The contribution of the *Gacaca* jurisdictions to resolving cases arising from the genocide

Contributions, limitations and expectations of the post-*Gacaca* phase

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ACKNOWLEDGMENT

The year 2009 marked the end of an era for PRI. After years of devoting itself to understanding and analysing the *Gacaca* jurisdictions, its monitoring and research programme came to a close.

Over eight years, PRI travelled across the country in search of facts, people and testimonies; this information formed a series of Gacaca reports which have been published by PRI since 2002. PRI has acquired unique knowledge about the *Gacaca* jurisdictions and this is largely due to the tenacity, patience, and analytical ability of the *Gacaca* team in Rwanda.

PRI is grateful to all of the men and women who have participated, in whatever way, to the monitoring and research programme on the *Gacaca* process.

PRI takes this opportunity to thank the National Service of *Gacaca* Jurisdictions which participated in and helped the smooth implementation of the programme. Likewise, PRI thanks national and international nongovernmental organizations, which inspired PRI in its work.

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PRI takes this opportunity to thank the National Service of *Gacaca* Jurisdictions which participated in and helped the smooth implementation of the programme. Likewise, PRI thanks national and international nongovernmental organizations, which inspired PRI in its work.

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Summary

The *Gacaca* jurisdictions were set up in 2001 in addition to the standard tribunals to take over ruling on cases arising from the genocide. They are now reaching their final phase. Most of the cases have been resolved, and the jurisdictions have begun to shut in some Sectors. Only a few thousand cases remain outstanding and these are due to be resolved by the time the scheme closes nationwide at the beginning of 2010.[1]

PRI has monitored the process from its inception and has fed back its findings through reports in which we made recommendations aimed at helping to improve the scheme. We ceased our monitoring activities at the start of September 2009. It seemed crucial, given the large amount of experience we gained, both to look back at the work carried out by our organisation, and to cast a wider look at the role played by *Gacaca* in resolving the genocide caseload, on its limitations and on the expectations of Rwandan society of the post-*Gacaca* phase.

In the first part therefore, this report will highlight the appropriation by the Rwandans of the resolution of the complex caseload arising from the 1994 genocide. Two *main* points were highlighted on the topic: on the one hand, the resort to neighbourhood justice processes involving the whole community, and on the other hand, the reinvention of mainstream mechanisms to assist the *Gacaca*.

These two factors without doubt represented the two major elements of the *Gacaca* process. The first enabled genocide survivors and genocide perpetrators to be brought together, and by so doing to free up communication channels. The second freed up the process and allowed the truth about the genocide to be uncovered through the foundation stones of the confession system and community service.

These factors were nevertheless affected by some difficulties to which we have often referred in our reports. We have in the past mentioned participation, a most crucial tool in eliciting witness statements on crimes often carried out by people against their neighbours. In many cases, the involvement was often more of a passive presence than active participation, caused by solidarity of silence motivated to the fear of reprisals.

We have often noted this in our reports.[2]

The operation of the *Gacaca* process has therefore been heavily influenced by its social and political context.

In the second part, we will analyse the limitations both conceptual and operational of the *Gacaca* process. The conceptual limitations come on the one hand from the twin objectives of

[1] Information given by The Executive Secretary of the SNJG, during the national coneference on unity reconciliation held on 9th December 2009 in Kigali. There were at that date 2,261 cases still outstanding before the Gacaca jurisdictions throughout the country.

[2] See for example Gacaca monitoring and research report: *The settlement of property offence cases committed during the genocide: Update on the execution of agreements and restoration orders*, *Penal Reform International*, August 2009, p. 39; see also: *Monitoring and Research Report on the Gacaca: Trials of offences against property committed during the genocide: a conflict between the theory of reparation and the social and economic reality in Rwanda, Penal Reform International,* July 2007, p. 70.

punishment and reconciliation assigned to the *Gacaca* process, and on the other hand from the limitations of forgiveness in the difficult social realities experienced by the parties. Some operational limitations are inherent in the running of the *Gacaca*. For example, it has been noted that trials did not always abide by fundamental principles of balanced and fair justice, displaying marked failings that affected the institution itself and by an acceleration of the trials that was prejudicial to the administration of serene justice. There were various other influences on the Gacaca caused either by political and administrative authorities or by the parties themselves that at times derailed the operation of the trials.

In the third part, we will present the expectations of the various actors of the post-*Gacaca* phase. It has become apparent that there is a need for a follow-on for the *Gacaca* trials; this could be in the shape of reconciliation forums that would carry out an in-depth analysis of the underlying causes of the genocide and also call upon the expertise of Rwanda's Righteous to further the reconciliation process by being the link between the various groups within Rwandan society.

As the *Gacaca* process reaches its conclusion, this report is designed to be a call to all actors and observers of the process to take into account its many facets and the expectations generated by its ending, and to integrate them into future approaches in dealing with the consequences of the 1994 genocide.

Glossary

C

Ceceka: Literally, "Keep quiet"; this expression was applied to people aiming to conceal information from the *Gacaca* process.

Cell: administrative level above the Village.

G

Gacaca: Literally, "lawn"; the *Gacaca* is a traditional conflict resolution system for neighbourhood disputes. By extension, it is the name given to new peoples' courts charged since 2005 with ruling on cases arising from the genocide. Their competence extends to passing judgement on the perpetrators of genocide crimes and other crimes against humanity in categories 2 and 3. Reforms currently underway are investigating extending their remit to some perpetrators of category 1 crimes.

I

Ibuka: Literally, "Remember"; this is the largest victim organisation for Rwandan genocide survivors; its mission is to fight for genocide survivors' rights and interests.

Interahamwe: Literally, "those who work together"; the paramilitary organisation of the National Revolutionary Movement for Development (MRND) political party.

Inyangamugayo: Literally, "honest person"; name used to describe *Gacaca* judges.

K

Kinyarwanda: Rwandan language, one of the three official languages, along with English and French.

N

NSGJ: National Service of *Gacaca* Jurisdictions.

S

Sector: Third level administrative area, above the Village (*umudugudu*) and the Cell.

U

Umuganda: Community service work carried out throughout the country and organised in each Cell. They are currently held on the last Saturday of every month.

List of abbreviations

AVEGA: (Association des Veuves du Génocide d'Avril 1994) Avega Widows, a genocide widows' association

NURC: National Unity and Reconciliation Commission

BTC: Belgian Technical Cooperation

ECHR: European Convention on Human Rights; also European Court of Human Rights

IDEA: International Institute for Democracy and Electoral Assistance

LIPRODHOR: A Rwandan human rights organisation (Ligue Rwandaise pour la Promotion et la Défense des Droits de l'Homme)

PULIM: Limoges University Press- Presses Universitaires de Limoges

PRI: Penal Reform International

OLR: Ottawa Law Review Revue de Droit d'Ottawa

NSGJ: National Service of *Gacaca* Jurisdictions

RSC: Revue de Sciences criminelles et de Droit pénal comparé

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Methodology

The research programme carried out by PRI since 2001 on the progress of genocide cases being tried by the *Gacaca* courts has aimed to supply the competent state authorities, and in particular the National Service of *Gacaca* Jurisdictions (thereafter NSGJ), with objective data used to support the establishment and implementation of these courts.

PRI has elected an "action research"[3] approach; this may best be defined as social research deliberately geared towards action; the action in question is a process of mentoring. The research carried out by PRI is aimed at collecting, analysing and putting into perspective all the data collected on the perceptions and practises of the various actors in the process- survivors, witnesses, accused people, judges and the population as a whole.

We used a qualitative and participatory approach to draw up this report, using a series of interviews, mostly semi-directed and one-to-one. Exploring people's perceptions requires a depth that can only be obtained through open questioning around pre-set themes.

The fieldwork was carried out by a team of 6 local researchers living in the areas where they carry out their observations, and supported by two research assistants based in Kigali who make frequent trips to the areas where the work is carried out. They each write up and analyse the collected data, with the support of a research director and two assistant directors; this data is then compiled, compared, cross-referenced and debated by the whole team in order to draw up our analytical and themed reports. The team also includes five translators and three typists, whose job is to transcribe and translate the tapes and reports submitted by the researchers.

We should at this stage point out that the interview extracts used in this report reflect the opinions of the people interviewed, and should not in any way be taken as representing the opinion of the group to which the interviewees belong. For example, an honest judge (*Inyangamugayo)* or a survivor quoted in the study does not speak for *all* honest judges or *all* survivors. Their words are quoted because they are illustrative of a strong trend within the data collected in the field during this research.

As soon as the preliminary results are available, they are reviewed and edited by the PRI researchers. The editing process mainly involves interpreting and analysing what is said. This report is based on this data, which is then proofread by experts or people with recognised experience in this field, but who are not part of the team.

Data used

This report is based on interviews carried out throughout the country's provinces within the various population groups. It is based on interviews conducted between June 2009 and September 2009 and on earlier data on the monitoring process of the *Gacaca*. The report also refers to studies carried out by other organisations and other researchers.

[3] GREENWOOD D.J. and LEVEN M., *Introduction to Action Research. Social research for social change*, SAGE Publications, 1998.

References

Interview extracts quoted in this report are referenced to the documents in which the information was collected, either as an observation of a situation, or spoken in an interview. The expression "*from our observations*" refers to one or more elements that figured frequently in much of the information collected.

Inasmuch as our interviewees' anonymity is guaranteed, only the person's role is cited in our interviews, and not their location. For this reason the particular Cell may sometimes not be mentioned.

Limitations of this research

We must express one major reservation, which is the possibility of bias being introduced through the translation process from Kinyarwanda into French. We take the utmost care to minimise the chances of this happening: a first translation is carried out from Kinyarwanda into French, and the French version is then checked by another translator who compares the two versions.

As we mentioned in earlier reports, this study does not pretend to be in any way exhaustive or representative in its observations or main conclusions. The results of this research will certainly attract criticism; it can of course be completed or cross-referenced with reports from other observers. Despite this reservation, the results presented in it are still significant and represent strong trends observed within the various social groups.

Introduction

PRI has been present in Rwanda since 1998, and monitored the *Gacaca* process from 2001 onwards; *Gacaca* started closing in the Sectors during 2009 and will be shut down throughout the country in the course of 2010.[4] PRI has covered the whole *Gacaca* process from its pilot phase until now in its various reports.[5] Since PRI brought its monitoring programme to a close in September 2009, it has become apparent that there was a need to use the experience gained to analyse the contributions and limitations of the scheme, but also as a way of introducing some perspective into the expectations of the system and into the challenges that will face the Rwandan authorities and whole population.

In order to achieve this we will firstly present an historical overview of the post-genocide situation, and secondly present the topic of this report.

1. *Historical overview*

In 1994, Rwanda experienced a genocide that claimed more than a million lives.[6] In the aftermath of this tragedy, there were more than 120,000 suspects in Rwandan prisons although the judiciary could handle only a few thousand cases a year.[7]

In tackling this huge challenge, the Rwandan authorities complemented the mainstream justice system with an ancient form of conflict resolution, the Gacaca, until then used to solve disputes within the community and to restore social peace and harmony.

An Organic Law of 26th January 2001 set up the "*Gacaca* jurisdictions", "considering the necessity, in order to achieve reconciliation and justice in Rwanda, to eradicate for good the culture of impunity and to adopt provisions enabling to ensure prosecutions and trials of perpetrators and accomplices without only aiming for simple punishment, but also for the reconstitution of the Rwandan society made decaying by bad leaders who prompted the population to exterminate one part of that society (...) [and] that it is important to provide for penalties allowing convicted prisoners to amend themselves and to favour their reintegration into the Rwandan society without hindrance to the people's normal life."[8]

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[4] Information given by The Executive Secretary of the NSGJ during the national unity and reconciliation conference held on 9th December 2009 in Kigali. There were 2,261 cases still outstanding in Gacaca courts at that date across the country.

[5] See www.penalreform.org.

[6] An official count carried out following a census in July 2000 and published by the Rwandan Territorial Adminstration put the figure at 1,074,017 dead; See Fondation Hirondelle/Hirondelle News Agency Arusha. Rwanda International Criminal Tribunal News, 8th February 2002. www.hirondelle.org.

[7] According to a UN study, at that rate it would have taken over a century to finish all the trials. See aussi CURRIN B., "Southern African Catholic Bishops. Conference Delegation to Rwanda": in *Justice and Peace. Annual Report, 1997*, p. 32, that estimated 500 years.

[8] See Law of the 26th January 2001 establishing the Gacaca jurisdictions.

The real innovation was to entrust elected judges, with the help of the entire population, with the task of judging people prosecuted for genocide and crimes against humanity committed between 1st October 1990 and 31st December 1994.

Between the 4th and 7th of October 2001 more than 254,000 "Rwandans of integrity" [9] were elected on the basis of their honesty.[10]

The *Gacaca* jurisdictions were set up at the Sector and Cell administrative levels. Each Cell has a Cell *Gacaca* jurisdiction, each Sector has a Sector *Gacaca* jurisdiction and an appeals *Gacaca* jurisdiction.[11] Cell *Gacaca* courts are deemed competent to try only property cases and their decisions may not be appealed.

The jurisdictions are constituted as follows: a Cell *Gacaca* court includes a general assembly, a *Gacaca* court seat and a coordination committee; Sector courts and the Court of Appeal comprise a general assembly, a seat and a coordination committee.[12]

The Cell general assembly includes all the residents of that cell aged over 18. Sector general assemblies are made up of the seats of the Cell *Gacaca* jurisdictions that make up that Sector, the seat of the Sector *Gacaca* court and the seat of the *Gacaca* Court of Appeal. Each seat is made up of nine persons of integrity and has access to five deputies.[13]

Four categories of genocide perpetrators were established by the Organic Law of 30th August 1996; these categories categorised people according to the role played by each person in the conception and execution of the 1994 tragedy. An Organic Law of 19th June 2004 reclassified the categories and reduced them to three in number.

The law also set up confessions, guilty pleading, excuse and repentance procedures; where accepted, these lead to commutation of half the sentence into community service work. Only civil reparation is deemed appropriate for property offences.

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[9] *Gacaca* judges are called *Inyangamugayo* in Kinyarwanda, which means "person of integrity".

