but lingered under the surface of social life. Out of necessity, life returned to a form of normality and cohabitation. Life in the hills is highly pragmatic. Tensions and conflicts are kept in the

dark because neighbours and villagers depend upon each other in their daily activities and their fight for survival in conditions of shared impoverishment.

'Thin' reconciliation differs from the *'thick'* version, in Rwanda as elsewhere. Cohabitation—*kubana*—is a matter of necessity, which may become less fearful for those directly involved as time passes, but interpersonal reconciliation—*ubwiyunge*—is a matter of the heart and a state of feeling in a social relation. Rwandans, and especially survivors, often refer to the 'heart' when talking about the events of the past and expressing the nature and level of trust and confidence they have in their neighbours, fellow villagers or

In the Rwandan context, the heart is the force unifying the human being. Emotions, thoughts and will are interconnected and unified in the heart. The heart is inaccessible to others but it is the locus where the truth lies. Due to the violence experienced in their midst, 'the hearts have changed'.

members of the other ethnic group. In the Rwandan context, the heart is the force unifying the human being. It is the centre of reception of outward impulses and the locus of interior movement. Emotions, thoughts and will are interconnected and unified in the heart. The heart is inaccessible to others but is where the truth lies. Due to the violence experienced in their midst, 'the hearts have changed'.

The heart has changed because of the crimes committed, the violence experienced or the dehumanizing acts observed. Living conditions, the social universe and daily interactions have changed to a form of normality again, but this outward appearance of normality does not reveal a great deal about the interior of someone. Outward appearances are deceptive, as popular expressions acknowledge: 'the mouth is not always saying what resides in the heart' or 'the rancorous stomach, you give it milk and it vomits blood'. Daily actions and interactions had become a way of dealing with the past, in a positive or negative sense: the crossing on the pathway to the fields, the offer and sharing of banana beer in the local cabaret (pub), the invitation to a wedding or the helping hand when transporting a sick person to the hospital might have been catalysts in the restructuring of emotions and relationships. Meanwhile accusations of witchcraft, threats or suspicions of poisoning, the (interpretation of) the blink of an eye or the failure to invite someone to a ceremony are enough to increase distrust. Sometimes alliances have been struck between victims and perpetrators, out of necessity, but sometimes also out of choice. Exploring and engaging in these practices was a means of inspecting the humanity of the other, crystallized in the heart.

The general perception that the Gacaca courts did not reveal the truth about the past implies not only that factual knowledge remains absent, but that a re-humanization and re-socialization of the other—the healing dimension of truth-telling—is not easily forthcoming.

Engaging the past in these daily practices and encounters had developed over the years. What we call truth telling, rendering justice, fostering reconciliation or providing compensation (or the reverse emotions, such as vengefulness or distrust) had taken root in the ambiguities of local life. Engaging the past became enmeshed in the

web of a tightly knit face-to-face community, difficult to understand from the perspective of an outsider who is used to different preconceived categories of what is taken for granted.

In any case, silence about the past was the order of the day. Things ‘from before’ were known or suspected but not spoken about aloud. The heart of the other person was only tacitly explored. The arrival of the Gacaca courts changed this situation significantly. They did not come as catalysts of a natural, if very difficult, process of cohabitation that had already started. They came to alter it in substance: as we have argued above, speaking, revealing or hearing the truth is the cornerstone of the court system. The (nature of) participation in the Gacaca sessions has become the activity to probe the (nature of the) heart of the other. From its installation, the truth had to be spoken in a state-sanctioned manner. The general perception on the part of the Rwandan people that the Gacaca sessions did not reveal the real truth about the past and therefore the truth of the heart for the ‘other’ is one of the most problematic aspects of the Gacaca court system. It implies not only that factual knowledge remains absent, but that a re-humanization and re-socialization of self and the other—the healing dimension of truth-telling—is not easily forthcoming. What Gacaca facilitated for some it disturbed or destroyed for others.

