

WHAT JUSTICE FOR RWANDA?

GACACA VERSUS TRUTH COMMISSION?

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INTRODUCTION.

One day after the Presidents of Rwanda, Juvenal Habyarimana, and of Burundi, Cyprien Ntaryamira, were killed in a rocket attack on their plane, on April 6th 1994,¹ the Rwandan capital of Kigali dissolved into terror and chaos as disparate Hutu troops led by the *interahamwe* as well as police forces, followed by civilians, went on a rampage, killing Tutsi and moderate Hutu. In fewer than a hundred days, 800,000 Rwandans throughout the country lost their lives, four million refugees fled their home to seek protection in camps, located inside and outside Rwanda, and innumerable numbers of people either died as an indirect result of the genocide through disease, malnutrition, or depression or suffered from non-deadly violence.² In this tiny country

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¹ The two leaders were returning from Dar es Salaam in Tanzania, where they and other African leaders met in an attempt to end years of ethnic warfare in their countries. According to a Belgian investigation, some evidence has emerged that extremist Hutu carried out the attack (in order to spark a coup), and that foreigners were also likely involved, though whom the foreigners were working for remains a mystery (see, BONNER R., "Unsolved Rwanda Mystery: The President's Plane Crash", in *The New York Times*, November 12, 1994).

² See, e.g., DALY E., "Between Punitive and Reconstructive Justice: the Gacaca Courts in Rwanda", in *New York University Journal of International Law and Politics*, Vol. 34, No. 2, 2002, pp. 359-396; DES FORGES A., *Leave None to Tell the Story: Genocide in Rwanda*, New York, Human Rights Watch, 1999; DRUMBL

of central Africa, every one plunged into the horror either as a victim or as a perpetrator, sometimes as both. After the massacres and the fleeing of the former government officials, a multiethnic government, led by the leaders of the rebel forces, came into power. For the last eleven years, Rwandan officials have promoted justice and reconciliation, but the country still faces a very long haul.

Following the mass killings, national and international trials set out to punish perpetrators, promote peace, and foster national reconciliation. However, it appeared quickly that neither the national judicial system nor the International Criminal Tribunal for Rwanda (I.C.T.R.) could reach – even close to – these goals.³ The latter suffers from a difficult relation with the Rwandan government, daily dysfunction, internal bureaucratic conflict and insufficient resources, which can explain the minuscule figure of fifteen verdicts in eleven years. The former faces a tremendous task of judging 130,000 suspects although the judicial system was all but destroyed in terms of personnel and infrastructure and thus incapable of coping with such a large number of cases. Therefore, in order to achieve justice and reconciliation, the government has

M., “Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda”, in *New York University Law Review*, No. 75, November 2000, pp. 1221-1326; GOUREVITCH P., *We Wish to Inform You that Tomorrow We Will Be Killed with Our Families: Stories from Rwanda*, New York, Farrar, Straus and Giroux, 1998; LYONS R., “The Rwanda Disaster: United Nations; Refugees’ Plight Is Worsening, Relief Workers Tell U.N.”, in *The New York Times*, July 22, 1994.

³ See, e.g., BONNER R., “Rwanda Prison Fills With Targets of Political Vengeance”, in *The New York Times*, January 1, 1995; LORCH D., “As Rwanda Trials Open, a Nation Struggles”, in *The New York Times*, April 7, 1995; MCKINLEY J., “Rwanda’s Past Again Vies to Be Prologue”, in *The New York Times*, November 24, 1996; MCKINLEY J., “On 1994 Blood Bath in Rwanda, Tribunal Hews to a Glacial Pace”, in *The New York Times*, November 21, 1997; EDITORIAL, “Looking Back at Rwanda”, in *The New York Times*, December 17, 1999.

resurrected, in April 1999, a traditional civil dispute resolution process, *gacaca*, which literally means “justice on the grass or on lawn” in Kinyarwanda and refers to “the grass that village elders once sat on as they mediated the disputes of rural life in Rwanda.”⁴

In this article, I shall argue that in addition to *gacaca* courts, a truth commission is needed in order to promote justice and above all, foster reconciliation in post-genocide Rwanda. In the context of transitional justice, retributive justice, which seeks justice and focuses on the perpetrators, appears to be inadequate to lead a society towards reconciliation. Therefore, some forms of restorative justice, which emphasize the healing of the whole society, seem necessary. In Rwanda, *gacaca* courts and a truth commission, two modes of restorative justice, are complementary. The former can bring justice, the latter can seek the truth; both crucial ingredients of a peaceful future for Rwandans. The essay opens with the discussion of the nature of the genocide and the responses to post-genocide Rwanda’s crisis. The second and third parts present the two modes of restorative justice: respectively the existent *gacaca* system and a theoretical framework for a truth commission. The comparison and the combination of both approaches in view of the double goal of justice and reconciliation in post-genocide Rwanda conclude this article.

⁴ FISHER I., “Massacres of '94: Rwanda Seeks Justice in Villages”, in *The New York Times*, April 21, 1999.

WHAT JUSTICE FOR RWANDA?

A. Pre- and Post-Genocide Rwanda.

Every genocide is unique. Indeed, the experiences of survivors – and perpetrators – differ, the historical context from which the violence emerged vary from case to case. A second proposition derives from this uniqueness: the responses to a genocide must be thought in the context of the massacres, the healing process must meet the needs of the society in order to allow it to engage in the path of reconciliation. Therefore, the social geography of the post-genocidal Rwandan society should determine policy responses to the extermination of 800,000 Rwandans. To understand clearly the underlying forces which led to the mass murders and then assess the responses adopted by the Rwandan government, I shall discuss first the 1994 events and their context.

1. Pre-Genocide Rwanda.

The extent of the inter-relationship between the Hutu and Tutsi is a highly contested and controversial issue.⁵ For some, ethnic rivalries between the majority Hutu and the minority Tutsi in Rwanda and Burundi have been a major ingredient in the life and politics of both nations since each became independent from Belgium in

⁵ See, e.g., DALY E., *op. cit.*, pp. 358-360; DRUMBL M., *op. cit.*, pp. 1243-1244.

1962.⁶ In both countries, before the independence, the Hutu had long been the subject to the political domination of the minority Tutsi elite. In Rwanda, after the independence and the subsequent civil war, the Hutu gained power and hold the fate of the country until the mainly Tutsi forces of the Rwandan Patriotic Front (R.P.F.) overthrew the official government in July 1994.

In contrast, for others, Hutu and Tutsi cannot properly be called distinct ethnic groups, they are Banyarwandan. Inter-ethnic marriages were common and mitigated the physical characteristics that once distinguished the Tutsi – tall and thin – and the Hutu – short and broad.⁷ Moreover, they speak the same language, worship the same God, share many of the same cultural traditions. The complexity of this situation explains the controversy and the contestation around the causes of the Rwandan genocide.