[10] See the criteria Article 14 of Organic Law No. 16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca courts, that reiterates on this point the terms of the repealed 2001 Organic Law:
"Is a person of integrity, any Rwandan meeting the following conditions:
1. not to have participated in genocide;
2. to be free from the spirit of sectarianism;
3. not to have been sentenced to a penalty of at least six (6) months of imprisonment;
4. to be of high morals and conduct;
5. to be truthful;
6. to be honest;
7. to be characterised by a spirit of speech sharing."

[11] See article 3 of Organic Law No. 16/2004 of 19th June 2004.

[12] Ibid. article 5.

[13] Ibid. article 6.

The activities of the Gacaca jurisdictions officially began on 18th June 2002. An information gathering process began within the twelve Sectors in the Provinces and in the city of Kigali on 19th June 2002. During these sessions, three kinds of information were collected: genocide preparations within that Cell, the execution of the genocide, its repercussions in the Cell and the role of each accused person. The next stage consists in drawing up the list of accused persons, sorting them into the various categories and preparing their case files (or defendant's form).

In November 2002, there were 751 Cell *Gacaca* jurisdictions in 118 Sectors throughout the country that began their prosecution of cases in the pilot phase of the process. Data collection was extended to whole country from January 2005 in the 8,262 Cell *Gacaca* jurisdictions, or 92% of the 9,013 Cell *Gacaca* jurisdictions.

The case files of persons accused of first category crimes were transferred to the courts of each province and the city of Kigali; those of second category accused persons were transferred to the Sector level *Gacaca* jurisdictions, and those of third category crimes to the Cell *Gacaca* courts. The trials process began on March 10th 2005 beginning with the cases that had been transferred during the pilot phase, and was extended to the whole country on 15th July 2006.

In order to address the need for speed in ruling on cases arising from the genocide, Organic Law No. 16/2004 of 19/6/2004 was amended by Organic Law No. 10/2007 of 1st March 2007. In its first chapter, this law stated that a jurisdiction may have several seats where necessary. Sector Gacaca jurisdiction seats were therefore doubled in number, with 3,348 sector jurisdictions and 1,957 appeals jurisdictions coming into operation on that date.

Categories 1 and 2 were radically altered at the same time. The second category henceforth covered not only the perpetrators it already contained but also came to include high profile murderers, torturers, and those who had degraded the dead bodies of victims. These had until then been tried in mainstream courts because they came under the first category of crimes. By coming into the second category, they were henceforth to be tried in Sector *Gacaca* courts, whose remit was thereby considerably widened by restricting the scope of category 1 and widening category 2.

2. *Purpose of this report*

The *Gacaca* set up to rule on cases arising from the genocide is very different from the original one. Whilst the old *Gacaca* was a community meeting with powers to arbitrate and the power to organise their own functioning at a local level, the new institution looks more like a proper criminal court with a retributory remit; this is in stark contrast with the conciliatory nature of traditional *Gacaca* assembly decisions.[14] The new institution is a State-run mechanism, repressive in nature but appealing for help from the whole population. The old institution is in this way practically stripped of its substance, save for its local and participatory nature.

Using the *Gacaca* courts addresses a number of aims: speeding up the trials process, bringing the truth about the genocide out into the open, punishing perpetrators and bringing about reconciliation between Rwandans.

[14] NTAMPAKA C., "Rwandan *Gacaca*, participative, repressive justice", *OLR*, 2001.

These jurisdictions form part of the fight against impunity and thereby represent a departure from "protestative" law that was the standard way of dealing with ethnic crimes carried out in Rwanda, and that had given rise to increasingly widespread mistrust in the justice system.[15]

It is well known that the cause of extreme violence and crimes is often to be found in long lists of human rights violations carried out in total impunity. The *Gacaca* process will, from this point of view and in a similar way to mainstream jurisdictions and *ad hoc* criminal tribunals, represented a new policy on repressing the most serious crimes, with the particularity of involving the Rwandan population in the trial of cases arising from the genocide. This approach appears to have significantly contributed to enabling both perpetrators and survivors to speak out and contributed to making a certain amount of truth emerge on what happened. The *Gacaca* jurisdictions have also contributed to defusing a little of the mistrust and widespread suspicion that were palpable in the aftermath of the genocide.

Very quickly however, the limitations of the system appeared, both in terms of its conception and its operation.

As far as its conception is concerned, the combination of punishment and reconciliation, although commendable, particularly after an extremely violent conflict, revealed itself to be rather difficult to implement. Several factors explain this, including the extent of the crimes, the climate of suspicion and mistrust caused by the genocide and the relative effectiveness of compensation to victims.

The operation of the *Gacaca* have revealed that the courts are out of step with the requirement for balanced justice, a problem that has worsened since the process was accelerated to work through the genocide case trials more quickly. This gave rise to the heavy involvement of various political and administrative actors whose influence in the process has not always been positive. The process was also derailed at times by other obstacles such as corruption and bargaining between the parties, and at a more general level biased witness statements on what really happened.

Because of this, the end of the process had given rise to high levels of expectation and fear about the coming period.

The purpose of this report is to shed a bright light on a process that appears as an innovative project in resolving mass crime cases, but whose real contributions and legacy to transitional justice are far from causing unanimous agreement.

This report will be composed of three parts- the first part will cover the contributions of the *Gacaca* system to resolving the genocide caseload, the second part will cover the limitations of *Gacaca* as an institution and the third part will analyse the expectations of the various actors.

[15] According to *Avocats Sans Frontières*, *Justice pour tous au Rwanda*. Report Semestriel. 1st semester 1999, Bruxelles, Kigali, September 1999, p. 38.

<u>Part One</u>: Taking ownership of the resolution of genocide crimes through the *Gacaca* process

The localised resolution of cases arising from the genocide is a hitherto unknown home-grown response and an innovative mechanism in transitional justice. The aim of the Rwandan authorities was to enable the various actors to take ownership of the conflict resolution process through the Gacaca jurisdictions, and to prove that Rwandan society had the capacity to sort out its own problems using traditional justice. Another enormous challenge was the one posed by the huge backlog of cases arising from the genocide. We should remind the reader that in the aftermath of the genocide, there were more than 120,000 suspects in custody, although the mainstream judicial system could process only a few thousand cases a year.

Inspired as it is by a traditional conflict resolution institution, the *Gacaca* aimed to be form of participatory neighbourhood justice that would contribute to repairing the fabric of society. In this sense, it truly takes into account the meeting ground of the various actors and seems to be a crucial factor in determining the acceptability of the genocide process resolution process. There are two major elements in the contribution of the *Gacaca* jurisdictions to the resolution of genocide cases. The first is the gamble on a participatory neighbourhood forum whose effects we shall analyse. The second factor consists in reinventing traditional mechanisms, in formats and conditions that we will examine.

Section I The gamble of a participatory neighbourhood court

Resolving the genocide caseload hinges on the local nature of the *Gacaca* courts and is based on the participation of the population the effects of which require analysis.

A Proximity

The *Gacaca* courts, like the mainstream tribunals charged with handling cases arising from the genocide, are a form of neighbourhood justice. Conflicts are resolved within the community that experienced them by means of these neighbourhood jurisdictions. This option had certain benefits, by taking into account the home-grown character of a genocide that was committed by some groups on others.

Using neighbourhood tribunals also addressed the requirement for support to the principles of justice. This is especially relevant in Africa where ethnic and cultural diversity, complicated by issues of colonialism and cultural integration, are a source of division between official justice and traditional justice, between urban communities, more likely to make use of State justice systems, and rural populations who favour traditional justice systems. The *Gacaca* therefore makes more sense for part of the Rwandan population. The current format of the institution, stripped as it is of its traditional aspects, along with the gravity of the crime of genocide, will mean that any analysis can only be relative.
Furthermore, peer judgement is liable to affect the credibility of the institution particularly in the instance of a "genocide of the people",[16] which involved a large proportion of the population. In

[16] See KIMONYO J.-P., *Rwanda : un genocide populaire,* Paris, Karthala, 2008.

these conditions, entrusting the resolution of such cases to the community itself can only call in to question the impartiality of some judges and their ability to transcend their own experiences. Ethnic issues must also be taken into account since it was tensions and recurring crises that led to the 1994 genocide.

The *Gacaca* will at least have enabled perpetrators and victims to meet in the same forum, which is a not unimportant factor when the importance of the place of justice and its ritual are taken into account, especially in the resolution of violent conflicts[17]. Furthermore, given the deleterious situation and extreme mistrust that reigned in the aftermath of the genocide, this initiative appeared to be a means of bringing together the various protagonists in the conflict, of having an effect beyond than mere justice and of helping bring reconciliation to the Rwandans.

Resolving the cases internally would enable most of the perpetrators to be included in the process, people who ordinarily escape justice in this type of post-conflict situations and whom the international solutions often fail to reach. In Rwanda, because a large proportion of the population took part in the genocide, it was crucial to resolve the cases and punish the perpetrators due to the fact that they continued to live "on the hills" with the survivors.

This local approach is in stark contrast with the unaccessible nature of the International Criminal Tribunal for Rwanda (ICTR), which might seem somehow disconnected from the Rwandan population. Unlike the *Gacaca* courts, the ICTR is not a *delicti commissi* forum. Furthermore, the many operational problems that affected the early stages of the tribunal[18] caused a "crisis of representation"[19], or even of credibility[20].

Despite these objections it is crucial to underline the place played by international resolution of the most serious crimes. It steps into the breach left by State inertia in the face of the most serious violations of human rights and makes the struggle against impunity its guiding principle.
This analysis has highlighted the local nature of the *Gacaca* jurisdictions. We will next turn to another feature of the institution, participation.

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[17] On the importance of the place of justice and its ritual, See GARAPON A., L'âne portant les reliques. Essai sur le rituel judiciaire, Le Centurion, Paris, 1985.

[18]On these failings, see numerous commentators: GUICHAOUA A., "Tribunal pour le Rwanda de la crise à l'échec", *Le Monde*, 4th September 2002. A UN report highlighted them from 1997 onwards, BASSIR-POUR A., "Un report de l'ONU met en cause le Tribunal pour le Rwanda", *Le Monde*, 14th February 1997, p. 3. A new report from the UN internal monitoring department on 11th March 2002 denounced fraud in the legal aid section. A lawyer was struck off in 2001 following this affair. "Vers un fonctionnement des tribunaux internationaux mieux contrôlé", *Dépêches du Juris-Classeur*, Friday 15th March 2002, no. 3. On 19th May 2001, one of the defence team was called before the tribunal to answer charges of genocide and crimes against humanity; on the 6th December of the same year, a case was drawn up against a former member of the defence team http//www.diplomatie-judiciaire.com/Nouvelles.htm. In August 2002, the NGO *International Crisis Group*, questioned the impartiality of the tribunal by claiming that it was a "winners' justice" and noted the risk of having its mandate compromised. *Le Monde*, 4th September 2002, p. 3. More charges were levelled against the tribunal of incapacity to stand up to the current Rwandan government and to judge FPR members, particularly in the case of the assassination of the former president. On 9th March 2004, Judge Jean-Louis Bruguière implicated president Paul Kigame along with eight other people in the assassination, Le Monde, 11th March 2004, p. 3.

[19] SAINT-JAMES V., "Trois répressions du genocide rwandais", in *Apprendre à douter. Questions de droit, Questions on le droit*. Etudes offertes à Claude LOMBOIS, p. 763.

[20] *Ibid.* It is doubtless as a means of palliating these feelings of remoteness that the Tribunal is very keen on communication with the Rwandan people, in a definite "outreach" policy.

B Participation

The *Gacaca* process was essentially predicated on the active and voluntary participation of the entire population, which was formally invited to take part in the sessions.[21] Those who conceived of the process thereby intended to call to the assembly the memories of the whole community in order to establish the individual responsibility of genocide perpetrators through a community-wide debate enabling an exchange of information. Participation had a dual role: to reduce the mistrust and widespread suspicion that were common in the aftermath of the genocide and to encourage the truth to come out.

Participation in the *Gacaca* thereby brought perpetrators and survivors of the genocide closer together and enabled people to speak out. As in other post-conflict situations and in the aftermath of such serious crimes, both victims and perpetrators tend to retreat into silence. This is most noticeable in the victims, who often find themselves without the resources to deal with the unspeakable, and are left fearing that they will have to relive enormously painful events, since speaking about such things often means reliving them.

Perpetrators of crimes were therefore able to bear witness to what they had done thereby enabling victims to find out to a certain extent the truth of what happened, as well to locate bodies.

Participation has however dropped off over the years. During the first year, in the case building phase, there was large-scale participation from the population, with most meetings being held in front of at least 300 to 500 people, although often this was more a presence than active participation.

In the case of witness statements, people were frequently elected to stay silent, which may be explained by the phenomenon of *ceceka*[22] that we mentioned in previous reports.[23] The population was also often moved to silence by the fear of reprisals, which might be expressed as false denunciations of having taken part in the genocide.
Because of this, the authorities in charge of the process began raising the population's awareness of the sense in participating.

On top of silent participation, absenteeism has become increasingly widespread, especially since 2007.
The social and political context has heavily influenced the *Gacaca* process. The smooth running of these tribunals, in which the proof comes from witness statements given in front of a community

[21] Organic Law No. 40/2000 of 26/01/2001 setting up the "Gacaca Jurisdictions" and organizing prosecutions for offences constituting the crime of genocide or crimes against humanity committed between October 1, 1990 and December 31, 1994, repealed.

[22] This term means 'silence' in Kinyarwanda.

[23] See *Gacaca monitoring and research report: The settlement of property offence cases committed during the genocide: Update on the execution of agreements and restoration orders,* August 2009, p. 39; and: *Trials of offences against property committed during the genocide: a conflict between the theory of reparation and the social and economic reality in Rwanda, Penal Reform International,* July 2007, p. 70.

in which everyone knows everyone else, relies on peaceful social conditions and the freedom to speak out.