In the decade before the state-sanctioned installation of the Gacaca courts, the survivors of the genocide had to develop ways of living together and interacting with each other. Engaging the past became enmeshed in the web of a tightly knit face-to-face community, difficult to understand from the perspective of an outsider. Silence about the past was the order of the day. The arrival of the Gacaca courts changed the natural but difficult process of cohabitation that had already started.

3. Evaluation: strengths and weaknesses

Most of the features of the Gacaca have a strong and a weak side, either because there are two dimensions to the feature or because it is perceived from a different angle. An overview of the most striking characteristics follows. We present them along a continuum from the strongest (points 1–3) to absolute weakness (points 5–7). Point 4 at the centre of this spectrum embodies as many strengths as weaknesses.

1. *Ordinary Rwandans prefer the Gacaca courts over the national courts and the ICTR* for dealing with the genocide crimes. For the ordinary peasant the classical tribunals are both physically and psychologically remote institutions. Although their thoughts on the ICTR may be partly mediated by the media reports and sensitization campaigns, they sincerely prefer the justice of proximity, despite its problems.

Ordinary Rwandans prefer the Gacaca courts over the national courts and the ICTR for dealing with the genocide crimes.

2. *Women have taken up an important role in the Gacaca proceedings.* This is in line with developments in other domains of Rwandan society. The old Gacaca, like society as a whole, was dominated by men. While the genocide was equally mainly a male thing, women have come to play a key role in the reconstruction efforts. The Gacaca nevertheless remains biased against women because of its inadequacy for fully addressing sexual crimes. Provisions have been made to allow women to testify on sexual crimes, for example, through in camera sessions. But the embedding of the Gacaca in a local face-to-face community makes it difficult to tackle these crimes.

3. *The Gacaca proceedings are speeding up the backlog of genocide-related cases.* The Gacaca trials are breaking all records in quantitative terms. They will not only effectively deal with the approximately 130,000 persons incarcerated after the genocide, but also handle the thousands more who were unexpectedly accused when the Gacaca courts started operating on the hills in the countryside. There will be mass justice for mass atrocity, in quantitative terms. There is less certainty about their performance in a qualitative sense.

The Gacaca trials will not only effectively deal with the approximately 130,000 persons incarcerated after the genocide, but also handle the thousands more who were unexpectedly accused when the Gacaca started operating on the hills in the countryside. There will be mass justice for mass atrocity, in quantitative terms. There is less certainty about their performance in a qualitative sense.

4. *The Gacaca court system is contradictory.* Contradiction is ingrained in the Gacaca court system and the reconciliation process in Rwanda. The post-genocide political regime has adopted a discourse of reconciliation over the course of time but it does not want to give it the chance to succeed. It obstructs that which it facilitates at the same time. It has conceived and implemented the Gacaca court system in the name of unity and reconciliation, but the legal and social engineering within an ancient institution and the behavioural attributes—the practice of governing—of the post-genocide regime are the biggest stumbling blocks to a genuine form of reconciliation. The domains in which these contradictions are manifest include the following.

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The post-genocide political regime has adopted a discourse of reconciliation over the course of time but it does not want to give it the chance to succeed. It obstructs that which it facilitates at the same time. The legal and social engineering within an ancient institution and the behavioural attributes—the practice of governing—of the post-genocide regime are the biggest stumbling blocks to a genuine form of reconciliation.

(a) *Fine-tuning or disaster management?* The Rwandan Government has shown its openness to adjustment of the process over the course of time. Several changes have made the system more effective and efficient. The gradual changes have altered the system by incorporating more restorative components—the reduction of sentence after a sincere confession and the prominent place of community service. All in all, however, the modifications have come about

rather slowly and are relatively minor, as can be seen from table 1 comparing the 2004 and 2007 laws. And what looks like fine-tuning from one angle seems to be disaster management from another.