2. The Genocide.

The death of President Juvenal Habyarimana, on April 6, 1994, triggered the mass murders in the land of thousand hills. Mark Drumbl argues that the genocide “was organized by the Rwandan government, supported by local authorities, and

⁶ The Belgians played an important role in the construction of ethnicity in Rwanda. For instance, in 1933-1934, they introduced identity cards that indicated the ethnicity of the holder.

⁷ See, e.g., GOUREVITCH P., op. cit., p. 48; MAMDANI M., *When Victims Become Killers*, Princeton, Princeton University Press, 2001; PRUNIER G., *The Rwanda Crisis: History of a Genocide*, New York, Columbia University Press, 1995, pp. 370-400.

undertaken by ordinary men and women.”⁸ The violence was driven by a shared rationale, social norm: “the government, and an astounding number of its subjects, imagined that by exterminating the Tutsi people they could make the world a better place, and the mass killing had followed.”⁹ In contrast, the violence can be seen not only as the result of an ethnic problem but as a political one. The extremist Hutu leaders planned the massacres of both moderate Hutu and Tutsi politicians by fear that they would lose power as a new multi-ethnic government ruled the country.¹⁰

Whether the violence that occurred in Rwanda from April to July 1994 was ethnic or political – probably both, the rest of the world witnessed it but hardly did anything. The failure of the humanity filters through *Shake Hands with the Devil*. Lt. Gen. Dallaire, alike many authors, holds accountable the international community, especially the first world nations and the U.N., for not preventing the break out of the genocide, for not intervening while the killings were occurring and finally for being unable to deal with the massive flows of refugees.¹¹ Furthermore, the continued indifference of the international community for the Rwanda crisis becomes apparent from the (un)use of the “g word”. The genocide was not recognized, at first, as a

⁸ DRUMBL M., *op. cit.*, p. 1245.

⁹ DES FORGES A., *op. cit.*, p. 203.

¹⁰ BONNER R., “Rwanda's Capital Calm After War Moves On”, in *The New York Times*, July 12, 1994.

¹¹ BARNETT M., *Eyewitness to a Genocide: The United Nations and Rwanda*, Ithaca, London, Cornell University Press, 2002; DALLAIRE R., “The Changing Role of Human Keeping Forces: The Relationship Between UN Peacekeepers and NGOs in Rwanda” in WHITMAN J., POCOCK D., *After Rwanda: The Coordination of United Nations Humanitarian Assistance*, London, New York, MacMillan Press, St. Martin's Press, 1996; DALLAIRE R., *Shake Hands with the Devil, The Failure of Humanity in Rwanda*, New York, Carrol & Graf Publishers, 2003.

genocide.¹² Although the United Nations, through the voice of its general secretary Boutros-Ghali was angrily condemning the massacres and calling them a genocide, neither the United States, nor the other powers, did describe the atrocities committed in Rwanda as a genocide but yet conceded that acts of genocide may have occurred.¹³ Four years after, President Clinton acknowledged for the first time that “we did not immediately call these crimes by their rightful name: genocide.”¹⁴ Moreover, the United States and the United Nations, along with other nations, recognized the bitter truth and consequences of their inaction to respond to the greatest peril occurring in Rwanda four years earlier.

3. Post-Genocide Rwanda.

The uncontrollable spasm of lawlessness and terror left Rwanda ravaged by ethnic hatred and political turmoil. The newly self-established government quickly

¹² See Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly resolution 260 A (III), December 9, 1948. Genocide means “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group” (art. 2). The same definition is used in the article 6 of the Rome Statute of the International Criminal Court (U.N. Doc. A/CONF.183/9*, July 17, 1998).

¹³ The refusal to call the Rwandan genocide genocide is to be mainly found in the legal obligation (from the 1948 convention, which was ratified – and thus became domestic law – by the United States and the other world powers) to prevent the occurrence of a genocide or, at least, to contain it and to end it. Since the world powers were not willing to get involved in Rwanda, they had to avoid calling the atrocities genocide. See, e.g., LEWIS P., “Boutros-Ghali Angrily Condemns All Sides for Not Saving Rwanda”, in *The New York Times*, May 26, 1994; JEHL D., “Officials Told to Avoid Calling Rwanda Killings ‘Genocide’”, in *The New York Times*, June 10, 1994; EDITORIAL, “Shameful Dawdling on Rwanda”, in *The New York Times*, June 15, 1994.

¹⁴ A word that President Clinton used eleven times in a speech given before a Rwandan audience, see WEINER T., “Critics Say U.S. Ignored C.I.A. Warnings of Genocide in Rwanda”, in *The New York Times*, March 26, 1998.

called for justice and tried to implement a successful regime change. In a post-genocide society, as Rwanda, two prominent concerns with regard to justice and reconciliation are raised.¹⁵ On the one hand, the danger of genocide would not disappear except if the institutional structure can be designed to accommodate both groups within the same polity. On the other hand, punishing past violence may incite more violence. Yet to allocate responsibility for wrongdoing as well as to heal the scars of victims is vital to foster reconciliation. Therefore, any solution to Rwanda's post-genocide crisis must be built on a few fundamental premises. First, silence is not an efficient answer.¹⁶ The path to peace and to reconciliation, requires some official responses. Second, the victims as well as the perpetrators belong to both groups. Many moderate Hutu were slain next to Tutsi. And "while Hutu constituted the vast majority of the killing population, not all the Hutu were killers nor were all the killers Hutu."¹⁷ Some Tutsi, especially the R.P.F. troops, are accused of gross human rights abuses before, during, and after the genocide.¹⁸ Finally, the change of regime must be taken into account to apprehend the

¹⁵ DRUMBL M., *op. cit.*, p. 1239.

¹⁶ See, e.g., HAYNER P., *Unspeakable Truths, Confronting State Terror and Atrocity*, London, New York, Routledge, 2001; LEMARCHAND R., "Coming to Terms with the Past: The Politics of Memory in Post-Genocide Rwanda, in *L'Observatoire de l'Afrique Centrale*, July 23, 2000; MINOW M., *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, Boston, Beacon Press, 1998.

¹⁷ DALY E., *op. cit.*, p. 365.

¹⁸ This is a very sensitive chapter of the genocide's history. Human Rights Watch estimates the number of people killed by Tutsi forces to be at least 25,000 to 30,000 people; see FISHER I., "Crisis Points Up Tough Choices for Tribunal on Rwanda", in *The New York Times*, December 19, 1999.

full context of post-genocide Rwanda.¹⁹ With these premises in mind, we now turn into the study of transitional justice.