Tensions between victims and perpetrators of the genocide, who have had to live alongside each other since the process of freeing prisoners began in 2003, have also disrupted the process. The fear of speaking out before one's community has affected the freedom of speech that was central to the *Gacaca* process; some feared that being a witness for the prosecution would put them at risk of reprisals[24] or attract hostility from neighbours, whilst others feared testifying for the defence and risk being accused of making light of the genocide or even of being themselves accused of crimes.[25]

This lack of enthusiasm can be explained by various factors: trial fatigue in a population that was called to meetings as often as twice a week, when a day or even two a week at the *Gacaca* rather than in the fields means a considerable amount of time lost by *Gacaca* judges, most of whom are peasant farmers. This decrease in participation has considerably adversely affected the *Inyangamugayo,* whose task was to lead meetings that were supposed to establish exactly the individual responsibility of each accused person[26]. We should remind the reader at this point that the legal resolution of cases arising from the genocide as conceived of in the *Gacaca* jurisdictions mainly relied on the large-scale voluntary participation of the population, who were called to testify on what they had done, endured, seen or heard.

[24] According to *Human Rights Watch*, dozens of survivors and other others involved in the Gacaca have been killed over the last few years, and some people have also been murdered in revenge. See *Human Rights Watch*, Murders in Eastern Rwanda, January 2007.

[25] On the fear generated by the Gacaca courts, see *Gacaca*, *La récolte d'informations en phase nationale. Penal Reform International*, June 2005, pp. 50-51

[26] Art. 64 Organic Law No. 16/2004 of 19th June 2004.

These developments have enabled a greater understanding of part of the rationale that underlay the *Gacaca* system, some of its desired aims and especially their interaction with social realities in the field.

As mentioned above, the *Gacaca* process is based on a reinvention of mainstream mechanisms, which we will now examine.

Section II Reinventing mainstream mechanisms to benefit the process

In resolving cases arising from the genocide, the Rwandan authorities turned to hitherto unknown mechanisms in the country's legal system: the confessions and pleading procedures for example that played a major role in kick-starting the *Gacaca* process, along with the introduction of a community service programme, a format more usually reserved in other situations for minor offences.

Confessions were heavily encouraged to the extent that mention was made a "confessions promotion". This begs a few questions on the veracity of accounts received in this way, especially in the case of second category defendants who might have benefited from a commutation to community service of half their sentence. This aspect will be covered in the first section.

Some issues have been raised about the use of the second innovation, community service; its inception in the Rwandan context, as well as its method of implementation, raises some questions that we shall address in the second section.

A Confession takes centre stage

Following the genocide, more than 120,000 people accused of involvement were imprisoned. In order to speed up the trials process, the authorities resorted to a confession and guilt pleading procedure.

Based on the Anglo-Saxon *plea-bargaining* system, this procedure consists in negotiating confessions by offering in return a commutation of part of the sentence into community service.Widely considered to be the cornerstone of the *Gacaca* process[27], the confessions procedure is a real innovation in the Rwandan justice system.

Although the encouragement to confess is a feature of many countries that have experienced mass crimes, the demand for it in Rwanda was driven by a desire on the part of the political authorities and the judiciary to find a balance between retributive justice and reconciliation. By making confession more attractive through sentence reductions or accommodations, the intention was to establish the truth about the crimes committed and further the reintegration into society of those convicted.

Practice has shown that this initiative was not always fully understood, but that it was gradually adopted by the accused. We shall examine this in the first section, and in the second section attempt to understand the effects of it on the process.

1. From early reticence to enthusiasm among the prisoners

[27] See *The guilty plea procedure, corderstone of the Rwandan justice system, Penal Reform International*, January 2003.

Research carried out at the start of the process showed that the procedure was not well understood by the population[28]. Some genocide survivors stated that they had no trust in Hutus in general and Hutu prisoners even less, whom they considered to have either been willing perpetrators or accomplices during the genocide; none were deserving of either pity or forgiveness at that time.[29] Survivors also doubted both the ability and intentions of genocide perpetrators to make full and honest confessions. Other victims on the other hand wished to forgive those who had made full and frank confessions, especially if their own socio-economic conditions had improved.[30]

The prisoners themselves displayed a certain amount of mistrust towards the authorities whose promises to reduce sentences following confession were not entirely believed. Their suspicion was that it was merely a ruse to get them to confess.

From 1998 onwards, *Gacaca* courts were organised in prisons by prisoners themselves, during which lists of people who had committed crimes were drawn up: names, type of crime, place, etc… Some pre-*Gacaca* sessions then followed, that involved the court presenting the prisoners to the assembled population.

Later, a new element was introduced during these presentations, which was the presence at these assemblies of groups of religious detainees – most of them members of one of the many protestant communities. They stated that they have confessed because of their faith and enjoined those assembled to do the same. They would dance and sing about the need to speak the truth and rebuild the country, publicly confessed their crimes and asked for forgiveness from the people.

Initiatives from civil society, especially those of the churches, have doubtless encouraged some detainees to become aware of their responsibility in the genocide and to confess[31]. According to one bishop interviewed, the focus was firstly on convincing prisoners to subscribe to the change of heart process, and then to encourage other members of the local community to subscribe to it as well. This procedure also helps prisoners to find peace with themselves before moving on to a process of reconciliation with the victims of their actions.[32]

It was evident during these sessions that people were afraid of providing information on acolytes or accomplices who were still free, and of how members of the community would react during *Gacaca* assemblies and of reprisals. The *Gacaca* were however fairly effective, and the confessions recovered during these assemblies were used alongside other sources of information in classifying prisoners. They were also used to "pre-classify" prisoners who were to be bailed under the terms

[28] Apart from many male prisoners and some genocide survivors. Female detainees seemed to think that they applied only to the men. See *Les juridictions Gacaca et leur préparation. Report de la recherche sur la Gacaca*, July-December 2001, p. 30.

[29] *Ibid*, p. 31.

[30] *Ibid.*

[31] In an interview with the Prison Fellowship Coordinator in Rwanda, he stated that the main tool for encouraging confession was the Bible, particularly Luke 19,1-10. Interview with the Prison Fellowship Coordinator in Rwanda, 19 August 2009, not recorded.

[32] Interview with Monseigeneur John Rucyahana, Anglican bishop of Ruhengeri, 19th August 2009, no. 2519.

of the presidential Communiqué of 1st January, this communiqué also underlined the importance of the confessions and plea-bargaining procedures. Shortly after this communiqué, around 2,360 people were released, starting with the elderly and the sick; the second wave of releases liberated 19,500 more.[33]

Subscribing to the procedure might be motivated by other reasons than religious ones. This was aptly summarised by one correspondent:

> *"There are three categories of confessors. There are those who confess to benefit from the pardon conferred by the presidential communiqué. When these people were released, they were approached by the Gacaca that saw that they had only made a partial confession. These people often went back to prison. There are also some who confessed just to get their sentence reduced. There were also some who were remorseful and decided to come right out and own up sincerely. These were the ones who helped the Gacaca to uncover the truth about the genocide."*[34]

The confessions procedure had direct effects on the *Gacaca* system, which we will now analyse.

2. Effects of the confessions procedure on the *Gacaca* process

As a general rule, confession in post-conflict situations has two types of repercussions: judicial and social-political. This phenomenon must be analysed in the Rwandan situation, there implementing the confessions and pea-bargaining procedures was a crucial stage in the Gacaca process.

a. The place of confession in the judicial system

A confession, despite being presented as truth by the person uttering it, should not however be confused with the truth- rather it is a step towards the truth. A legal confession is more of a rewriting of history that may or not be corroborated. Accounts are then subjected to contradictory validation by the judges and victims. In the *Gacaca* system for example, confession is subject to a validation process set out in article 54 of the Organic Law of 19th June 2004 that states:

"To be accepted as confessions, guilt plea, repentance and apologies, the defendant must:

1. give a detailed description of the confessed offence, how he or she
    a. carried it out and where, when he or she committed it, witnesses to the
    b. facts, persons victimized and where he or she threw their dead bodies
    c. and damage caused;
2. reveal the co-authors, accomplices and any other information useful to the exercise of the public action;
3. apologise for the offences that he or she has committed."

[33] Freed prisoners spent two months in an "Ingando" that rehabilitated them to living life on the outside. People received instruction in these camps, on themes as diverse as unity and reconciliation, the Gacaca courts, principles of democracy and good governance, justice and human rights, development strategies in Rwanda, the place of the population in maintaining security, etc...

[34] Interview with a female survivor, 26th June 2009, no. 2472.

Confessions are supposed to make the process of establishing the facts a lot easier, and by so doing, represent the proof about the crimes committed. By the same token, it lightens the task of fact-finding and lessens the load on the judges.

In the context of the *Gacaca*, we can say that this aim has been partly achieved. Confessions gleaned from the accused have in most cases enabled accomplices to be identified and in some cases bodies to be recovered.

This is what some interviewees reported:

> *"People who went along with the confession of guilt principle helped to establish the truth about the genocide. A person who decided to make a sincere confession helped clarify a particular problem: when they owned up to what they'd done and identified their accomplices, they were able to go to those people and complete the information that wasn't clear. Confessions meant that justice could be delivered as well as make the hidden truth come out. If everyone had gone along with the confessions principle, the Gacaca process would have already reached its objectives."*[35]

> *"The confessions will have been of some use. A neighbour confessed to having killed my two sisters. He identified those responsible for raping them and confessed to having killed them. I went to see him in prison to ask him for information on what had happened because he had written to me to apologise. During our conversation, he told me everything. He was the first of them all to confess and plead guilty, and he told us the names of killers and looters. That was thanks to the confessions and guilty pleas process."*[36]

Confessing is first and foremost a personal process. "Confessing is not only the statement on a set of events but a truly personal decision through which the guilty person sets about mending their ways."[37]

In the context of the *Gacaca*, some accused people did not truly confess their share of responsibility in the events. This explains the stance of some "confessors" who made the most of the prospect of having part of their sentence commuted to community service by making partial or foreshortened confessions. This was one of the unintended consequences of the "promotion" of confession by the authorities. Many saw only the benefit they could get from it, without realising the repercussions of it - to afford the criminal a way back into society and a reconciliation.

Beyond the legal aspects, confessions also have an effect on the social-political situation; we will now outline these effects in the context of the *Gacaca*.

b. Effects of confession on the social--political situation

A criminal might feel a real social need to confess[38]; whether motivated by repentance or remorse, they then confess their offence spontaneously. The information revealed by the

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[35] Interview with a female survivor, 3rd July 2009, no. 2476.

[36] *Ibid.*

[37] Translator's translation. FRANCOIS J., "Aveu, vérité, justice et subjectivité. Autour d'un engagement de Michel Foucault", *Revue interdisciplinaire d'études juridiques* 1981, p. 177.

[38] CUAZ (A.), *L'aveu en matière pénale*, Thèse Droit Lyon, 1908, Arthur Rousseau éditeur, p. 1.

perpetrator of the offence enables his or her personality to be examined in depth, for their conscience to be examined. The outcome of the confession process will relieve the perpetrator of the moral burden of what he or she did, will remove some remorse for the wrong they did, and for whatever bad reasons they acted.

Confession, supposed to cleanse the criminal, can also contribute to establishing a kind of social, historical and healing truth.

The word "truth" has several different meanings. The first meaning is of factual truth, the matching of words and their object that involves the collection of information and answers the questions: Who, When, How many, How, Where, etc…

The second meaning is of a historical truth, about the meaning of events, their place in human history, their effect on contemporary people as well on future generations. It is this type of truth that allows a conflict to be analysed in its entirety across time and at various points. The justice system is not usually focused on achieving this type of truth. Furthermore, judges are not trained to take behave like historians nor are they in a framework in which they can be expected to do such work. The justice system does not aspire to achieve historical balance, nor did the Gacaca attempt such an undertaking.

By reiterating the principle of the struggle against impunity and by writing into the collective consciousness the need to punish such serious crimes, *Gacaca* nonetheless enabled some aspects of historical truth to be achieved, particularly through confession and testimonies on the crimes committed.

The testimonies and confessions heard in the *Gacaca* are the building blocks of a memory of the genocide, and henceforth occupy an important place in collective and individual consciences. Individual accounts often become the building blocks of a wider collective memory. It is hoped that recording and perpetuating these stories through the collective conscience will expunge from the social contract the conditions that caused that brought about the conflict in the first place. Archives of testimonies and on a wider scale memory-building policies are all aimed at avoiding the injustices of the past.

A collective memory thus recorded enables new ethical and political requirements for co-existence to be built, and for the conditions of a more peaceful future to be laid down.

> "*Gacaca also has played a role in developing a memory of the genocide; during the trials, confessions helped to find out where the bodies of genocide victims had been thrown. This allowed people to be buried with dignity during the commemoration."*[39]
>
> "The *Gacaca process helped the commemoration of the genocide, because during the Gacaca people said what had happened and that helped during the commemoration.*"[40]

[39] Interview with a female survivor, 23rd June 2009, no. 2450.

[40] Interview with a freed prisoner, 23rd June 2009, no. 2449.

"*Gacaca in its turn helped in the commemoration, the confessions that were given in the Gacaca showed where the bodies of the victims had been thrown and they were buried properly during the commemoration period*".[41]

This is a difficult aim to achieve because "memories of a mass crime, especially of genocide, are still felt in the present."[42] The question is how to lay down the foundations for living together while the past is still so painfully present. This is the challenge faced by the Gacaca process.

The third kind of truth, healing truth, is one that in post-conflict processes enables a country to rebuild the foundations of peaceful co-existence, by helping to heal people's hearts and return to social harmony.

Whilst proving that hearts have been healed is obviously difficult, our observations suggest that the truth objective, aided by the confessions procedure, has been instrumental in helping smooth down relations between the perpetrators of the genocide and the survivors. In most cases, confession enabled survivors to learn how their loved ones died and enabled them to be buried with dignity.

This was confirmed by various interviewees:

"*In truth if the Gacaca process hadn't been there, people wouldn't even have asked for water from their fellow Rwandans. We feel that the Gacaca allowed the truth about the genocide to come out. It allowed us to exhume and find our killed loved ones who had been left in the hills so that we could bury them in the memorial sites for genocide victims in our sector.*"[43]

"The trials process on genocide crimes was very useful to us. We didn't know where our loved ones had died, but those who did it told us through their confessions. Those who didn't want to confess were punished by the court."[44]

"*Truth is relative and I got what I wanted from the Gacaca process. I even gave a sheep to the man who owned up to having killed my father because I felt that he was telling the truth about my father's death. I was criticised for that but I don't give a damn because now I know everything I wanted to know about the genocide that took my loved ones."*[45]

"Truth means telling what you saw without lying or defaming anybody. The Gacaca process played a big part in making the truth come out, especially in collecting information and even though some people chose to remain silent. While the victims haven't found the places where their loved ones' bodies were thrown, you can say that the truth is still hidden, and the Gacaca process won't have achieved its aims. In fact you can't say that the trials are over until the truth is out."[46]

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[41] Interview with an Ibuka representative, 22nd July 2009, no. 2551.