(b) *The court system is at once everything and nothing.* The changes and modifications have altered the Gacaca courts into a hybrid institution with elements of the original informal conflict resolution mechanism but now fully incorporated into the formal judicial system. This makes the court system innovative, with different traditions and objectives possibly reinforcing each other, but it also makes it fragile when the heterogeneous sources of inspiration and intended outcomes tend to be irreconcilable or might neutralize each other. The Gacaca courts are at one and the same time a centralized and a decentralized justice system: they embody the installation and completion of a process at the local level, while controlled and guided from above. It is also a formal and an informal way of doing justice. The courts are also a blend of retributive and restorative justice with ‘confessions *and* accusations, plea-bargains *and* trials, forgiveness *and* punishment, community service *and* incarceration’ (Waldorf 2006: 52–3). But, as is argued above, at their core lies retributive justice. They are, further, claimed to be home-grown, inspired by customary justice but in accordance with international human rights standards. Based on numerous observations of the practical functioning of the courts, we conclude that the Gacaca courts are a novelty, on the one hand, mimicking a traditional conflict resolution mechanism but with the reduced potential for reconciliation, while, on the other hand, they mimic the modern legal system, with a reduced guarantee of due process.

The Gacaca courts are a hybrid of the original informal conflict resolution mechanism fully incorporated into the formal judicial system—at one and the same time a centralized and a decentralized justice system—a formal and an informal way of doing justice and a blend of retributive and restorative justice. On the one hand, they mimic a traditional conflict resolution mechanism but with a reduced potential for reconciliation, while, on the other hand, they mimic the modern legal system, with a reduced guarantee of due process.

(c) *Peasants or judicial technicians: can the subaltern speak?* In Rwanda the real non-state administration of justice is taking place outside the Gacaca activities, in line with what is described in section 2.5. A thorough assessment and understanding of the social practices of the population in question is necessary to verify whether an adaptation or implementation of a traditional justice and reconciliation mechanism will be productive. The strength of traditional justice mechanisms probably lies in the fact that they function in line with the socio-cultural habitat of the population in their daily activities. This may not be seen as an effective way of dealing with the past from the perspective of a human rights body, but it is *the way of the local population*, partly out of necessity, partly out of choice. Paradoxically, the activities of the Gacaca to a certain extent go against the practices already developed over time to deal with the past. They do not fit into the pragmatism of the peasant’s lifestyle and are not adapted to the realpolitik of the micro-cosmos. This confirms their status as an ‘invented tradition’ and a rupture with the past. Moreover, there is a severe deficiency in the historical and cultural understanding of the ancient Gacaca, and the conception and implementation process of the modern Gacaca does not take into account the socio-political dimensions and consequences of the process. ‘We only apply the law’ has been the dominant response of the regime in general and the lawyers, and the majority of the non-governmental organizations, implementing and assisting the Gacaca process. A narrow legalistic approach can be a safeguard in the interactions with government officials in a closely monitored and tightly closed-off socio-political environment, but it also implies self-imposed partial blindness to a number of the elements at stake. A customary-inspired mechanism needs a culturally sensitive approach.

(d) *It is both too decentralized and not decentralized enough.* As is mentioned above, the ordinary Rwandan prefers the justice of proximity over national or international courts or other judicial bodies.

In Rwanda the real non-state administration of justice is taking place outside of the Gacaca activities, which go against the practices already developed over time to deal with the past, do not fit into the pragmatism of the peasant's lifestyle and are not adapted to the realpolitik of the micro-cosmos.