B. Retributive Justice.

For a society in transition, dealing with past injustices is a crucial test. Jeremy Sarkin argues that “the need of victims and the society as a whole to heal from the wounds [...] often has to be balanced against the new political reality.”²⁰ As the violence stopped, the new Rwandan government wished to proceed with trials for the members of the ousted government and for thousands of civilians suspected of taking part in genocidal attacks and other human rights violations during the recent civil war. Meanwhile, in an attempt to compensate for its failure to intervene during the slaughter, the international community agreed to establish an international war-crimes tribunal which would prosecute the planners and the organizers of the genocide.²¹ Thus national and international trials were to assuage Rwanda’s burden via the punishment of the *génocidaires*. That is retributive justice.

Retributive justice is punitive. It focuses on the defendant and the adversarial relationship between defense and prosecution. Above all, what matters is the fairness

¹⁹ In *Rwanda: The Preventable Genocide*, the Organization for African Unity (2000) notes that Hutu were terrified of being arrested or killed by the new rulers.

²⁰ SARKIN J., “The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide”, in *Journal of African Law*, Vol. 45, No. 2, 2001, p. 143.

²¹ LEWIS P., “Rwanda Agrees to a U.N. War-Crimes Tribunal”, in *The New York Times*, August 9, 1994.

of the process and the equality and the proportionality of the sanctions.²² In contrast, restorative justice, another mode of transitional justice, focuses on the victim(s) and the relationship between the victim(s), the perpetrator(s), and the whole community. Restorative justice aims not only at justice but – also and especially – at reconciliation.²³ My contention is to show that Rwanda needs restorative justice since retributive justice is necessary but not sufficient to heal the Rwandan society from its past. The question that follows is what form of restorative justice suits best post-genocide Rwanda. First, I discuss why national and international trials are insufficient.

1. The Genocide Trials.

The 1994 genocide was massive, not only because the death toll reached the tremendous number of 800,000, but also because almost the same number of people was implicated, with varying degrees of responsibility,²⁴ in the mass killings. In July 1994, the already weak Rwandan judicial system was all but destroyed in terms of personnel and infrastructure. The judiciary was a primary target, many judges,

²² TIEMESSEN A. E., “After Arusha: Gacaca Justice in Post-Genocide Rwanda”, in *African Studies Quarterly*, Vol. 8, No. 1, Fall, p. 60.

²³ BRAIWTHWAITE J., “Restorative Justice: Assessing an Immodest Theory and a Pessimistic Theory”, in TONRY M. (ed.), *Crime and Justice*, Chicago, University of Chicago Press, Vol. 25, 1999; LLEWELLYN J., HOWSE R., “Restorative Justice, A Conceptual Framework”, *Law Commission of Canada*, 1999, http://www.lcc.gc.ca/research_project/99_justice_1-en.asp, accessed on November 11, 2005.

²⁴ Mark Drumbl states that “individual involvement with the genocide occurred at six levels: (1) zealous participant, (2) “following orders”, (3) participations under duress, (4) aiding and abetting, (5) passive acquiescence, and (6) active opposition” (DRUMBL M., *op. cit.*, p. 1246).

attorneys, and lawyers were killed, some imprisoned, others fled into exile.²⁵ Yet, the 130,000 Rwandans, arrested upon suspicion of alleged crimes of genocide – although none of these people had been officially charged with a crime, “require a capable and extensive national court system.”²⁶ However, trials did not begin until December 1996. Moreover, “the manner in which the trials have been conducted has raised questions about their fairness,”²⁷ often defendants do not have a counsel, some trials have been concluded in as little as four hours, there are numerous instances of suspected interference by government in court decisions. Above all, to date, less than ten percent of individuals detained have been tried,²⁸ which leaves the other 90 percent languishing in overcrowded prisons, serving sentences without due process.²⁹

2. The International Criminal Tribunal for Rwanda.

In November 1994, the Security Council established the International Criminal Tribunal for Rwanda (I.C.T.R.) in Arusha. Such a tribunal was required because the crime of genocide appeals for a collective response from the international community –

²⁵ LORCH D., “As Rwanda Trials Open, a Nation Struggles”, in *The New York Times*, April 7, 1995; NEUFFER E., *The Keys to my Neighbor’s House: Seeking Justice in Bosnia and Rwanda*, New York, Picador, 2001, p. 257.

²⁶ TIEMESSEN A. E., *op. cit.*, p. 59.

²⁷ SARKIN J., *op. cit.*, p. 157.

²⁸ Amongst the 7,000 Rwandans who have been tried: 10 per cent received the death sentence (twenty-three were executed before April 1998, since then no death penalty has been enforced), 30 per cent were imposed life imprisonment and acquittals made up about 20 per cent of the total.

²⁹ See, e.g., Amnesty International, *Rwanda the Enduring Legacy of the Genocide and War*, 2004; Amnesty International, Report 2005, Rwanda, 2005; MCKINLEY J., *op. cit.*, November 2, 1997; MCKINLEY J., *op. cit.*, November 21, 1997; MCKINLEY J., “Searching in Vain for Rwanda’s Moral High Ground”, in *The New York Times*, December 21, 1997; SCHABAS W., “Justice, Democracy, and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems”, in *Criminal Law Forum*, Vol. 7, 1996, pp. 523-559; TIEMESSEN A. E., *op. cit.*, p. 59

response which was never offered during the genocide itself.³⁰ The tribunal is to judge persons, of whatever nationality, accused of genocide and crimes against humanity, committed from January 1, to December 31, 1994. In the wake of the genocide, the tribunal was created to “contribute to the process of national reconciliation and to restoration and maintenance of peace.”³¹ But Martha Minow doubts that trials can reach these goals. She does “not think it wise to claim that international and domestic prosecutions for war crimes and other horrors themselves create an international moral and legal order, prevent genocides, or forge the political transformation of previously oppressive regimes.”³² However, Richard Goldstone, former Prosecutor of the tribunal, indicated that the “essential objective” of his office is “to bring justice to those most responsible [...] for the mass killings,”³³ referring in particular to persons in positions of leadership and authority. Thus a division of labor appeared between the national and international trials: the prosecution of the architects of the genocide for the latter, the prosecution of the rest of the defendants for the former. Nonetheless, in eleven years, the results are meager: fifteen verdicts. Furthermore, the credibility of the institution has been hurt by many dysfunctions that plagued it: management problems due to insufficient means, internal bureaucratic conflicts, non-respect of international human

³⁰ See the preamble of the Convention on the Prevention and Punishment of the Crime of Genocide (General Assembly resolution 260 A (III), December 9, 1948).