[42] COQUIO C., *Rwanda. Le réel et les récits*, Belin, 2004, p. 122.

[43] Interview with a survivor, 29th September 2009, no. 2498.

[44] Interview with a female survivor, 26th June 2009, no. 2472.

[45] Interview with a group of survivors, 5th August 2009, no. 2511.

[46] Interview with a female survivor, 23rd June 2009, no. 2450.

> "*The truth about the genocide is what sheds real light on what happened during the genocide. Truth saves people, resolves conflicts and reconciles people to each other. But the truth that was expected in the Gacaca process was not said. There is still some hidden stuff, even if part of the truth got out.*"[47]

In summary, truth has three different levels: the perpetrators' level, through confessions of guilt; at the level of the population that witnessed the crimes; and finally the level of the victims who testified on what they'd experienced during the genocide.

> *"Gacaca helped both sides. It helped those who carried out the genocide crimes and it helped the victims. It was the meeting place in which everyone could say what they saw or experienced during the genocide. A person who had a great weight in his heart could put it down. Someone who had something hidden in them and had the opportunity to get it out in the open either of his own accord or through others was also relieved of that burden.*
>
> *Family members of those who had committed the genocide were quite suspicious and cold towards the survivors, but when the accused person was subjected after the trial to the sentence that fitted his crime, his family was relieved as well of this fog that hung over them. Especially since the true perpetrator was now known.*
>
> *As for the victim, they were also relieved if they managed to find out how their loved ones had been killed, who had killed them, and where their bodies had been thrown, and they were able to bury them in dignity. At that time they relieve themselves of a heavy burden by finding out what happened to their loved ones."*[48]

The supposed perpetrators of the genocide and members of their family also really appreciate the confessions procedure for its ability to exonerate those not guilty and find those who are truly guilty. The process has contributed to a certain extent to relieving the tensions that were palpable in the aftermath of the genocide. Before those accused subscribed on a large scale to the confessions process, the Gacaca process was struggling to operate because many genocide perpetrators were mired in silence.

The following extracts illustrate this:

> "*The confessions have been very useful in the Gacaca process. They encouraged those who had opted for Ceceka (to stay silent) to own up. Gacaca have worked well because of those who were in prison: their confessions influenced those still on the outside.*"[49]
> "*The confessions played a crucial role in the Gacaca. Before, if you wanted to find people who'd killed others, people would tell you that they were already dead. When people ion prison became aware of the confessions process, the truth came out and they confessed their crimes as well as naming those who were responsible but still free.*[50]

[47] Interview with an *Ibuka* representative, 24th June 2009, no. 2455.

[48] *Ibid.*

[49] Interview with a female survivor, 23rd June 2009, no. 2450.

[50] Interview with a freed prisoner, 23rd June 2009, no. 2449.

Implementing the confessions process, and more specifically its effects on second category defendants, who thereby had the chance to have half their sentence commuted to community service, considerably freed up the *Gacaca* process.

The *Gacaca* trials have certainly not however made the entire truth about the genocide emerge. A more in-depth examination of the conditions of these confessions leads to the conclusion that there is often a big difference between the truth and the content of the confession, and also that there are a number of unintended consequences linked to the perceived advantages of community service. The fact that some killers came from other areas means that it may be difficult to identify the perpetrators of genocidal acts in any given place. According to the social psychologist Simon Gasibirege, the *Gacaca* process will have caused between 30 and 40 % of the truth to emerge; from a sociological point of view this is not a bad result, since most of the population will be affected by it at this level.[51]

Some actors in the process judge that the truth did not emerge in its entirety in the *Gacaca* process. This was apparent in interviews carried out in the field:

> *"Truth in the context of the Gacaca is a big word. The truth most often in the Gacaca is what makes people look good and gets them off. Even the Inyangamugayo don't always tell the truth. Still, you can't say that there was no truth in the Gacaca, just that it's not unadulterated truth. Truth in the Gacaca means just jumping through a hoop."*[52]

> *"The Gacaca jurisdictions didn't reveal the whole truth but did contribute to it. They didn't really plumb the depths of things but they did play an important part in the search for truth."*[53]

Aside from the purely legal aspect, confessions encourage suspicions to be brought into the open and represent an undertaking for the future. In order to take his place in society, the criminal must show remorse in accordance with his conscience. A confession is supposed to be an example, a way of rebuilding the social pact, a tool for reviving human relationships." [54]

By confessing, the criminal acknowledges the basic principles that underlie the punishment to which the justice system is sentencing him, and to a certain extent punishes himself. The law can only be effective if it is taken assimilated into the social conscience, and a sentence can only be effective if it is understood and accepted by the person to whom it is given.

It can be said from this point of view that confessions in front of the *Gacaca* have helped to defuse a certain amount of suspicion and enabled a peaceful coexistence to begin. In the aftermath of the genocide, there was a lot of mistrust and suspicion in society, as was told by these interviewees:

> *"Before the Gacaca were set up, we were suspicious. We didn't open up to each other, we didn't say the truth. But I tried to talk to the wives of those who had done us wrong. Because the president himself had*

[51] Interview with Professor Simon GASIBIREGE, 18th August 2009, not recorded.

[52] Interview with a survivor, 30th June 2009, no. 2467.

[53] Interview with a female survivor, 26th June 2009, no. 2428.

[54] SUSINI J., "Aspects modernes de l'aveu, une authentique problématique sociologique", *RSC*, 1984, no. 4, p. 817 and following pp.

made moves to help them, I felt that I had to forgive them to help with the reconciliation. I knew the dead wouldn't come back to life and I had to live among these people. If I died they would be the ones who would be burying me since I have no near family. That was how it was until the start of the Gacaca process." [55]

"What makes me think that the Gacaca had been a good thing is that before it happened there was a lot of suspicion. Whenever any of the survivors saw a family member of those who'd carried out the genocide, in other words Hutu people, they confused them with the genocide killers. They had to call everyone they saw an Interahamwe militiaman since they didn't know who was really guilty of killing their loved ones during the genocide. When the Gacaca started operating, information was collected that stated who had played a key role in the genocide, who had taken part in lootings, in destruction of property, who had killed; usually once everything was clear, people were sentenced. In fact the picture we have is that there is less suspicion than before; we feel freer with our fellow citizens because we know that it was such and such a person who killed our loved ones; they have either asked for forgiveness or have been sentenced or have even completed their sentence. At the moment we have no problems."[56]

"Before the Gacaca came, there was suspicion between us but especially between victims and people who had family members in prison. Those people did not get on well together, they didn't have much regard for each other, but when the Gacaca arrived it put us together; it taught us the advantages of believing in the confessions system, in the pleas system, in repentance and in asking for forgiveness. People have stopped being afraid because they have been able to go to the victims and ask for their forgiveness and be granted it. Those who didn't take part in the crimes have been tried and found innocent."[57]

"It was difficult living together because of the climate of suspicion. I remember that after the genocide people would stare at each other. Suspicion coloured our relationships. You were afraid to go towards others, we didn't know who was guilty and who was innocent. Bit by bit from the Gacaca process guilty people who nobody knew about were unveiled. There were also some innocent people that everyone until then had thought were guilty."[58]

"Gacaca was very useful in helping people to live together. It enabled people to say what they'd done. It's also what enabled survivors to agree to forgive. Before Gacaca people lived together but in a climate of suspicion."[59]

This suspicion and mix of feelings seem to have lessened as the trials went on and that there was an impact on cohabitation between survivors and the families of the convicted.

This was confirmed by interviewees:

"If Gacaca hadn't come along people were going to take revenge, they might have killed each other or poisoned each other or start throwing insults at each other. The Gacaca process defused the tensions that were there. It had a big role to play in resolving conflicts within the population."[60]

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[55] Interview with a female survivor, 5th August 2009, no. 2511.

[56] Interview with an *Inyangamugayo*, 29th July 2009, no. 2497.

[57] Interview with a resident, 28th July 2009, no. 2493.

[58] Interview with a survivors' representative, 7th August 2009, no. 2511.

[59] Interview with a survivor, 23rd June 2009, no. 2449.

"The situation is still difficult because of what happened and it still isn't back to normal yet. There has been a gradual improvement compared to the early days though. This is due to the fact that the pain of the survivors is becoming less acute bit by bit, and they now know who wronged them. They know who owes them what. Now that they know who is guilty, a load has been lifted from them. They don't need to tar all Hutus with the same brush. They know who owes them what. In short, the tension has eased a little but there is still a long way to go. Psychologically things are changing."[61]

"Before confessing and pleading guilty, things were hard. Later, by appearing before the Gacaca jurisdictions we came to have better feelings. We now have a clearer conscience because we have good relationships with the people we wronged. We share food and drink, I have no more problems with them. When I was set free, I went to see the victims and asked for their forgiveness.
Now I don't have a problem with them. They ask me to their family parties. My conscience is now clear."[62]

"Gacaca brought people together, be they perpetrators or victims. Before, sorrow stopped us from having contact with them. Now, thanks to the Gacaca we have come closer together. We are closer to the wives of those who wronged us. We went together to the Gacaca court sessions. We ask them to help us with work in the fields, and they are always willing to do that. I don't think there's a problem any more: unity and reconciliation have really happened. They've helped us to sort out our differences. As always there are those who are happy and those who are unhappy."[63]

The Gacaca trials have not however resolved all the tensions and suspicion within the population, as is evidenced in the following interview extract:

"As far as living alongside each other is concerned, we must admit that Rwandans are both good and bad. *We tend to veil our feelings of animosity or friendship. As for co-existing, as I said before, I don't want to lie to you- there are still problems. People are still prey to their feelings. And it's still too early for relationships to be back to normal; fifteen years is quite a short time. I can't blame people. We're not intimate again yet, but superficial social relations are good. People help each other out. If someone dies, they are willing to help regardless of ethnic origin. If someone who killed your family members loses a child, you pretend to forget and visit him. But deeper relationships are still a problem. Wounds are not yet healed over, for a variety of reasons. People are still suffering after-effects such as poverty, illness, etc…."*[64]

In some cases, the trials have actually created tension or even frustration between survivors and genocide perpetrators. This is especially the case in the event of false testimonies or in property crime cases.

According to a NURC report, levels of personal mistrust within Rwandan society are still very high. Some 46% of the population and 71% of genocide survivors believe that the families of

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[60] Interview with a survivor, 30th June 2009, 2467.

[61] Interview with a survivors' representative, 7th August 2009, no. 2511.

[62] Interview with a person sentenced to community service, 26th June 2009, no. 2472.

[63] Interview with a female survivor, 5th August 2009, no. 2511.

[64] Interview with a survivors' representative, 07 August 2009, precited.

genocide crime perpetrators will always feel animosity towards survivors who accused them or testified against them.[65]

After analysing these cornerstones of the *Gacaca* process, we will now turn to another aspect that is innovative in several respects: community service.

B A new approach to community service

If there are as many victims as perpetrators in a conflict, carrying out justice becomes difficult. The problem is how to separate or even lock up a large proportion of the community when everyone has to continue living together. It is this issue that was addressed in the introduction of the community service programme into the Rwandan panoply of punishments.

It was conceived of in the Organic Law of 2001[66] whose organisation and regulation were determined by presidential order on 10th December 2001[67], and was further developed in the Organic Law of 19th June 2004[68].
Its implementation began in September 2005 with the opening of several pilot community service camps. In order to understand its importance, we should mention that more than 90,000 people were sentenced to community service and 20 783 people are currently completing their sentence[69]. The execution of rulings by these jurisdictions is therefore a major phase of the *Gacaca* process.
There are some particularities of the community service programme as it was introduced into the Rwandan range of punishments implemented to date. In all the other countries where community service exists, it is used only for misdemeanours and or for some crimes for which prison would be out of proportion with the offence committed. Here however the sentence is handed out to people convicted of genocide crimes.

Furthermore the way in which the community service has been implemented differs markedly from what happens in most countries which include this alternative to prison in their range of sanctions. In order to better appreciate the particularities of this form of punishment in the Rwandan context, we must analyse the rationale behind it and then examine its implementation.

1. The rationale behind community service

[65] See National Unity and Reconciliation Commission (NURC), Sociale cohesion 2005-2008, p. 59.

[66] Organic Law No. 40/2000 of 26/01/2001 Setting up "Gacaca Jurisdictions" and organizing prosecutions for offences constituting the crime of genocide or crimes against humanity committed between October 1, 1990 and December 31, 1994, repealed.

[67] Presidential Order No. 26/01 of 10/12/2001 relating to the substitution of the penalty of imprisonment for community service, Republic of Rwanda (2002) Official Gazette of the Republic of Rwanda, No. 3 entered into force 1st February 2002, repealed.

[68] Organic Law No. 16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994.
[69] See Report from Executive secretary of TIG, December 2009.

Community service was conceived of as a way of decongesting the prisons and of assisting convicts to be rehabilitated into society. The aim of community service as a tool, beyond its usual aim of rehabilitating individual convicts into society, is to rebuild social relationships and through them the whole fabric of society, leading to improved social cohesion in the post-genocide period. It is part of a national policy that combines repression of crime, unity, reconciliation and development, and can be seen as a means of calming down the resentment that would be caused by inflicting overly severe punishment that would adversely affect the reconciliation process.

Community service in Rwanda has a unique format.