The fact that the Gacaca courts are operating in the natural living environment of those involved lives up to this desire. However, the Gacaca and the reconciliation process in Rwanda in general are an extremely state-driven, state-owned and top-down process with people abiding by the principles, mechanisms and discourses laid out for them. To give some examples: state officials became involved in a judicial procedure and circumvented the 'ownership' of the population

when they started filtering out 'real' category 1 suspects in order to reduce the number of accused in that category. Part of the truth cannot be spoken, as we will see again below: the state controls what can be aired, creating self-censorship within the population. At the same time, the Gacaca courts, with their harsh retributive powers, are too decentralized. They operate in the social constellation of local communities all of which are characterized by their particular demographic make-up, power structure and existing conflicts. This creates the possibility for people to forge alliances or the need to follow a certain strategy in the practice of 'accusing' or 'conspiring in silence', not necessarily reflecting the procedure envisioned. This is linked first and foremost to the capacities and capabilities of individuals. The power of authority, money or the gun allows some to influence the proceedings. But it is also a result of the power of sheer numbers, the (ethnic) composition of the collective. When survivors are few and isolated they tend to keep quiet in order not to be (physically or socially) eliminated from the community or their testimonies are partially ignored. When survivors are numerous, part of the (administrative) power structure and represented on the bench of the Gacaca courts, they have more leverage—a situation that can then create the feeling of powerlessness and arbitrariness on the part of released prisoners and the accused.

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Part of the truth cannot be spoken. The state controls what can be aired, creating self-censorship within the population.

(e) *Revenge, retribution or reconciliation?* We observed that the ritualistic coming together in the context of the weekly Gacaca sessions alters the strained relations, especially between the released prisoners and survivors. The importance of ritual in general, whether or not in the context of the use of a traditional conflict resolution mechanism in the aftermath of violent conflict, has often been observed, especially in an African context. But we need to distinguish between a ritual *sensu strictu* and the ritualistic dimension of a process to fully understand the effect of the

Gacaca sessions. The traditional Gacaca was not a ritual, nor is its modern version. It is the repeated act of coming together in the Gacaca sessions, irrespective of what is done there in the sense of content, that seems to have a transformative influence on social relations with those encountered in those meetings. But the substance of the encounters is handled according to the purely prosecutorial logic which limits the discursive aspects normally connected with ritual doings or the dialogical and healing dimension of truth-telling processes. The ongoing Gacaca activities demonstrate only a limited potential to evolve towards trust between ethnic groups, empathy for each other's position and losses in the conflict, and a culture of democratic deliberation and dialogue. This results from the fact that the Gacaca courts function according to the logic of criminal trials and not as small truth and reconciliation commissions. In that way, the Gacaca process perpetuates the cleavages it is supposed to eradicate.

(f) *Contextual factors hinder and facilitate the Gacaca proceedings.* The Gacaca trials are not taking place in isolation. Extreme poverty has made people resort to questionable tactics and strategies in the Gacaca proceedings. Survivors lack an adequate reparation policy. Families of convicted perpetrators lose the most important source of income when the head of the household is taken away to serve his sentence. Moreover, the rule of law has not yet taken root in Rwanda. Extrajudicial killings on the periphery of the Gacaca activities are seriously hampering the stated objectives. They instil fear within the population. Moreover, Rwanda is no democracy (yet). Freedom of choice and opinion are not easily forthcoming. People are guided in their choice during elections and the local administrative structures are conceived with a balance between appointed and elected positions. Authorities occupying appointed positions at the local level form a shadow government to the 'elected' administrative authorities. Accountability goes upwards to authorities higher up, not downwards to the population. All the key figures in the (local) administration are members of the RPF and most of them belong to the minority ethnic group. This usurpation of power by one ethnic group is noticed by the Bahutu population. Although they find it to a certain extent the natural consequence of a military overthrow, resentment spills over into the Gacaca activities. Although local authorities are not overtly active in the Gacaca process, they form the framework within which the Gacaca functions. In Hutu perceptions this often means that the combination of the Gacaca, with its reference to the pre-colonial past, and a power structure that is occupied by a politico-military movement dominated by members of the Tutsi minority is perceived as a return to the feudal period when Hutu servants were subordinate to Tutsi lords in all domains of life. The government installed and supports the Gacaca process. As a stated objective, the Gacaca tribunals need to arrive at the truth, reconciliation and accountability. The court system further needs to eradicate the culture of impunity. From this perspective the Gacaca courts are a legitimate and laudable policy initiative in their own right. But the practice of governing in other policy domains, the overarching institutional build-up and the perceived nature of power undermine the functioning and legitimacy of the court system.