³¹ I.C.T.R. Statute, preamble.

³² MINOW M., *op. cit.*, p. 49.

³³ See Press Statement by the Prosecutor of the International Criminal Tribunal for Rwanda, December 12, 1995.

rights standards regarding the fair trial rights of defendants, and above all a difficult relation with the Rwandan government. Eventually, instead of displaying a symbolic effect of prosecuting even a limited number of leaders, “which would have considerable impact on national reconciliation as well as deterrence of such crimes in the future,”³⁴ the I.C.T.R. failed to render justice which hurts the so-needed healing process of the Rwandan society.

3. Towards Restorative Justice.

Facing the tension between justice and reconciliation, the transitional process occurring in Rwanda entails tremendous challenges. In Arusha and in Rwanda, trials have failed to bring justice, let alone reconciliation. The justice process remains “laborious and frustrating.”³⁵ In order to improve the process, Rwandan officials have turned, in 1999, to the *gacaca* courts system. It is a traditional civil dispute resolution process based on a community approach, i.e. a form of restorative justice. Meanwhile, the national judicial system as well as the I.C.T.R. would continue to render justice, retributive justice. These two modes of transitional justice, should not be seen as mere alternatives but as partners, reinforcing each other. Reconciliation cannot be reached

³⁴ AKHAVAN P., “Justice And Reconciliation In The Great Lakes Region Of Africa: The Contribution of The International Criminal Tribunal For Rwanda”, in *Duke Journal of Comparative & International Law*, Vol. 7, 1997,

<http://www.law.duke.edu/journals/djcil/articles/djcil7p325.htm>, accessed on November 11, 2005.

³⁵ GAPARAYI I. T., “Justice and social reconstruction in the aftermath of genocide in Rwanda : an Evaluation of the possible role of the gacaca tribunals”, in *African Human Rights Law Journal*, No. 1, 2001, http://www.chr.up.ac.za/academic_pro/llm1/dissert_b_2000.html, accessed on November 12, 2005.

without some sense of justice, provided by retributive justice. Nevertheless, retributive justice alone does not lead a society towards reconciliation.

GACACA COURTS.

In Rwanda, long before the colonial period, communities developed informal neighborhood courts where people gathered to have disputes heard and settled claims relating to land rights, property damage, or minor attacks. These customary local courts are known in Kinyarwanda as *gacaca*, which literally means “justice on the grass or on lawn” and refers to the lawn where traditionally elders mediated the disputes of rural life in Rwanda.³⁶ *Gacaca* was intended to “sanction the violation of rules that are shared by the community, with the sole objective of reconciliation through restoring harmony and social order and reintegration of the person who was the source of the disorder.”³⁷ The idea of restorative justice is the heart of *gacaca*.

A. The Resurrection of *Gacaca* courts.

Facing the congestion of the national judicial system and therefore the slow progress towards accountability for the perpetrators of the genocide, the Rwandan government has resurrected, in April 1999, the traditional mode of dispute resolution, *gacaca*, which however never dealt with criminal justice.³⁸ The use of *gacaca* courts has

³⁶ REYNTJENS F., “Le Gacaca ou la justice du gazon au Rwanda”, in *Politique Africaine*, No. 40, 1990, pp. 31-41.

³⁷ TIEMESSEN A. E., *op. cit.*, p. 61.

³⁸ REYNTJENS F., *op. cit.*

been adopted as a mechanism to ease the burden on the national courts as well as to deal with the overcrowded jails – that are the sources of many human rights violations.³⁹ *Gacaca* offers a community-based approach which emphasizes the reintegration of *génocidaires* back into the community without neglecting the victim(s). Indeed, the latter can start their healing process through the truth-telling nature of the confessions. Above all, it is the whole community who benefits from *gacaca* and engages on the path to a peaceful future.

1. *Gacaca* Courts.

The government has developed a wide-scale pyramid structure for the *gacaca* courts; 11,000 courts have been created at four different levels, from local (“*la cellule*”) to national via the regional and provincial levels. The law categorizes criminal responsibility through four categories indicating the seriousness of the crime committed – between October 1, 1990 to December 31, 1994 – and the appropriate punishment. Whereas national and international trials deal with the most serious crimes and suspects, i.e. leaders and planners of the genocide (category 1), *gacaca* courts judge the three other categories of suspects: from the perpetrators, conspirators, or accomplices of intentional homicides, to those who destroyed property. Unlike for

³⁹ “Organic Law creating “Gacaca Jurisdictions” and organizing prosecutions of offenses that constitute the crime of genocide or crimes against humanity committed between October 1, 1990 and December 31, 1994”, Organic Law No. 40/2000, in Official Journal of Republic of Rwanda, October 12, 2000.

category 1 crimes, the possible punishments for category 2-4 crimes do not include the death penalty. They range from life imprisonment to community service.

[Table 1 about here]

Gacaca is a community-based approach: evidence is gathered through an audience participation process, where all evidence is presented orally.⁴⁰ After the debate, the verdict is given by 19 lay judges, the *gacaca* Seat, who have been elected amongst “*honourable*” Rwandans. In 2001, the *gacaca* Assemblies – composed of every Rwandan older than 18, in each village – elected 260,000 judges to lead the 11,000 *gacaca* courts around the country. A seven step pre-trial process (which includes drawing lists of suspects and witnesses, collecting evidence and establishing the appropriate categories for offences) preceded the actual trials. The trial itself opens with the introduction of the suspect to the audience and the recalling of the accusations. The accused can either plead his/her innocence or confess his crimes. In the former case, the audience composing the *gacaca* Assembly as well as the state prosecutor testify for or against the accused. The hearing is to be run “in a non-adversarial, deliberative manner, and lawyers are prohibited from taking any part in the proceedings.”⁴¹ If no one testifies against the defendant and no evidence is

⁴⁰ Rwanda Supreme Court and Lawyers Without Borders, *Manuel explicatif sur la loi organique portant création des juridictions gacaca*, http://www.asf.be/FR/FRnews/manuel_gacaca.pdf, accessed on November 13, 2005.

⁴¹ HARRELL P. E., *Rwanda's Gamble, Gacaca and a New Model of Transitional Justice*, New York, Writers Club Press, 2003., p. 73.

provided, the accused is found not guilty by default and freed immediately. In the other cases, after the debate, the Seat of *gacaca* retires *in camera* to deliberate on the suspect's guilt. The determination of guilt and penalty is to be made by consensus, or "failing that, a simple majority of the 19 will suffice."⁴² An appeal procedure enables a defendant to have his case heard *de novo* by the appellate *gacaca*. In the case of a confession, after a public hearing of the suspect's testimony and apologies, the *gacaca* Assembly reflects on the defendant's account and testifies as to its veracity. If, to the opinion of the Seat, the confession is full and complete, the defendant is granted a reduced penalty.