In contrast with usual eligibility criteria for which it is usually used in countries where it exists (i.e. non-violent delinquents and misdemeanours), the people sentenced to community service in Rwanda are people convicted of genocide crimes; these are second category convicts, including perpetrators, co-perpetrators and accomplices of deliberate homicides or serious attacks that caused death, people who wounded with intent to cause death, people who had taken part in criminal acts without intention to cause death[70] and since the 2007 amendments, high profile murderers, torturers and those who committed dehumanising acts on bodies[71], crimes that hitherto belonged to category 1.
In order to be granted this alternative sentence, the defendant must confess his or her crimes and identify any accomplices. The Organic Law of 19th May 2008[72] states that: "A person sentenced to both a custodial sentence and to serve community service and if it is proved that the work was exemplary executed, then the custodial sentence shall be commuted into community service."[73]

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[70] According to Article 11 of Organic Law No. 10/2007 amending and completing Article 51 of Organic Law No. 16/2004 of 19/6/2004, the second category includes:
"Second category:
1. the well-known murderer who distinguished himself or herself in the area where he or she lived or wherever he or she passed, because of the zeal which charactarized him or her in the killings or excessive wickedness with which they were carried out, together with his or her accomplices;
2. the person who committed acts of torture against others, even though they did not result into death, together with his or her accomplices;
3. the person who committed dehumanising acts on the dead body, together with his or her accomplices;
4. the person whose criminal acts or criminal participation place among the killer or authors of serious attacks against others, causing death, together with his or her accomplices;
5. the person who injured or committed other acts of serious attacks, with intention to kill them, but who did not attain his or her objective, together with his or her accomplices;
6. the person who committed or participated in criminal acts against persons, without any intention of killing them, together with his or her accomplices."

[71] Organic Law No. 16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994, that entered into force on 19th June 2004 in the Official Gazette of the Republic of Rwanda, special publication, amended and completed by Organic Law No. 28/2006 of 27/06/2006 entered into force on 12th July 2006 and by Organic Law No. 10/2007 of 01/03/2007 entered into force on 1st March 2007 by publication in the Official Gazette of the Republic of Rwanda, no. 5.

[72] See Organic Law No. 13/2008 of 19 May 2008, amending and completing Organic Law No. 16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994.

[73] This represents a substantial of the previous legislation; the Organic Law of 1st March 2007 amended and completed the Organic Law of 19th June 2004, by stating that convicts should serve out one third or one sixth of their sentence in prison, one third or a sixth of the sentence is suspended, and the the rest is carried out as community work.

The assent of the convicted person was necessary for this sentence to be handed down. Under the terms of the Organic Law of 2001[74] and of the 2001 Presidential Order[75], community service could not be imposed on a convicted person. The 2001 Organic Law on the *Gacaca* states in this respect that "In case of a prison sentence with commutation of half the sentence into community services, the convicted prisoner may choose either to carry out the said community services or to serve the full sentence in prison."[76] The presidential order for its part defines community service as "the duty of a person convicted of genocide crimes or crimes against humanity to carry out instead of imprisonment and with their assent, unpaid community service work in a designated institution"[77] The 2004 *Gacaca* law[78] and the presidential order of March 2005[79] have since made the requirement for the convicted person's assent unnecessary.

Reactions to this sentence were mostly negative when it was first implemented. There were two main types of reaction: some people were incredulous, believing that a community service sentence was far too lenient for the crimes committed. Others viewed it as a chore. This perception has improved over the years, and the sentence is now increasingly perceived as a kind of State pardon.

One of the objectives stated by the authorities while implementing the community service programme was reconciling the Rwandans with each other. Before we examine how successful it has been in this respect, we must first note some of the obstacles.

The method of implementing the community service orders have certain characteristics that must be highlighted.

2. Implementation

There are two types of community service being implemented by the authorities: work camps[80] and neighbourhood community service carried out in the area where the convicted person lives. As far as this last type of service is concerned, article 32 of Presidential Order No. 10/01 of 7th

[74] Organic Law No. 40/2000 of 26/01/2001 Setting up "Gacaca Jurisdictions" and organizing prosecutions for offences constituting the crime of genocide or crimes against humanity committed between October 1, 1990 and December 31, 1994, repealed.

[75] Presidential Order No. 26/01 of 10/12/2001 relating to the substitution of the penalty of imprisonment for community service, repealed.

[76] Article 75 of Organic Law No. 40/2000 of the 26th January 2001, repealed.

[77] Translator's own translation of the text. See Article 2 of Presidential Order no. 26/01 of 10th December 2001, repealed.

[78] Organic Law No. 16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994, entered into force on 19th June 2004 by publication in the *Official Gazette of the Republic of Rwanda*, special issue.

[79] Presidential Order no. 10/01 of 7th March 2005 determining the terms of implementation of the alternative sentence to prison of community service, entered into force on 15th March 2005 by publication in the *Official Gazette of the Republic of Rwanda,* no. 6.

[80] 57 TIG camps are currently oprerational in the country.

March 2005 stipulated that a community service order should be carried out for three days a week and that on request by the host institution and the convicted person together the district or town committee may permit that periods of service of less than a year be carried out over a shorter period according to the work to be carried out. Article 35 also states that a placement must take into account the place of residence of the prisoner and the ability of the work to rehabilitate the prisoner into society.

Despite these legal stipulations, camp-based community service has proved to be the preferred option. Convicts work in these camps for 6 days a week and at least 8 hours a day. There are occasions when this option is justified because the numbers of people doing community service in a particular area are too low to be able to organise them into work parties in the neighbourhood. The cost of organising community service in such circumstances would be too onerous for the numbers of people involved. Another aim is to make groups of people sentenced to community service carry out significant large-scale projects. Moreover, community service time is halved if the service is carried in a camp because work is done six days a week instead of three in the neighbourhood.

Camp-based community service was contrary to the legislation in force at the time the camps were set up. The 2001 text stipulated that community service should be carried out by the convicted person in their district of origin (although not necessarily in the same Cell or Sector), and that any sentence to carry out community service outside their district of residence presupposed that the convicted person had agreed to it[81]. The legal texts have gradually adapted to the new status quo. In the presidential order of March 2005 for example, there is no longer a requirement for the convicted person to assent to being made to carry out his sentence in a district other than his district of residence.

In conclusion, community service is a useful mechanism for resolving cases arising from the genocide and may contribute to the reconciliation process. The conditions in which it has been implemented are however seriously affecting the chances of rehabilitating convicts and of optimum cohabitation between the social groups.
This first section has presented an assessment of the contribution of the Gacaca process in settling cases arising from the genocide. This innovative method of resolving mass crimes has in this way been well appropriated by local actors. By inviting the whole population to take part in the Gacaca, the Rwandan authorities wanted to bring justice to the very places where the crimes were committed. This local aspect along with the participation of the population has certainly affected how survivors and perpetrators of the genocide live alongside each other.

Similarly, the reinvention and adaptation to new contexts of mainstream mechanisms such as confession or community service seem to represent real efforts in the search for the best possible way of resolving cases arising from the genocide.

The successes of the Gacaca process should not however conceal worries about its limitations, some of which were raised at the time of its implementation and have subsequently materialised during its operation. This we shall examine next.

[81] See Article 30 of Presidential Order no. 26/01 of 10th December 2001, repealed.

Part Two: Conceptual and operational limitations of the *Gacaca* process; questions on the post-*Gacaca* phase

Despite its proven contributions to the resolution of genocide cases, the *Gacaca* system has displayed some limitations. The operation of the jurisdictions has revealed it to be over invested in expectations about its conception and its operation. The huge and hugely complex caseload and the unproven ability of the *Gacaca* to carry out effective reparation have heavily affected the hopes vested in the institution. One of these objectives was to punish and reconcile. It seems difficult, or even impossible, to make a single institution play both these roles. The failings of such an alliance have come to light during its operation; we shall now analyse this phenomenon.

The very structure of these jurisdictions, composed as they are of non-professional and often poorly educated judges, has heavily influenced their operation, and at the same time given rise to the risk of a range of intrusions.

A United Nations study concluded that the Gacaca "were not competent to judge genocide perpetrators nor even ordinary criminals."[82]

The operation of the *Gacaca* has to a certain extent borne out the worries that beset them when they were set up. We shall now examine this aspect after an analysis of the conceptual limitations of the system.

Section I Conceptual limitations of *Gacaca*

By implementing the *Gacaca* jurisdictions, the Rwandan authorities wanted to punish those responsible for the genocide, whilst encouraging reconciliation between Rwandans. Combining these two aims has revealed itself to be hard to achieve, so very different can they be conciliate. Justice can contribute to restoring social peace, but reconciliation seems to be a concept that is far wider that can be dealt with in a court of law. At best the court would be able to contribute to achieving reconciliation, in conjunction with other bodies. The juxtaposition of punishment and reconciliation in the *Gacaca* process appears in some respects to be a hindrance. This we shall examine in the first section. In the second section we shall note that the concept of forgiveness, as a part of the process, suffers from the ambiguous perception and implementation by actors involved with it.

A Punishment and reconciliation: an intractable problem?

The broad outline and implementation conditions of the national reconciliation process are bound by dynamics that are specific to each situation and to local particularities and wrapped up in the history of the conflict that they are supposed to resolve. In order to bring the genocide caseload under control, Rwanda opted for a policy of punishment and reconciliation, which brought about a whole set of problems in the interaction between punishment and the challenges of reconciliation.

[82] United Nations, "*Gacaca* : le droit coutumier, Report final de la deuxième phase d'enquête on le terrain", 1996, annex 1, p. 12.

Frédéric Gros has identified four sets of purpose, four complete motives justifications for a sentence: the law, society, the individual and the victim. These four motives are the four categories that inspire a sentence.

The first purpose of the sentence is to remind people of the law. The religious and moral argument predominates in this purpose; it is an argument that is linked to a taboo or a transgressed universal norm.[83]

The second purpose of the sentence is to defend society.[84]

The third purpose is re-education of the offender. This purpose, says Gros, is constructed around a psychological and educational argument that seeks to transform the convicted person. Punishment therefore means to educate. The argument here is of renewal and culpability, of a process of conditioning in which the person receiving the punishment will be presented as a educable.

The fourth and final purpose of punishment aims to build a relationship between victim and offender. The argument here is more of a legal and ethical one that aims to overturn the ethical slide into revenge to arrive at a relationship-based form or justice. The focus will be on recognition and self-esteem, rivalry and challenges, and the common ground between victim and criminal.

The punishment meted out, when reconciliation is aimed for, has at least two main characteristics: it represents an interface between individual and community and is also one of the threads that will start to reweave the social fabric. Crime is seen as an act that goes against the strong positions held by the collective conscience, and the corresponding punishment backs up rules that express social similarities essential and crucial to ensuring social cohesion.

A criminal trial is in this respect a forum for exchange and dialogue between miscreant and victim, and beyond them, a dialogue with the entire community. The punishment meted out takes on a symbolic dimension- "it is owed to the victim but also and more crucially to society."[85] It is a way of conveying to a person the fact that they belong to a common culture (...) to impress upon him or her or teach him or her basic taboos that underpin human relations."[86] Louis Assier-Andrieu aptly summarises this purpose of the criminal trial that, according to him, plays a three part role: handing down a sentence to the convicted person that reflects the cultural message that he is supposed to assimilate so that he can be reintroduced into a group of people whose relationships are orchestrated by institutions.[87]
Basing his ideas on anthropology and history, Paul Fauconnet has shown that punishment is a procedure designed to cancel out the act committed and to restore the faith that was damaged by

[83] See GROS F., in : GARAPON A., precited.

[84] *Ibid.*

[85] Translator's translation; *Ibid.*

[86] Translator's translation; ASSIER-ANDRIEU L., *Le droit dans les sociétés humaines*. Nathan, 1996, p. 273.

[87] *Ibid.*

the crime: "The punishment would punish the crime itself if it get hold of it to annihilate it"[88], he writes.

Punishment therefore becomes a vector for peace and for reconciliation; these are the objectives assigned to criminal sanctions within the *Gacaca* process. The problem however is whether these two aims are compatible. It will be achievable only if there is trust in the trial ability to pull the two aims together, which is not a certainty. The *Gacaca* trials certainly showed that the legal world can itself be a source of tension or even conflict.

Reconciliation as defined by the NURC encompasses a range of factors so diverse that they ably demonstrate the complexity of the concept:

Unity and reconciliation for the Rwandans is a range of practises among the people who believe that they share a nationality, a culture and rights, and who have mutual trust for each other, tolerance, respect, equality, complementarity, truth and are willing to help each other to heal the wounds inherited from the bad history they went through in order to arrive at a situation where they can evolve in complete peace."[89]

Others consider that reconciliation means "to sit down together once again, to start to talk again with each other to work out how to go forwards."[90]

IDEA[91] identifies four interdependent criteria or aims: to discover and tell the (historical) truth, to heal victims' wounds through confessions and request and receive forgiveness, to dispense healing justice, and to repair or compensate. These criteria and aims seem to be necessary in bringing about a reconciliation process in three stages outlined by the institution: firstly a non-violent cohabitation free from fear, followed by the rebuilding of trust, and finally development of a type of empathy, i.e. the ability to put oneself in the place of others and to empathise with their feelings and emotions.

There is now consensus in acknowledging that the process can take a significant length of time, as was stated by Archbishop Desmond Tutu on the subject of the South African Truth and Reconciliation Commission: (check quote) "The reasonable mission of our commission is not to reach reconciliation but rather to promote it."[92] Kriesberg's definition is similar, presenting reconciliation as a process: "*Reconciliation refers to the process by which parties that have experienced an oppressive relationship or a destructive conflict with each other move to attain or to restore a relationship that they consider to be minimally acceptable.*"[93] Louis Joinet's approach agrees with this, suggesting a phase of

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[88] FAUCONNET P., La responsabilité. Etude de sociologie. Alcan, 1928, p. 217.

[89] Translator's translation *Politique nationale d'unité et réconciliation,* National Unity and Reconciliation Commission, August 2007, pp. 4-5.

[90] Interview with M. Simon GASIBIREGE, mentioned ibid.

[91] *International Institute for Democracy and Electoral Assistance.*

[92] HAYNER P., *Unspeakable truths: confronting state terror and atrocity*, London Routledge, 2001. For other definitions, see: BLOOMFIELD D., BARNES T., HUYSE L., *Reconciliation after violent conflict, Stockholm: International Institute for democracy and electoral Assistance*, 2004; ASSEFA H., "Reconciliation", in *Reychler, L. & Pafenholz, T., Peacebuilding: a field guide*, Boulder: Lynne Reinner, 2001, pp. 336-342.