The ritualistic coming together in the context of the weekly Gacaca sessions alters strained relations, especially between the released prisoners and survivors. It is the repeated act of coming together in the Gacaca sessions, irrespective of what is done there in the sense of content, that seems to have a transformative influence on social relations. But the substance of the encounters is handled according to the purely prosecutorial logic. The Gacaca courts function according to the logic of criminal trials and not as small truth and reconciliation commissions.

5. *Unpopular participatory justice.* The Gacaca courts derive their legitimacy from popular participation, but people are not very willing to participate. After initial interest, fatigue has set in. Fines and coercion have come to replace voluntary participation. This is not only because the process takes too long, but also because a majority of the Bahutu now experience the courts as a form of victor's justice through which they are unable to make their own claims.

6. *No truth in the Gacaca process.* One overarching and omnipresent opinion accompanies the Gacaca process: the truth is absent. This has serious consequences for the system in its essence and hampers its ultimate objectives. The surfacing of the truth functions as the cornerstone of the entire transitional justice architecture in post-genocide Rwanda, as we have argued. The reasons why there is no truth are multiple and complex (Ingelaere 2007). The 'truth' is, in the first place, curtailed by the a priori defining parameters of

what the 'truth' can be, methodologically and ideologically, but also by the features of Rwandan culture. The 'truth' is mostly 'forensic' because it is derived from a criminal procedure. It varies according to locality since it surfaces through the dynamic of local constellations idiosyncratically subverting and interpreting the truth-generating procedures. The 'truth', furthermore, has a high degree of instrumentality as it is sought through confrontation along group-based (mostly ethnic) lines, not deliberation or dialogue. It has a certain degree of arbitrariness resulting from the principle of 'confession and denunciation without

The general perception on the part of the Rwandan people that the truth is not emerging is one of the most problematic aspects of the Gacaca court system.

verification'. As a result the 'truth' is 'partial' in the sense of 'incomplete' and 'deformed', but also 'one-sided' and 'one-dimensional', lacking a broadly based contextual anchoring.

7. Reconciliation in jeopardy and a Hutu subculture in the making? The Gacaca courts are unable to deal with RPF crimes and revenge killings by Tutsi civilians. The genocide against the Tutsi minority cannot be equated with the civil war crimes against the Hutu population. The first was violence to exterminate, the second violence to avenge, subjugate and control. Nevertheless, the fact that the first is being dealt with and the second is eclipsed from view establishes a moral hierarchy of right and wrong, pain and suffering. The dissonance between popular embodied experiences and understandings of the conflict on the one hand and the government-controlled and government-produced way of dealing with the past, at the practical and interpretative levels, is one of the main obstacles to legitimizing the current socio-political order. It creates a mass of unexpressed grievances under the surface of daily life and the assiduous Gacaca activities, fermenting in the 'hidden transcript'. These are opinions and experiences that are not forgotten but simply not aired because *they are not expressible* through the transitional justice architecture that has been installed. Rumours—for example, the idea of a machine accompanying the Gacaca courts to destroy all Bahutu, or the idea of a double genocide—can be seen as a mere existential window on that popular social imagination. Claims by Bahutu that they suffered in the past are not a basis for a legal defence, and are certainly illegal when they are a part of genocide ideology, but they reflect genuine perceptions. A report on 'genocide ideology' reveals the extremely wide and unclear definition of what genocide ideology is (Rwanda 2006a). Its broad scope allows for a zealous, uninhibited and arbitrary use of

The fact that genocide against the Tutsi minority is being dealt with while the crimes against the Hutu population during the civil war period are eclipsed from view establishes a moral hierarchy of right and wrong, pain and suffering, and creates a mass of unexpressed grievance under the surface of daily life and the assiduous Gacaca activities.

force to eradicate not only genocidal tendencies but every slightest sign of non-conformity. As a self-fulfilling prophecy it creates, perpetuates or even enhances that which it is supposedly eradicating—a Hutu subculture. Breaking the cycle of violence—one of the objectives of the Gacaca process—needs to be based on a shared understanding of the origins of Rwandan society incorporating its innate and

complex Hutu–Tutsi bipolarity grafted on the struggle for power over time, while first recognizing its culmination point in the 1990s with *both* genocide and civil war(s) (Mamdani 2002: 266–70).