2. *Gacaca* as Restorative Justice.

Although the new *gacaca* courts diverge largely from their traditional form, they still emphasize the restoration of the social order over punishment. Moreover, not only do they ease the burden on the conventional judicial system and on the overcrowded prisons but they also foster reconciliation, starting from the community to the whole society. These are patterns of restorative justice. At the heart of *gacaca* justice is the community. The *gacaca* Assembly brings together every adult member of the community to judge one of them. Plea bargaining offers the perpetrator the opportunity to confess and apologize, and by doing so to be reintegrated into the community. This truth-telling nature of the confessions offers hope for reconciliation.

⁴² *Ibid.*, p. 74.

Indeed, the “ordinary killers” – whom we encounter in *Machete Season* – wish to regain their humanness.⁴³ The lawn of the village is an appropriate starting point. A consensus is needed amongst the participants to decide whether to reintegrate someone into the community and under which conditions. What is fundamental, a local narrative comes out this dialogue between victims, perpetrators and the rest of the community.

According to Michelle Wagner, however, we should not over-estimate *gacaca*'s potential since the communities as well as the families have been destroyed and the community is at the core of what *gacaca* is.⁴⁴ Nevertheless, *gacaca* brings recognition to the specific post-genocide demographics where the responsibilities of women increased dramatically.⁴⁵ For Alana Erin Tiemessen “the community basis of *gacaca* allows women to participate on various levels [of the act of justice], recognizes their role in the reconciliation process, and brings their identity beyond that of victimization.”⁴⁶

Furthermore, *gacaca* courts allocate compensation to victims. The compensation can take the form of community service and/or financial aid from a still-to-be-created governmental compensation fund. However, monetary compensation hurts Rwandan culture for which “receiving monetary compensation for human life simply amounts to

⁴³ HATZFELD J., *Machete Season*, New York, Farrar, Straus and Giroux, 2005

⁴⁴ See FISHER I., “Massacres of '94: Rwanda Seeks Justice in Villages”, in *The New York Times*, April 21, 1999.

⁴⁵ HEATHER H., “Rwanda’s Women: The Key to Reconciliation”, in *The Journal of Humanitarian Assistance*, May 10, 2000, <http://www.jha.ac/greatlakes/b001.htm>, accessed on November 13, 2005.

⁴⁶ TIEMESSEN A. E., *op. cit.*, p. 63.

treachery against their loved ones.”⁴⁷ Above all, some sort of compensation is needed to establish the foundations of a peaceful society.

With the *gacaca* courts, in addition to the national and international trials, Rwanda is pursuing a “dual-pronged goal to justice and reconciliation.”⁴⁸ No peace can be built upon impunity and injustice, but no lasting peace can be built without reconciliation, either. Cell *gacaca* and its emotional texture sets the stage for the creation of local narrative on which the community can base its reconciliation. *Gacaca* seems to be able to promote both justice and reconciliation; it is the object of the next section to assess this hope.

B. Trying Genocide through *Gacaca*.

On March 10, 2005, the first trials opened in 113 *gacaca* courts throughout Rwanda. Two days later, the first sentence was rendered. Today, the enterprise is still at its very beginning. Above all, the modernized *gacaca* is controversial.

1. Due Process and Fairness.

The most widely voiced concern about *gacaca* is that “due legal process will be compromised and the rights of the defendants ignored.” The O.A.U. report continues “speed and efficiency, important as they are, must also be accompanied by fairness. Basic Human rights must not be sacrificed either to productivity or local

⁴⁷ GABIRO G., “Rwanda genocide: paying for reconciliation”, in *Hirondelle*, December 19, 2002.

⁴⁸ FULLERTON P., “Trying Genocide Through Gacaca”, Vancouver, Liu Institute for Global Issues, June, 2003, http://www.gjp.ubc.ca/_media/srch/030613genocide_through_gacaca.pdf, accessed on November 13, 2005.

participation.”⁴⁹ The *gacaca* system profoundly compromises on principles of justice as defined by criminal law standards.⁵⁰ There is no separation between prosecutor and judge, no legal counsel for the defendant, no legally reasoned verdict, strong pressure toward self-incrimination (the plea bargaining), a potential risk for major divergences in punishment (though the *comité de coordination*’s role is to ensure uniformity in the decision process throughout Rwanda), a threat of intimidation towards the *gacaca* organs, witnesses and defendants, and a risk of “vigilante’s justice”⁵¹ where vengeance and will of empowerment may dominate the accusations. Moreover, the competence and expertise of the *gacaca* judges, whose role will determine the decisions that emanate from the court, is questionable.

Nonetheless, for Michael Ignatieff, “while *gacaca* certainly falls far short of international “fair trial” standards, insistence on the latter could result only in much more serious violations of the rights of those accused who would remain in prison indefinitely, absent any alternative means of determining their guilt or innocence.”⁵²

Similarly, Peter Uvin identifies the cultural inappropriateness of the international law critiques of *gacaca* courts: “the practice of *Gacaca* may well be able to respect key

⁴⁹ Organization of African Unity (O.A.U.), *Report 2000*, Chapt. 18.

⁵⁰ UVIN P., “The Introduction of a Modernized Gacaca for Judging Suspects of Participation in Genocide and the Massacres of 1994 in Rwanda”, Discussion Article prepared for the Belgian Secretary of State for Development Cooperation, <http://fletcher.tufts.edu/humansecurity/pdf/Boutmans.pdf>, visited on November 14, 2005.

⁵¹ DALY E., *op. cit.*, p. 383.

⁵² IGNATIEFF M., *Human Rights as Politics and Idolatry*, Princeton, Princeton University Press, 2002, p. 35.

conditions of fair trial and due process, but in an original, locally appropriate form, and not in the usual western-style form.”⁵³ Here lies one of the major issues: the implementation of safeguards, in order to respect the international criminal standards, may reinvent the same formal justice system that is clearly not working. Yet, the government, with the support of the international community, should seek to put into place a system that maximizes the positive potentials and minimizes the negative ones. Foremost, the evaluation of *gacaca* should not only focus at the judicial level, for it is especially a social and political experiment.