[93] KRIESBERG L., "Changing forms of co-existence", p. 60, in Abu-Nimer, Mohamed ed., *Reconciliation justice, and coexistence: theory and practice*, Lexington books, 2001, pp. 47-64.

straightforward conciliation in the first instance, because, he concludes, *"by seeking reconciliation too quickly ones risks turning compromise into compromise of principles."*[94]

Our interviews revealed that reconciliation has a highly pragmatic and realistic angle: communities are often acutely aware of the need to live together, and of the unavoidability of social relationships. This is not especially surprising in the light of the Rwandans' own definition of reconciliation as set out above.

The following extract illustrates this well:

> '*We understand what is meant by unity and reconciliation. As survivors, if you find yourself surrounded by people who are not survivors where that wasn't the case before, you'd better not reject gestures of friendship because you simply can't do without them. I feel that unity and reconciliation are crucial.*"[95]

What also emerged from our observations and interviews is the fact that some actors are fairly sceptical about the reconciliatory role of the Gacaca, as is shown in the following extracts:

> *'Gacaca is presented as a tribunal that's only there to judge, but reconciliation takes a lifetime. There is no law in reconciliation, but the Gacaca has law that it applies. It would be a mistake to say that Gacaca can make reconciliation happen.'*[96]

> *'I think that the role of the Gacaca in promoting unity and reconciliation is very limited (...) Even though reconciliation is one of the objectives of the Gacaca, its aim was far more to punish those who had committed crimes. The Gacaca had nothing to do with the reconciliation.'*[97]

B Forgiveness and reconciliation: theory vs social necessities

Reconciliation also presupposes that there will have been forgiveness, that crucial in a post-conflict situation. What sort of forgiveness is being sought in countries like Rwanda that have opted for legal resolution? Is that forgiveness compatible with legal punishment?

We must first note that in the case of mass crimes, we are in the realm of the unforgiveable and right at the outer edges of forgiveness. "Lord, forgive them not, for they know what they do,"[98] writes Vladimir Jankélévitch, of the "mad dog people"[99] who perpetrated Auschwitz, "that act that denied the essence of man as a man."[100] There was no question, according to Jankelevitch, of forgiving this "monstrous achievement of hate: to forget this immense crime against humanity

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[94] JOINET L., *Questions de l'impunité des auteurs des violations des Droits de l'Homme* (civils et politiques), precited.

[95] Interview with a female survivor, 26th June 2009, no. 2428.

[96] Interview with a survivor, 30th June 2009, no. 2467.

[97] Interview with a survivors' representative, 7th August 2009, no. 2511.

[98] JANKELEVITCH V., *L'imprescriptible. Pardonner? Dans l'honneur et la dignité*. Paris, Seuil. 2005, p. 2.

[99] *Ibid.*

[100] *Ibid.*

would be another crime for the human species."[101] Forgiveness is however necessary for victims and killers to be able to find the inner calm to live together in harmony.

To forgive can have two very different meanings. It is most often the will to forgive, for ethical and/or religious reasons, even if a person is still feeling hurt inside and has unsurmountable feelings. Forgiveness is a moral act through which one gives up on any type of revenge. This concept of forgiveness is most often found in religious settings, in which forgiveness is mandatory. The risk is that it can be illusory, "to believe that one has forgiven, and not to realise that feelings guide particular reactions, expressions of mistrust or aggressivity in relationships with others, and acts where the feelings are not acknowledged."[102]

Different from retribution, forgiveness is not merely the automatic wiping out of a debt. It does not belong to the legal world, notes P. Ricoeur; it is not even part of the law. It is distinct from the law both in its rationale and its aims.[103] The virtue of forgiveness is not in bringing a dispute to an end, but in laying down the foundations for the post-conflict phase, by establishing conditions that allow exchanges between the various protagonists.[104]

Forgiveness can be viewed as the ultimate expression of an ethical system that is based on generosity, and the absolute lack of vested interest. The hyperbole of the formal act of forgiveness as described by Jankelevitch is emblematic of a moral structure defined by the absolute need for it to be freely given. Forgiveness has three characteristics, says Jankelevitch.

Its first characteristic is that it is an event, an act. This trait of the "true" act of forgiveness sets it into a framework that presupposes the freedom of the offender: he recognises his wrongdoing without being pressurised.

The second characteristic is that there is relationship between two men, between the forgiver and the forgiven. The relationship of forgiveness happens between offender and offended against, without the intervention of a third party, be they institutional or not.

The third and final characteristic is that is complete, and beyond the law; it is a gift freely given, outside the law, a gift given graciously by the offended to the offender.[105] We must note that in this respect there is no automatic right to forgiveness; it is requested from another person, mainly from the victim.[106] Forgiveness as used in the *Gacaca* process questions the place of the individual in what has become a collective process. This is what survivors said, and most complained of the lack of individual action by killers:

> *"Perpetrators and their families, especially their families since most of them are missing, ask for forgiveness. I was lucky enough to survive, so a member of the family of those who did this should come to*

[101] *Ibid.*

[102] *Ibid.*

[103] RICOEUR P., *Le juste*, Paris, Editions Esprit, 1995, p. 206.

[104] *Ibid.*, p. 253.

[105] JANKELEVITCH V., *Le pardon*, Paris, Aubier, 1967.

[106] RICOEUR P., *Le pardon peut-il guérir*? Esprit, 210, March-April 1995, p. 82.

ask me for my forgiveness. To put my mind at rest, he should take the initiative to ask for my forgiveness."[107]

"Those who have asked for forgiveness for the crimes they've committed, either in the Gacaca or in prison, don't address their request directly to the victim. This might be because the perpetrators haven't yet got to the stage of really feeling and being struck by the severity of the crimes they committed."[108]

The interpersonal relationship that grows between victim and the perpetrator from the act of forgiveness should not allow contributions from the State or religious institutions to go unnoticed.

In the case of State intervention, there are some risks of manipulation; this is due to the desire to put an end to the dark past as quickly as possible.

"After my confession was read out in front of the Gacaca, they asked the people if there was anything to add, and they said there was nothing to add. Because I had finished my bit by asking for forgiveness, they asked the people if they agreed to forgive me, and they said they did. To do this, they asked those who agreed to prove it by putting their hands up, and they asked those who had abstained to come to the front to explain the problem so that it wouldn't come out later. They whispered a bit but those in charge of the Gacaca said that if they didn't want to come up they would sort everyone out one by one to make their position clear. That's when they said that they forgave me and they clapped. I think therefore that there are no more problems."[109]

As for the religious world, the irrational nature of mass crimes might suggest its involvement. Some people maintain that only God can forgive. Being forgiven means to receive (...) an act of love (...) that restores a situation of integrity or a positive relationship despite the wrongdoing."[110]

The influence of the religious sphere has become involved in the reconciliation process, which is not especially surprising in a largely Christian country. On the 18th of June 2002, at the official opening of the *Gacaca* jurisdiction process, the country's president Paul Kagame said: "Sins must be repressed and punished, but also forgiven. I ask the perpetrators to show courage and to confess, to repent, and to ask for forgiveness." This invitation of forgiveness into the resolution of cases arising from the genocide was reiterated some years later during an interview: "It is important that the guilty confess their crimes and ask for forgiveness from victims. On the one had confession will ease their conscience, but particularly these confessions comfort survivors who learn through them how their loved ones died and where their bodies were left."[111]

The authenticity of forgiveness, whether requested or granted, comes from within those involved. Forgiveness can be defined as the attitude of a person who, having been the victim of an offence, takes the initiative of cancelling out the moral debt owed by the offender, or who

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[107] Interview with a survivors' representative, 7th August 2009, no. 2511.

[108] Interview with a survivor, 30th June 2009, no. 2467.

[109]Interview by PRI with a prisoner freed by presidential communiqué of 2003, 28th September 2005, no. 987.

[110] *Ibid.*

[111] Interview with President Paul Kagame, by Colette Braeckman, in "Rwanda, dix ans après", *Politique International,* no. 103, Spring 2004, p. 417.

responds to a request for forgiveness from an offender repenting of the offence committed. The concept of forgiveness refers us to its corollary, which is the act of repentance. In religious practises, forgiveness is granted after a process of reconciliation in several stages and states: recognition of the offence, regret, confession and reparation.

Confession does not however discharge all responsibility. Acknowledging one's wrongdoing and being forgiven does not erase responsibility for the act. Both for perpetrators and for survivors, going through the various stages of this process will mean becoming involved on an individual and spontaneous level, which cannot possibly come from a collective invitation. It is possible that the call for forgiveness has skewed the process a little.

We should note that references to forgiveness made by the authorities sometimes cause confusion in the minds of both genocide perpetrators and survivors.

> *"Since the president himself was taking steps towards it, I felt that forgiveness was crucial to help the reconciliation process. I knew that the dead wouldn't come back to life and I had to live amongst those people."*[112]

Forgiveness has at times been bent by both sides to fulfil social or legal requirements. It could be requested by genocide perpetrators as a way of fulfilling the conditions of the confessions procedure and of benefiting from the community service option:

> *"This so-called forgiveness, requested in order to benefit from community service, or even to be let off repayment, is not true forgiveness. They ask for it to reduce their sentence but their heart is not free. Even those who agree to forgive aren't doing it 100%. This is obvious in relationships between the two parties. It's just camouflage."*[113]

> *"All of those who asked for forgiveness did so because they had to. They haven't got the choice. They are afraid of living out their lives in prison if they don't ask for forgiveness. They aren't being sincere by doing it that way, they just want to get out of prison. Once they're free, they forget everything and calmly back to their original place in society. I'll tell you why. I know loads of people who asked for forgiveness, but they won't go to offer to help the victims. They forget that they killed the child they relied on. Once they've asked for forgiveness in front of the Gacaca, they think it's all over."*[114]

Similarly, the victims sometimes grant forgiveness out of pragmatism, because they need to keep living alongside the perpetrators:

> *"We can't do anything more for these people. Rwanda belongs to all of us. It's our whole country that is responsible. If we refuse to forgive them, we could end up isolated. Who would we then be able to ask for help with fetching the water for example?*
> *I often ask a child of a perpetrator to fetch me some water, to help me carry things. The child does it. What else can we do? If we don't forgive, we risk living in isolation. We can't live with the plants, we can't have the birds for companions."*[115]

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[112] Interview with a female survivor, 5th August 2009, no. 2511.

[113] Interview with a survivors' representative, 30th June 2009, no. 2467.

[114] Interview with a survivors' representative, 7th August 2009, no. 2511.

[115] *Ibid.*

In some cases the feeling was that forgiveness was a given or at the very least a formality. Furthermore, forgiveness was often granted because there was no choice. Some survivors said that they had forgiven their attackers because the State had forgiven the criminals:

> *"People who forgive following a sincere confession don't forget their murdered family members. I forgave him because the State had pardoned him. I wasn't going to do otherwise because my family members aren't going to come back to life!"* [116]

This notion of State-mandated forgiveness is based on provisional releases of prisoners in 2003 and 2005 after a presidential communiqué, but is also founded in the institution of community service, which is often seen as a kind of forgiveness.

These developments have enabled us to identify and analyse the conceptual limitations of the *Gacaca*. We should remind the reader at this point that apart from the factors that have just been elaborated, the Gacaca revealed its own failings and problems that seriously affected its chances of providing optimal resolution of the genocide caseload. This is what we shall now examine.

Section II Operational limitations

The *Gacaca* has revealed multiple operational failings that may be grouped into two main categories: it is affected on the one hand its failure to abide by the principles of a fair trial, and on the other hand by various other influences.

A Failure to abide by principles of a fair trial

The *Gacaca* jurisdictions are hybrid institutions, borrowing both from tradition and from mainstream system. The articulation of these two aspects has had repercussions on the operation of the institution. This is especially true of the basic principles of fair trial that have often eluded the *Gacaca,* for reasons that we shall now examine.

1. Damaging failings

First among the failings in the *Gacaca* was the ineffectiveness of the adversarial principle. Central among the basic procedural guarantees, the right to an adversarial trial means that each party must be made aware -in order to argue them- all the pieces of evidence and information put before the judge with a view to influencing his or her decision. Linked to a certain extent to the principle of presumption of innocence, the fair trial principle really comes into its own during the trial phase when it regiments the exhibition of the evidence, which must be done orally and publicly. We must remind the reader that in the same way as the principle of matched weapons, the adversarial trial is an aspect of a fair trial.[117]

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[116] Interview by PRI with a female survivor, 14th December 2005, no. 1125.

[117] For a general overview of the concept, see Van DROOGHENBROECKK, *La Convention européenne des Droits de l'Homme, trois années de jurisprudence de la ECHR, 2002-2004*, Bruxelles, Larcier, 2006.

By this definition, the right to an adversarial trial must be effective. This effectiveness presupposes that the defendant has a real and not merely theoretical opportunity to become aware of the documentation and pieces of evidence presented in his case.[118] It has been observed that that this principle is not always respected.[119]

This failing is partly due to the absence of lawyers, despite being clearly forbidden by law. Defendants are therefore deprived of this basic right, under the excuse that having barristers present would disturb non-professional judges who have a limited knowledge of the law. By so doing, the principles of fair trial have been ignored. Defendants are therefore turning up to trials without having any awareness of the evidence against them and without enough time to prepare their defence.

The importance of this principle has been underlined because the right to a defense is one of the basic fundamental rights,[120] as recognised in Article 10 of the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights.[121]

On the national level, the Rwandan constitution underlines "the right to be informed of the nature and cause of charges and the right to defence are absolute at all levels and degrees of proceedings before administrative, judicial and all other decision making organs."[122] It goes on to state in Article 19 that "every person accused of a crime shall be presumed innocent until his or her guilt has been conclusively proved in accordance with the law in a public and fair hearing in which all the necessary guarantees for defence have been made available." The Civil Procedures Code states in Article 10 that: "No-one may be judged without having testified or been called to testify."

These failings reveal problems in the operation of the system but also show the limitations of the Gacaca jurisdictions themselves. It may have been preferable to limit the role of the Gacaca to a mere information-gathering one about crimes and their perpetrators. These jurisdictions could then have been used as an examining chamber leaving the judging phase to mainstream courts whose powers would be strengthened.