4. Conclusion

Since their inception, the idea of using the Gacaca courts to deal with crimes related to the 1994 genocide in Rwanda has circulated widely across the globe. Their existence is very well known, but knowledge of their nature and, most importantly, their actual functioning only started to surface after they were implemented nationwide in 2005. A comparison between the ‘ancient’ and the ‘new’ Gacaca has made it clear that the Gacaca courts are not a fully blown traditional justice and reconciliation mechanism. They are not the result of a gradual evolution but a novelty mimicking both an ancient dispute settlement practice and classical justice. Moreover, the in-depth insight in the micro-administration of justice in local communities, an overview of its outcome in terms of numbers of people accused and tried at the macro level and an anatomy of the nature of the societal process it has initiated (or, better, enhanced) temper the initial enthusiasm. The Gacaca courts are not a straightforward success. At the macro level we have seen that the system has strengths but that the process is overshadowed by its weaknesses. On the individual level, the Gacaca courts came to facilitate for some what they destroyed or disturbed for others, be it at the level of truth telling, seeking redress, holding accountable or creating reconciliation.

Could these weaknesses have been better foreseen and could they/can they still be adequately addressed? What are the prospects for the future, the cautionary lessons learned? An answer is not straightforward and not easily forthcoming. The summing up of strengths and weaknesses above gives hints about the do’s and don’ts.

The fact that the Gacaca courts suffer from a too extensive social and legal engineering campaign seems to be important. Moreover, the task that burdens the institution is extremely ambitious. Ambitions should be tempered and intrusion limited, after considering the Rwandan way of doing justice. It is important that the mechanism is built upon established and existing locally owned and socio-culturally inspired practices of ‘dealing with the past’, be it in the domain of healing, accountability, truth speaking or coexistence/reconciliation. This is only so to a limited extent in the case of the Gacaca. Its core is retributive, while the essence of the ancient institution was restorative. Observation indicates that the restorative aspect, for example, restitution at the level of the cell-level courts, works better than classical justice taking place among peers at the level of the sector-level Gacaca courts. Community service remains an important alternative and restorative penalty emanating from the Gacaca trials.

In addition, a thorough understanding of the dynamics and the unfolding of the violence on the periphery, the genocide (and war) out on the hills, would have made it possible to

design the system in such a way as to differentiate better between those at the top of the chain of command (even at the local level) and the rank and file. Changes in the system have to bring this about *ex post facto*. As is said above, all this can be seen as either fine-tuning or disaster management. It is in any case an operation to bring the system more into line with what is already existing in the population and feasible for the future.

Living together again is a practice that is forged locally. The state and its policies can facilitate or obstruct these practices. In Rwanda, both facilitation and obstruction are taking place—on the one hand through the contradictory nature of the design of the Gacaca courts, and on the other hand through the policies and practice of governing surrounding the court system. It seems important not to enhance the cleavages one is supposedly eradicating and to install and support inclusive policies that are not creating an ‘us vs them’ dynamic within the population, enhancing identities one intends to reconfigure (unless that which one says is not that which one wants, of course). It will be difficult to adjust the Gacaca process further in that regard. Time is lacking, and the process is well under way. However, the future leaves room for an inclusive development for all in one of the poorest nations in the world. Inclusion will be paramount in the transitional justice policies possibly upcoming, for example, the possible installation of a reparation fund. The Gacaca experience has shown the elements at stake and the avenues (not) to take.

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