2. Victor’s Justice.

In July 1994, the bloodbath stopped with the victory of the R.P.F. over the official government in the ongoing civil war and the subsequent fleeing of extremist Hutu to neighboring Congo. As already mentioned, not all the victims were Tutsi and not all killers were Hutu. It is true that the Tutsi forces of the R.P.F. ended the genocide, but meanwhile they committed numerous atrocities. Human Rights Watch estimated the number of people killed by Tutsi forces to be at least at 25,000 to 30,000 people. This is one of the most sensitive chapters of the genocide’s history.⁵⁴ If justice through *gacaca* is to promote reconciliation (as the government officials claim) it cannot be a victor’s justice. The legitimacy of *gacaca* constitutes one of the keys for its

⁵³ UVIN P., *op. cit.*

⁵⁴ FISHER I., “Crisis Points Up Tough Choices for Tribunal on Rwanda”, in *The New York Times*, December 19, 1999.

success. *Gacaca* courts should not be used by the Tutsi to protect their hold on power and ensure their survival, even though, they proclaim Rwanda is an ethnicity-free country where ethnic divisions are obsolete. In fact, according to Filip Reyntjens, a tutsification is occurring, leading Rwanda to a Tusti ethnocracy. Hence, the policy of eliminating ethnicity is a political tool to legitimate Tusti authority.⁵⁵ Above all, *gacaca* jurisdictions should be free from any power holders' interference especially regarding the crimes perpetrated by the R.P.F. forces.

3. Towards Reconciliation.

The modernized *gacaca* pursues a twofold goal: on the one hand, speeding up the trials and emptying the prisons, on the other hand, involving the community, including the victims, establishing the truth and, through that, promoting reconciliation. Rwandan officials believe that without justice no reconciliation is possible. Hence, *gacaca* jurisdictions not only seek for the discovery of the truth via the full confession and the plea bargaining processes, but also punish the perpetrators. The end of the culture of impunity is an essential ingredient of *gacaca* courts. Indeed, generalized amnesty is currently politically and socially out of the question, for victims will have to share the same hills as their perpetrators. *Gacaca*, as a community-based approach of both justice and reconciliation, emphasizes the relationship between

⁵⁵ REYNTJENS F., "Rwanda, Ten Years On: From Genocide to Dictatorship", in *African Affairs*, No. 103, 2004, p. 187.

victims, perpetrators and the rest of the village. It tries to heal the suffering of the victims as well as to reintegrate the perpetrator after he/she has confessed and apologized. The effort demanded from the victims is tremendous: they have to re-open publicly the wound that they have hardly tried to slowly close. Yet Priscillia Hayner believes that we, as a community composed of victims, perpetrators and bystanders, need to remember past atrocities in order to forget them.⁵⁶

Moreover, the objective is to restore the social order and to re-include the person who was the source of the disorder. *Gacaca* offers a shame-based instead of a guilt-based remedy. Such remedies constitute the best response to radical evil.⁵⁷ When violence occurs in situations where acting violently is simply not deviant, i.e. radical evil, punishment and retribution do not prevent radical evil from re-occurring and do not restore the broken social order. In fact, shame, a consciousness of one's own responsibility, is accompanied with "feelings of regret, blameworthiness, and sometimes even disgrace."⁵⁸ *Gacaca* can offer re-integrative shaming to the *génocidaires*. This tremendous endeavor to heal engages a last actor. The international community must support financially this effort. Its role is vital especially if it is accompanied by an "*accompagnement critique*"⁵⁹ which would encourage Rwandan

⁵⁶ HAYNER P., *Unspeakable Truths, Confronting State Terror and Atrocity*, London, New York, Routledge, 2001.

⁵⁷ NINO C. S., *Radical Evil on Trial*, New Haven, Yale University Press, 1996

⁵⁸ DRUMBL M., *op. cit.*, p. 1257.

⁵⁹ DIGNEFFE F., FIERENS J. (ed.), *op. cit.*, p. 78.

officials to improve the *gacaca* system. Eventually, the revival and the transformation of the traditional *gacaca* nourish many different reactions amongst Rwandans but all desire to live in a peaceful country and, hence, are willing to give a chance to *gacaca* since it seems to be the only reasonable solution.

TRUTH COMMISSION.

In countries emerging from periods of gross violations of human rights, the question of how to deal with the past needs to be resolved if the country is to progress towards a peaceful future. In post-genocide Rwanda, first retributive justice was implemented to deal with the past. The failure of national and international trials to bring either justice or reconciliation encourages the government to turn to a traditional – though modernized – mode of justice: *gacaca*. Yet, another mode of restorative justice could have been implemented: a truth and reconciliation commission.⁶⁰ In this section, I build a theoretical framework for the use of such a commission in Rwanda considering both pitfalls and benefits.

A. The Turn Towards Truth.

On their visits to South Africa, in 1996 and 1997, Rwandan officials commented that justice was needed in order to engage with the process of reconciliation: “there can

⁶⁰ I use both expressions of truth commission and truth and reconciliation commission to refer to the same concept of a truth-seeking process via the establishment of an independent body which receives the task to investigate past atrocities and to produce a report of its findings.

be no reconciliation with victims unless there has been justice.”⁶¹ The emphasis was on justice not on truth.

1. From Justice to Truth.

According to Priscilla Hayner, “the limited reach of the courts and [...] the recognition that even successful prosecution do not resolve the conflict and pain associated with past abuses”⁶² explain the turn toward truth-seeking as a central component of the response to past atrocities. Martha Minow favorably explores the usefulness of public inquiries and truth commissions as well-suited mechanisms to meet goals for societal responses to collective violence.⁶³ Truth commissions should be utilized to pursue efforts at reconstituting a united society. The truth-seeking process promotes collective accountability, heals the victims, generates the record of the human rights violations, and therefore roots out the causes of genocide and minimizes future violence.

Rwanda’s history shows a turn towards truth in 1993. Following the signing of the Arusha agreement, between the government and the armed opposition, Rwandan human rights organizations set up an international commission to investigate violence committed by the belligerents during the civil war.⁶⁴ The effectiveness of the

⁶¹ SARKIN J., *op. cit.*, p. 154.

⁶² HAYNER P., *op. cit.*, p. 14.

⁶³ MINOW M., *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, Boston, Beacon Press, 1998, pp. 87-88.

⁶⁴ HAYNER P., *op. cit.*, pp. 17-20.

commission was undermined by the resentment of both ruling and opposition groups which led to ongoing violence while the commissioners were investigating. The murders of potential witnesses impinged upon the truth-telling, reconciliation and healing process. However, when the report was published in 1993, the response was positive in both Rwanda and Europe. “The commission’s work served an important function in promoting international awareness of the Rwanda crisis.”⁶⁵ Nevertheless, the report, which concentrated on human rights abuses committed by the government forces, was despised by Rwandan officials. Most of all, the report and its recommendations failed to prevent the break out of the genocide one year later.