Another option would have been to develop a hybrid system that included professional judges. The Gacaca system as it was conceived and implemented seems to have deployed the entire range

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[118] In the Ocalan case for example, the ECHR ruled that it was inadmissible that the defendant himself should only have been made aware of the case against him – which ran to some 17,000 pages- for the first time at the first hearing. Ocalan (GC), para. 147.

[119] See especially: Testimonies and evidence in the *Gacaca* Courts*, Penal Reform International,* August 2008; and, *The settlement of property offence cases committed during the genocide: Update on the execution of agreements and restoration orders*. August 2009.

[120] ROUSSILLON H., "Contrôle de constitutionnalité et droits fondamentaux, l'efficacité des droits fondamentaux", in: *L'effectivité des droits fondamentaux dans les pays de la communauté francophone, Actes du Colloque international tenu à Port-Louis, Maurice, en October 1993, AUPELF-UREF*, Série "Prospectives francophones", Editions Eric Koelhler Fleury, France, 1994, pp. 371-379.

[121]Ratified by Rwanda in 1975.

[122] Article 18 of the Constitution of 4th June 2003.

of punishments provided for by the criminal courts without any of the guarantees -matching of weapons, adversarial system etc....

Another deplorable aspect of the *Gacaca* was its acceleration, due to the need to process the genocide caseload as quickly as possible. This had a not-negligeable effect, as shall be discovered next.

2. Impact of the acceleration of the process on its serenity

The speed with which the caseload from the genocide was processed became a recurring feature in the deployment of the Gacaca process. From 2007 onwards, the NSGJ emphasized the need to finish the process. In order to respond to this need, Organic Law No. 16/2004 of 19/6/2004 was amended by Organic Law No. 10/2007 of 1st March 2007;[123] in Article 1, this law stated that "a *Gacaca* court may have more than one Bench where necessary." *Gacaca* court benches were therefore doubled in number: there were 3348 Sector jurisdictions and 1957 Gacaca courts of appeal from that date. The various seats convened at the same time twice a week in many sectors.

Yet another amendment to the 2004 Organic Law came into force in 2008, widening the remit of the *Gacaca* courts,[124] and henceforth making them competent to judge some category 1 defendants, particularly rapists.

The wish to speed up the process, clearly expressed by the authorities from 2007 onwards, only increased the difficulties. The increasing acceleration of the process was somewhat at odds with the serenity required for the exercise of justice. Although each situation clearly requires precise and appropriate action in each situation, on the judicial level the problem of mass crime remains a major challenge for the judiciary, whose slowness in standard cases is a recurrent theme.
The speed objective sought by the *Gacaca* is in opposition to the requirement for serenity and fairness in trials. Judges are under pressure and cannot get into the detail of cases. Rulings are given hastily and defendants do not always have time to defend themselves. Witnesses are not always present because they cannot be present at two sessions at once.

Because of this change, people gradually lost confidence in the *Gacaca* process.

Voltaire aptly said: "a judgement given in haste is often without justice". This notion reflected the preoccupations of its time: the fear of arbitrary justice being rendered arbitrarily because if was too hasty. We now have a different view on this problem, people are now worried about slowness in the justice system. The truth is often more complex however, and it is up to the judge to find a balance between two often contradictory imperatives: to take their time in judging, but

[123] Organic Law No. 10/2007 of 1st March 2007 modifying and completing Organic Law No. 16/2004 of 19th June 2004 "*establishing the organisation, competence and functioning of the Gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity committed between October 1st 1990 and December 31st 1994"*: *Official Gazette of the Republic of Rwanda* of 1st March 2007.

[124] See Organic Law No. 13/2008 du 19 May 2008 modifying and completing Organic Law No. 16/2004 of 19th June 2004 "*establishing the organisation, competence and functioning of the Gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity committed between October 1st 1990 and December 31st 1994"* as modified and completed to date, (*Official Gazette of 1st June 2008*).

to be timely in delivering the judgments.[125] Judgements given late often have only a theoretical effect.[126]

Judging mass crimes brings two types of temporality into play. The first, the standard or real type, is chronological, experienced by every society. The other type is manufactured and is the judicial kind; this is the one that leads through a ritual process to the settling of a case. They are linked and represent the faces of the same coin. There can be and very often is a dichotomy between real time and judicial time. This is unbearable in normal times, but even more so in the case of mass crime. In mass crime, real time, judicial time and suffering time are interlinked and complicate the crucial reconciliation process if they are not kept under control.

A trial, like all rituals, turns back time. It combats finality by its capacity to reproduce the original time, to go back to a moment in time not yet wilted by passing years, a timeless time.[127] In truth the passing of time is inherent in the judicial process. The much-vaunted "distance" of the judge is not measured solely in relation to the defendant: it is also a distance in time. Serene justice requires distance, and thinking time is useful to both sides.

Even though the control over time effected by international law might differ widely from the control exercised by internal law, distinction must be made for types of law between content norms and procedural norms. Both aim to capture time: all law is a process of anticipation. The norms determine in advance individual behaviour and the terms of social relations in a formula that is used in the future. By so doing, and as long as it is respected, the law helps to stabilise situations.

This ideal relationship between law and time rarely materialises however, and even less in international than in national law.

The caseload of crimes against humanity and crimes of genocide actually require particular attention both in international and in national law.

B Multiple influences

The *Gacaca* process was always going to be subject to influences and intrusions of all kinds due to its very concept and functioning. First among the main influences affecting the institution are the lack of qualification of the judges and the political and administrative management of the *Gacaca* process.

Vested by law with the capacity to investigate, call people to appear, order preventive detention, but also to issue sentences, the *Gacaca* jurisdictions combine the powers of the traditional *Gacaca* tribunals, with those of mainstream courts, ordinary tribunals and even those of the Procurator of the Republic. They are real criminal courts vested with the full range of judicial powers. However, the vast majority of judges is not sufficiently qualified to handle such a serious caseload.

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[125] AGUILA Y., *Le juge et le temps, in Le Temps, la justice et le droit*, *Les Entretiens d'Aguesseau*, textes réunis par Simone Gaboriau et Hélène Pauliat, PULIM, 2004, p. 7.

[126] Hence the importance of the principle of reasonable delay contained in Article 6 of the ECHR.

[127] GARAPON A., *Essai sur le rituel judiciaire*, Ed. Odile Jacob, 2001, p. 60.

We noticed during our interviews with judges that a great many of them did not understand legal concepts such as intent, a key part of the definition of the crime of genocide, nor the concept of adversarial debate. This has resulted in heavy jail sentences without any proof of intent being given and with no respect for the adversarial system. These failings have been prejudicial to the fairness of trials because the judges did not have the required competence to lead complex trials requiring a large amount of legal knowledge.

Non-professional judges were asked to judge complex genocide cases. According to one interview carried out by Belgian Technical Cooperation (BTC), 92.7% of the *Inyangamugayo* were peasant farmers and 15.4% of them were illiterate.[128] These judges have however had to manage a huge and hugely complex caseload, bearing a heavy legal and historical responsibility.

This lack of ability to carry through such a complex process opened the door to interference not only from administrative and political authorities but also from the parties.

[128] Coopération Technique Belge, *Report on improving the living conditions of the Inyangamugayo*, November 2005.

In a previous report[129] we highlighted the questionable involvement of local administrative authorities in the process. These authorities have become heavily involved in the process and even more so since the arrival of the "performance contracts" that set deadlines, and whose compatibility with the serenity required in justice is questionable.

Local authorities were very present in the process, especially at the Sector level trials[130] and have at times influenced the running of the trials.

This criticism may also be levelled at the NSGJ, which is supposed to be a monitoring and coordination body for the *Gacaca* jurisdictions and which over the years has taken on astonishing numbers of prerogatives to the point of issuing orders akin to regulations on the *Gacaca* process. This is true of the "instructions" produced by an institution that has not always stayed within its remit.

These factors have often led to manipulation and derailing of the process by various actors, reducing judges' room for manoeuvre when they are torn between the parties and the administrative authorities.

Another cause of derailment noted in the process was corruption, which is reported as a fairly widespread phenomenon, but certainly rather difficult to prove.[131] Various factors have been identified as the cause, such as the poverty of the survivors, the desire of defendants to regain their place in society, the precarious financial situation of the *Inyangamugayo*, who are forced to neglect their usual work in order to carry out their role in the *Gacaca*[132], and finally the inclusion of performance contracts into the activities of the *Gacaca.*[133]

The second part of this report highlighted the conceptual and operational limitations of the Gacaca. It seems that from its inception, the system contained the kernels of the problems that appeared during its operation. The same is true of its rationale and structure.

Operational problems have also adversely affected the optimal resolution of the cases arising from the genocide.

We should not therefore be surprised that as the process came to an end, various actors expressed their worries and expectations of the next period. This is what we shall cover in part 3 of this report.

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[129] Testimonies and evidence in the *Gacaca* Courts. *Penal Reform international*, August 2009, pp. 42-48.

[130] *Gacaca* are held at two administrative levels: the former Sector (this term is obsolete since the administrative reorganisation of Rwanda in 2006, although the Gacaca continue to be administered at the old Sector level) level courts handle second category cases, and since 2008 they have also taken on first category cases; the former Cells handle property offence cases.

[131] See on this issue, for example, the LIPRODHOR Report of 2006, p. 71; also see *Les témoignages et la preuve devant les juridictions Gacaca, Penal Reform International*, August 2008, p. 49 and following pp.

[132] This aspect was highlighted in the testimony of one person of integrity during the National Reconciliation Conference organised by the NURC in Kigali on 9th December 2009. This person stated that their gacaca work was a sacrifice, a gift to help reconstruct the country.

[133] On all these points, see *Les témoignages et la preuve devant les juridictions Gacaca,* ibid.

Part 3: Expectations of the post-*Gacaca* phase

Whilst it is still too early to assess in detail the effects of the *Gacaca* and its impact on social groups, we should note that the reconciliation objective is still a major challenge. This assessment is based on several factors such as mutual ongoing mistrust between the parties, the financial precariousness of most of those convicted, who are therefore not able to compensate their victims of whom most are in complete penury, or the frustration produced by the Gacaca process itself.

It is not surprising that the end of the process has produced such heavy expectations. These are related in part to the vacuum that will be left by the *Gacaca*, and to the need to complete their activities by setting up social bodies.

In this respect it has appeared that a judicious way of continuing the genocide case resolution process would be to set up reconciliation forums. This is what we will examine in the first section. It has also become clear that using the Righteous as reconciliation facilitators might be a good idea within the reconciliation process; this is what we shall examine in the second section.

Section I Expectations of the reconciliation forums

The notion of reconciliation cited by actors in the *Gacaca* process is often in stark contrast with people's realities, so great are the disparities in conceptions and experiences, and also in socio-economic conditions, between the various social groups. As this report has shown, Rwandan tradition has wide range of definition for the concept, enabling signs of reconciliation to be inferred from some types of behaviour. Individual interviews with various actors have however revealed some of the enormous complexity surrounding the issue, and the feelings that hide the extent of the problem.

The issue of truth, although difficult to achieve in its entirety in post conflict situations, is affected in Rwanda by many different factors that have made its implementation more problematic. This true of the often deliberate silence adopted by people in front of the *Gacaca*, usually in order to avoid reprisals or to protect loved ones, and of the half-truths or biased confessions used as part of a cost-benefit assessment aimed at obtaining a sentence of community service. Finally, the problem of finding out the whole truth on what happened, combined with the ineffectiveness of reparation measures, appear to hinder the achievement of effective reconciliation.

It is therefore important, as this *Gacaca* process draws to an end to understand the social dynamics that it kick-started, in order to know how to continue it. The *Gacaca* has encouraged the emergence of social forums which it is important to reinforce and make permanent.

Interviews carried out in the field revealed the heavy expectations of the post-*Gacaca* period:

> *"There should be a place in which Rwandans could become reconciled. But there should also be a place where unresolved problems from the Gacaca could be resolved. There should also be educated Inyangamugayo who could resolve these problems with wisdom."*[134]

[134] Interview with a freed prisoner, 23rd June 2009, no. 2449, ibid.

"After Gacaca there should who could follow up to see whether the forgiveness that was requested has helped bring about unity and reconciliation. There should be a committee charged with making people aware of unity and reconciliation. There should be committees like this at Sector level, or even Cell level. This committee should be mixed, which is to say it should include survivors and perpetrators as well as those who didn't take part in the genocide and religious people. This committee should carry on working towards unity and reconciliation."[135]

"*I think that after Gacaca, the State should set up a programme to promote cohabitation within the population. It should promote activities that encourage people to meet each other such as community works but also in the shape of conversations that must be organised to enable people to swap views on what happened.*"[136]

This request for a post-Gacaca institution is also explained by the fact that the whole truth about the genocide is not yet known:

"*What's needed is for people to be brought together to tell the truth, things as they are without avoiding the truth (…). It should have been done under the Gacaca, but unfortunately it became just a formality. There wasn't true forgiveness for the offences carried out. Offenders didn't truly ask for forgiveness from the victim so that the victim could forgive him sincerely and for ever.*"[137]

Some people are aware of limitations in the institution, especially in its ability to bring about reconciliation. This report has demonstrated how difficult it is to make a legal institution do a work that is alien to it. This also transpired in interviews:

"There should be something after Gacaca that could play a role in bringing reconciliation to the parties, so that they can sit down together and say that what kept them apart is now over, no need to punish, just to tell each other the truth and overcome what happened, it's not a job for a judge, but just them and a conciliator who isn't there as a judge but as a mediator.
Gacaca as a tribunal only judged the perpetrators of the genocide, but it can't end the conflicts that keep people apart. It can't expurgate the crimes that were committed because not everyone is happy with the decision taken in the Gacaca. Person who were convicted say that justice wasn't carried out, whilst the victims say that the Gacaca is just a chance to grant a pardon to the criminals."[138]

"You can't really say that Gacaca cleared up all the causes of the genocide. Gacaca isn't a solution for disputes, it's just a court. Clearing up cases is a permanent solution. Gacaca dispenses justice but doesn't end the conflict once and for all."[139]

"Compensation for material losses isn't enough. That's the point of raising awareness as we did. We told them that mere payment for material goods was not enough, but that they would also have to approach each other and talk and open up to each other for wounded hearts to be able to heal." [140]

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[135] *Ibid.*

[136] *Ibid.*

[137] Interview with a survivor, 10th March 2009, p. 2467.