2. Learning from Others.

To this date, eighteen truth commissions have dealt with gross human rights violations throughout the world. Lessons can be learnt from these experiences. Priscilla Hayner, in her insightful account of official truth bodies, notes that “though with varying degrees of emphasis, a truth commission may have any or all of the following five basic aims: to discover, clarify, and formally acknowledge past abuses; to respond to specific needs of victims; to contribute to justice and accountability; to outline institutional responsibility and recommend reforms; and to promote reconciliation and

⁶⁵ SARKIN J., “The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda”, in *Human Rights Quarterly*, Vol. 21, No. 3, 1999, pp. 778-779.

reduce conflict over the past.”⁶⁶ These goals set the stage for the reflection on the possibility of a Rwandan truth commission to investigate the past.

B. A Theoretical Framework.

Although the post-genocide Rwandan government has never considered the opportunity of utilizing a truth commission to deal with the past, the benefits and pitfalls of such bodies have been raised in the literature on transitional justice.⁶⁷

1. A Truth Commission in Rwanda: Benefits and Pitfalls.

The establishment of a truth and reconciliation commission in Rwanda could be a means of healing Rwandans' wounds, beginning reconciliation and rebuilding a unified country, and therefore reducing the risks for future conflicts. Moreover, such a commission could have been the response to the incapability and the inadequacy of the criminal judicial system to cope with the legacy of the genocide; instead the Rwandan government opted for the revival of *gacaca*. Above all, unlike *gacaca* courts, a truth commission has the potential to (re)write a collective -shared by all- narrative upon which peace can be built.

⁶⁶ HAYNER P., *op. cit.*, p. 24.

⁶⁷ See, e.g., DRUMBL M., “Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda”, in *New York University Law Review*, No. 75, November 2000, pp. 1221-1326; HAYNER P., *Unspeakable Truths, Confronting State Terror and Atrocity*, London, New York, Routledge, 2001; MINOW M., *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, Boston, Beacon Press, 1998; SARKIN J., “The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda”, in *Human Rights Quarterly*, Vol. 21, No. 3, 1999, pp. 767-823; SARKIN J., “The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide”, in *Journal of African Law*, Vol. 45, No. 2, 2001, pp. 143-172.

The following question is when to launch the process, i.e. the question of the ripeness. Here lies a paradox if there is still ongoing strife, time might never be ripe but meanwhile, the longer we wait, the greater the damage to the whole society.⁶⁸ In the case of Rwanda, since the genocide itself was ended in July 1994 by the seizure of power by the R.P.F. of Robert Kagame, time is ripe for a truth commission, although violence occurs sometimes in part some parts of the country.

Chiefly, on the basis of public accounts, a truth commission can draw a picture of the human rights abuses that is as complete as possible, and above all make it known. It includes the nature and the extent of the crimes as well as a record of the names and fates of the victims. This narrative of the atrocities and the underlying forces that led to them would hinder “the current tendency of the Hutu to deny of the genocide [and] at the same time justify their actions on the basis of their own perceived losses.”⁶⁹ Martha Minow suggests that truth commissions may be more effective than trials at establishing an incontrovertible historical record.⁷⁰ It is on the foundations of this new narrative – accepted by all – that Rwandans can establish a new united society. Furthermore, a truth commission could provide victims “a forum through which to reclaim their dignity and perpetrators will have a channel through which to expiate

⁶⁸ Priscilla Hayner observes that there is a “the quicker the better” rule, see HAYNER P., *op. cit.*, p. 221. See also, SARKIN J., *op. cit.*, 1999, p. 798.

⁶⁹ SARKIN J., *op. cit.*, 1999, p. 798.

⁷⁰ MINOW M., *op. cit.*, p. 47, pp. 58-59, p. 78.

their guilt.”⁷¹ Rwanda remains a traumatized country. Rwandans need a therapeutic treatment to release their pain; otherwise, living together again in a peaceful society will never happen. A truth commission could offer such a therapy: victims could tell the truth and vent their hostilities in a controlled and non-violent manner. Retributive justice leaves unaddressed the important need to treat depression in Rwanda which is populated by the *bapfuye buhagazi* (the “walking dead”).⁷² A truth and reconciliation commission can facilitate a national catharsis since it creates the conditions for mourning and grieving. Meanwhile, *génocidaires* would be given the opportunity to expiate their wrongdoings and apologize to the victims or their families. The dialogue coming out of the truth may lead all Rwandans to live peacefully in the same hills.

To achieve collective reconciliation, a society needs individual forgiveness. While “it is senseless to make generalizations about forgiveness, they are nevertheless important insights that can be gleaned”⁷³ from experiences of dealing with past atrocities. Atonement from the perpetrators eases forgiveness.⁷⁴ To forgive means neither to forget nor to lose.⁷⁵ The act of forgiving can heal grief, forge a new relationship, and break the cycles of violence.⁷⁶ In Rwanda, no one can force any

⁷¹ SARKIN J., *op. cit.*, 2000, p. 167.

⁷² DRUMBL M., *op. cit.*, p. 1270.

⁷³ GOBODO-MADIKIZELA P., *A Human Being Died that Night: A South African Story of Forgiveness*, Boston, Houghton Mifflin, 2003, p. 98.

⁷⁴ BROOKS R., *Atonement and Forgiveness, A Model for Black Reparations*, Berkley, University of California Press, 2004, pp. 163-169.

⁷⁵ TUTU D., *No Future Without Forgiveness*, New York, Double Day, 1999.

⁷⁶ MINOW M., *op. cit.*, p. 14.

survivor to forgive; yet a truth and reconciliation commission could facilitate the restoration of the relationship between victims and perpetrators, which may lead to tender of apologies by *génocidaires*, followed by forgiveness from the victims. In turn, the transformation of that relationship will strengthen the process of reconciliation. In this context, should amnesty be granted? Mark Drumbl claims that “amnesty could heighten the comprehensiveness of the historical record”, but should be “accompanied by apologies, public yet re-integrative shaming and compensation for the victims.”⁷⁷ However, International law prohibits the granting of amnesty for the gross violations of human rights. Foremost, the decision to grant amnesty and if so, under which conditions, belongs to Rwandans.

Nonetheless, a truth and reconciliation commission holds “the potential of opening up old wounds, renewing resentment and hostility against the perpetrators of abuses.”⁷⁸ Moreover, the success of the commission will rely greatly on its legitimacy. Independent commissioners should seek a truth shared by all Rwandans and not only a victor’s truth. Hence, the participation of both Tutsi and Hutu is a *sine qua non* condition. In addition of being legitimate to the eyes of all Rwandans, a truth commission should be tailored to both the country’s current situation and its history. Only such a *ad hoc* commission would provide the best chance of success for the

⁷⁷ DRUMBL M., *op. cit.*, p. 1274.