[138] Interview with a survivor, 30th June 2009, no. 2467.

[139] Interview with a minister of religion, 9th July 2009, no. 3483.

[140] Interview with an *Inyangamugayo*, 5th August 2009, no. 2505.

Apart from the expectations of reconciliation forums, our interviews revealed that the honest judges might also be able to take over from the *Gacaca*. We shall now examine this issue.

Section II The Righteous, facilitators of the reconciliation

In the search for continuity for the *Gacaca* process, using the Righteous may seem an attractive solution. These are people who saved people in danger during the genocide, sometimes risking their own life to do so.

These Righteous people were often inspired by humanist and/or religious principles. Whether they be religious people or not, many Righteous subscribe to strong humanitarian and humanist beliefs, which caused them to feel strong empathy for the victims. For some these beliefs come from the Christian tradition. What is different about them is that these values overcame any other consideration in them. As was shown by Ervin Staub, these Righteous people have a different perspective on events, going against mainstream norms and opinions and holding values often looked down upon by the perpetrators of these crimes and passive witnesses. They reaffirm the humanity of the victims.[141]

Their involvement in the reconciliation process might encourage the development of good practises. Highlighting their actions may encourage genocide perpetrators to rethink their own actions in the light of their own responsibility, by showing them that they had choices and that even now they can contribute to the reconciliation process by taking responsibility for their actions and repenting.

As far as the survivors are concerned, enhancing the role of the Righteous would enable the social links between the two groups to humanised, by combating the belief that *all* Hutus were responsible for the genocide, a belief that was likely to curtail any chance of closeness developing in what was a climate of mistrust and generalised suspicion.

The policy of acknowledging the Righteous began only ten years after the genocide, and have been paid homage in a ceremony involving various Rwandan actors. On this occasion, President Paul Kagame said:
"Particular homage must be paid to those men and women who displayed enormous courage by risking their lives to save their neighbours and friends. You displayed the highest degree of humanity, by risking your life to save another. You could have chosen not to do that, yet you did it anyway. For this reason you carry within you our hopes. There are people still alive today in Rwanda, people in this very stadium, who without your courage and bravery would have died ten years ago."[142]
Tribute was also paid to the Righteous by the Ibuka organisation: during the final part of the mourning ceremony it saluted "all those who did their best for human dignity."[143]

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[141] STAUB E., *The Roots of Evil. The Origins of Genocide and other Group Violence*, Cambridge University Press, 2002, p. 166.

[142] Address by President Paul Kagame on the 10th anniversary of the genocide, 7th April 2004.

[143] Closing ceremony for the mourning period, 19th July 2004, Gisozi Memorial in Kigali.

PRI had already highlighted the need to raise the profile of the actions of the Righteous as part of the reconciliation process. It seems that in the context of bringing peace and long-term reconciliation to the entire community, using the Righteous as examples was compelling.

Raising the profile of the actions of these Righteous people, and thereby underlining the notion of individual responsibility, contributes to the reconciliation process, because perpetrators are judged first and foremost on an individual basis; the reconciliation process will similarly be played out at the person to person level.

It seems however that despite the best efforts of the Rwandan government, the issue of the Righteous is still at the stage of symbolic recognition.

The notion of seeing the Righteous play a large role in the reconciliation process has been considered by the various social actors. According to Professor Gasibirege for example, they might represent "the cement of social relations, and will surely be called to play a large role."[144] This view is shared by other actors, such as the *Ibuka* organisation, which stated that "the Righteous will be relied on heavily in reconciling the Rwandan people."[145]

Burundi may also be used as an example in this respect. Programmes have been set up there to raise the profile of the Righteous. The RCN citizens' network for example had set up a project called "Appui à la culture des actes justes" (support for the culture of righteous acts)[146] that aims to "restore and promote positive cultural values in civil society in order to bring about harmony between the various parts of society (...)".

A Heroes summit held in April 2004 gathered more than a hundred ordinary people who achieved extraordinary things at the most difficult and dangerous times of the ethnic violence in Burundi. The aims of this initiative are to share experiences between heroes and local organisations working towards peace and reconciliation, to raise the profile of what these heroes did, to sketch out their role for the future as builders of peace, and for them to be celebrated by the authorities and civil society.

[144] Interview with Professor Simon Gasibirege, ibid.

[145] Interview with the executive secretary of *Ibuka*, 20th August 2009, not recorded.

[146] See RCN-Burundi, Appui à la culture des actes justes, Bujumbura, 2002.

Conclusion

This report has summarised the theoretical and empirical aspects of the *Gacaca* process. From this it has emerged that the scheme was expressed in very different ways at the grassroots level. As an internally generated forum for resolving complex cases from the genocide, the *Gacaca* appealed for the population's help in establishing the truth on crimes committed; it addressed the need for geographical proximity and participation of the population needed to make it acceptable. It also represents a symbolic break with the cycle of impunity in the same vein as the standard court system or the ICTR.

Introducing innovative mechanisms into the range of punishments such as the confessions procedure, and community service were also major features of the process. It is also undeniable that the *Gacaca* enabled an almost unbelievable speeding up of trials and the rapid handling of the genocide caseload. But at what price was this speed gained? This is a question that begs to be asked at a time when the process is gradually coming to an end. As demonstrated in this report, the advantages of the *Gacaca* very often also revealed themselves as being its weaknesses. This is true of the confessions procedure as well as of community service or even the acceleration of the process- by wanting to go too quickly, basic principles of justice were often overlooked, and with them the basis of a good administration of justice and the required conditions to make the parties feel that justice had been delivered. This was not always the case: the Avega organisation estimates that the *Gacaca* delivered justice in only 30% of cases.[147]

In the end it appeared that the most important aspect was to get the cases processed and judged; whilst the caseload was indeed a heavy burden for the country, it was nevertheless worthy of being handled in the best possible way, which in turn would left a lasting judicial and social and political legacy.

These failings and and/or malfunctions in the *Gacaca* have left a number of challenges for social actors in Rwanda, of which two are the most worthy of note.

Firstly is the issue of truth. The right to truth and justice are basic factors in the reconciliation process, in which they represent a necessary but not exhaustive step. This is not only the right of the individual victim or their family to find out what happened: "the right to know is also a collective right whose origin is historical, so that violations do not happen again."[148] The right to the truth is crucial factor in the reconciliation process, to the extent that the quest for new information-gathering processes appears not only to translate a desire to achieve the highest possible amount of truth on the genocide, but is also an indictment of the *Gacaca* process.

It seems on preliminary examination that the *Gacaca* process addressed these issues up to a point in the light of these criteria. As we pointed out above however, the process of establishing the truth is far from complete, partly due to the often partial nature of confessions, motivated by the prospect of classification of a crime into category 2, and bringing with it the chance of commutation of half the sentence to community service.

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[147] See les déclarations de la Secrétaire Exécutive d'AVEGA, in *New Times* 22 June 2009.

[148] See Mr Joinet's final report, in accordance with Sub-committee decision 1996/119: "Question de l'impunité des auteurs des violations des droits de l'homme (civils et politiques)", E/CN. 4/ Sub. 2/1997/20/Rev. 1, 2nd October 1997.

We must secondly consider the issue of the effectiveness of the reparation process in light of the often precarious socio-economic conditions of both survivors and of a large majority of those convicted.[149] As far as reparation is concerned, and despite the efforts deployed, it has proved to be neither entirely effective nor exhaustive, due to the fact that emotional damage is not included in the list of damages.[150]

This preoccupation is revealed in the following extracts:

> "*Reparation can be divided into two types: reparation of hearts and material reparation.*
> *As far as reparation of hearts is concerned, there is training organised in how to be a trauma counsellor, with instructions on how to make yourself useful to others. This training is one of the things that has helped repair hearts.*
> *The truth that came out in the Gacaca has played a big part in repairing the hearts of surviving genocide victims.*"[151]

> *"You could say that reparation has been done, from the time that a survivor finds accommodation within the community where he is supposed to reintegrate. If accommodation is made ready for survivors and when their goods have been compensated at an acceptable level, reparation will have been made to the survivors, but at the whole country level reparation will have been done when all the damaged goods throughout the country have been made good. If all that was put in place that would be one way of rebuilding the social fabric. So the instructions about repairing hearts should be stepped up, as well as the policy of unity and reconciliation so that it starts operating at the very local level of the Umudugudu.*
> *For those who are not able to pay, what's obvious is that the perpetrators were dishonestly encouraged by the bad State. That's why if it's possible there should be a fund to help those who are not capable of paying, since we're all part of this country. And those who committed crimes were dragged into it by the bad State and now we have a good State. This fund should be topped up by all Rwandans and all the friends of Rwanda."*[152]

> *"Given the speed at which the damage was caused, it's hard to repair it. We can't put things back in the state they were in. Victims will never forget the wrongs that were committed against them. They can't have all their goods back. But we must try. I can't say how much reparation must be made in order to be acceptable. (...) no reparation can be complete. Satisfaction will come of its own accord."*[153]

> *"Reparation isn't possible. Even the scars of visible wounds will not go. Wounds to the heart will always be there. Despite these wounds, we survivors must accept that life will go on."*[154]

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[149] On the topic, see our last report*: The settlement of property offence cases committed during the genocide: Update on the execution of agreements and restoration orders. PRI August 2009.*

[150] See especially on this topic our last report: *The settlement of property offence cases committed during the genocide: Update on the execution of agreements and restoration orders. PRI August 2009*

[151] Interview with a female survivor, 24th June 2009, no. 2455.

[152] *Ibid.*

[153] Interview with a survivors' representative, 7th August 2009, no. 2511.

[154] Interview with a female survivor, 5th August 2009, no. 2511.

"People wronged you by killing your loved ones. They come out in public to say that they killed your child, your husband and your parents. You forgive them, and they go home. But when you ask them to repair the damage they've caused, they are more resentful than you.
If they compensated us willingly, that would help us to forget what happened during the genocide, people would renew their relationships and would be reconciled. They would become united again."[155]

In the post-*Gacaca* period, it is the very format of the criminal trial that must be challenged, so much at odds with the scale of the crimes against humanity it is, both in quantity and in severity."[156] Hannah Arendt underlined perfectly the profound impossibility of scaling the criminal trial format up to cope with mass crime. On top of the considerable practical obstacles, it highlights the very fact that this wrong, unlike other criminal acts, supersedes and breaks down all legal order. Antoine Garapon wrote that "mass crime overpowers the capacities of human justice. This is inherent in its very nature, infiltrating to the very core of mechanisms that were supposed to protect citizens from violence."[157]

In the light of what we have just said, it can be noted that the *Gacaca* attempted to stay close to the reality of the genocide by reinventing mechanisms and adapting them to the Rwandan context. *Gacaca* will have left behind a sizeable legacy of lessons in transitional justice.

Due however to the obstacles inherent in mass crimes on the one hand, but also due to the failings of the *Gacaca* system itself, this innovative mechanism for resolving mass crime has shown glaring limitations, both in its concept and in its operation.

At the end of the process,[158] both positive and negatives effects of the experience will have to be taken into account by the Rwandan authorities, civil society and the research community in order to generate appropriate strategies for resolving the genocide caseload in the best possible way.

[155] Interview with a female survivor, 26th June 2009, no. 2428.

[156] GARAPON A., *Des crimes qu'on ne peut ni punir ni pardonner. Pour une justice internationale*, Odile Jacob, 2002, p. 272.

[157] *Ibid.* p. 275.

[158] It should be noted that most cases were handled by the jurisdictions and that the closure is continuing within the sectors and is due to end nationally at the beginning of 2010.

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Annexes

Bilan du classement quantitatif et qualitatif

- **Entretiens effectués par les enquêteurs et assistants de 2001en 2009**

Qualité de la personne interviewée	Nombre d'entretiens effectués
Associations et Religieux	121
Autorités	295
Accusés	97
Juges Gacaca	525
Prisonniers	85
Libérés	235
Population	649
Partie payante (relatif au crime contre les biens)	38
Rescapés	374
Tigistes	84
Témoin devant Gacaca	34
Acquittés	5
Condamnés	13
Huissiers[159]	2
Aveux	27
Batwa	5
Juste	26
Famille détenus	46
TOTAL	**2.661**

[159] Remarquez que ce sont des huissiers professionnels, car ceux de l'Etat ont été rencontrés entant qu'autorités

➢ **Rapports d'Observation des juridictions Gacaca effectués par les enquêteurs de 2002 à 2009**

Juridictions / Provinces	Juridictions de Cellule	Juridictions de Secteur	Juridictions de Secteur Appel	Total
Butare	9	89	19	**117**
Byumba	17	68	40	**125**
Cyangugu	17	91	40	**148**
Gisenyi	41	130	84	**255**
Umutara	15	85	38	**138**
Kigali-Ville	4	33	26	**63**
Kigali-Rural	1	33	17	**51**
Kibuye	20	162	88	**270**
Ruhengeri	0	45	28	**73**
TOTAL	**124**	**736**	**380**	**1240**

- **Suivi des entretiens traités par l'équipe des traducteurs de 2002 à 2009**

Qualité des Thèmes personnes abordés	Assos.	Autorités	Coordo. Gacaca	Juges Gcca	Libérés et Acquittés	Accusés et condamnés	Population	Religieux	Fam. Tig.	Rescapés
Ingérence	10	22	10	18	0	12	25	0	0	33
Cohabitat°, Réconciliat°, Réintégrat°	50	20	10	21	40	22	42	2	10	22
Phase de jugement	17	13	23	106	7	28	31	3	11	69
Processus Gacaca	59	47	16	90	10	20	50	14	12	44
Corruption	13	11	10	35	20	22	14	2	7	25
Restitution, réparation	7	45	0	7	14	66	21	10	10	22
TIG	10	30	1	20	20	40	12	2	10	11
Exécution de condamnation	5	35	0	0	20	36	25	2	10	51
Témoignage	11	13	4	5	16	15	31	0	11	45
TOTAL	**182**	**236**	**74**	**302**	**147**	**261**	**251**	**35**	**81**	**322**