⁷⁸ SARKIN J., *op. cit.*, 1999, p. 800.

laborious task of leading a country towards national reconciliation. To maximize the chances of a successful truth-seeking as well as of reconciliation, the truth and reconciliation commission must be carefully designed and the right persons ought to be appointed.

2. The Process.

a. Establishment of the Commission.

The majority of truth commissions have been established by presidential decree.⁷⁹ However, if a law creates the commission, this allows a broader mandate and reflects the will of the whole nation to seek truth and not the new government's particular will. Additionally, a neutral appointment process of the commissioners must be guaranteed. An independent well-balanced commission is critical to ensure that Rwandans see it as legitimate and credible and therefore are willing to participate. On the basis of the Salvadoran experience, Jeremy Sarkin proposes that a panel of personalities, a mix of Rwandan and foreigners, appoint Rwandan commissioners.⁸⁰ The benefits of this approach combine the involvement of the international community and a Rwandan –staffed and ran– truth commission.

⁷⁹ HAYNER P., *op. cit.*, p. 214.

⁸⁰ SARKIN J., *op. cit.*, 1999, p. 806.

b. Mandate.

The commission needs a broad mandate to attain its goal of delivering an official record of the past atrocities. The investigated time period should not be reduced to the three months of the actual genocide, but include the civil war period as well as the post-genocide period. By so doing, the purpose is to avoid blaming only one group of the population. Both Hutu and Tutsi have committed massive murders and both Tutsi and Hutu have suffered from them. The types of human rights abuses that would be examined as well as the scope of the rights need to be defined beforehand. In addition, the parameters of what truth is to be recorded (and how), and what level of proof is needed could be defined by the panel.⁸¹

c. Publicity.

In countries such as Rwanda, “where a primary goal of a truth commission is to advance understanding and reconciliation and to reduce animosities,”⁸² there are persuasive reasons to hold public hearings. By giving the victims a chance to tell publicly their story, a commission acknowledges their sufferings and helps to release their pain. By bringing the survivors’ voices to the public (aired on television and radio), a commission can encourage public understanding and sympathy for the victims, and therefore reduce the denial of the truth by some Hutu. In Rwanda, using

⁸¹ HAYNER P., *op. cit.*, pp. 228-233.

⁸² *Ibid.*, p. 228.

the same means that called for the killings – the radio – to promote reconciliation could have a symbolic effect on the whole population.

d. Resources.

A truth commission is extremely time and resource intensive.⁸³ This huge cost should be shared by the international community. Foreign countries could support financially the organization of the panel and the commission – therefore it would not rely on governmental funding – as well as provide logistical aid in the field of information management and analysis. This latter point, though very important in the establishment of the record of the abuses, is usually not given enough attention. Commissioners from countries which have experienced a truth commission (for instance, South Africa) could help Rwandans to implement and carry on their own truth-seeking.

e. Final Report.

The *raison d'être* of a truth commission is the establishment of an official record of the past abuses. The hope is that such a report, listing the causes, the nature, and the extent of the atrocities as well as the names of the victims, brings the Rwandans to acknowledge the same truth. On the foundations of that truth, and after apologies from the perpetrators followed by compensation and reparation – and some sense of

⁸³ *Ibid.*, p. 227.

forgiveness, Rwandans can build together a united and peaceful future where a culture of human rights and the rule of law reign.

3. Challenging the Past and Shaping the Future.

The legitimacy of such a commission constitutes a key element of its success. Should it be absent, reconciliation would remain a vain hope. The establishment of the truth-seeking process ought to seek the inclusion of every Rwandan into the process. Although there is no “objective truth, it is critical that the version of “the truth” [...] embraces the experience of all.”⁸⁴ Therefore, a positive attitude of the government is vital. On the one hand, the endorsement by the government of the project would show its will to seek the truth – even though it has to admit its responsibility for abuses committed by it – and such a support would encourage a honest and full participation of all. On the other hand, the Rwandan government should avoid interference; otherwise the commission will be seen as victor’s justice by the Hutu. Above all, in countries in transition where a legitimacy crisis faces the newly-established government, the work of a truth commission, if successful, can improve the legitimacy of the new government and thus creates the conditions for reconciliation.

Moreover a truth commission could address the problem of land disputes. Since the genocide, latent conflict over property has been a major source of tension. “As Hutu refugees return [from exile], they find others on the land they used to occupy.

⁸⁴ SARKIN J., *op. cit.*, 1999, p. 802.

Fear of being denounced as genocide perpetrators stops many from reclaiming their land.”⁸⁵ Among the truth and reconciliation commission, a special committee of the land disputes could be created. Its task could be limited to the collection of testimonies over land disputes, followed by recommendations for the government or encompass a mission of mediation between parties. Above all, the committee should provide a forum where land disputes can be discussed without the fear of being accused of participation the mass murders.

Ultimately, we can conclude the design of the framework for a Rwandan truth commission with Priscillia Hayner’s words: “the decision to dig into the details of a difficult past must always be left to a country and its people to decide, and in some countries there may be reasons to leave the past well alone.”⁸⁶ Only a truth commission designed for Rwandans by Rwandans has a chance of success, i.e. bringing Rwanda towards reconciliation via the acknowledgment by all Rwandans of a common historical record based on both victims and perpetrators’ stories.

CONCLUSIONS.

GACACA VERSUS TRUTH COMMISSION?

Three different responses have addressed post-genocide Rwanda. The first two, national and international trials, quickly showed their incapability and inadequacy to

⁸⁵ *Ibid.*, 1999, p. 786.

⁸⁶ HAYNER P., *op. cit.*, p. 9.

bring justice, let alone reconciliation. In order to ease the judicial burden and deal with the overcrowded jails, the Rwandan government resurrected and transformed the traditional *gacaca*, a mode of restorative justice. Moreover, *gacaca* bears the potential to restore the social order via the participation of the whole community in the healing process. Victims are offered a forum through which they can reclaim their dignity and *gacaca* provides the perpetrators with a channel through which they can expiate their guilt and tender apologies. The public accounts and hearings generate local narratives on which a better future will be built and thus lead Rwandans to reconciliation.

In the particular context of post-genocide Rwanda, the restorative benefits of a truth commission would be similar to the benefits brought by *gacaca*. Both modes need the same conditions to be successful: support from the rulers and international community but not interference, protection and participation for all (victims, alleged *génocidaires*, and the rest of the community), and above all, legitimacy.

[Table 2 about here]

Yet, *gacaca* and a truth commission diverge on a fundamental premise. Whereas *gacaca* seeks justice for reconciliation, a truth commission seeks truth for reconciliation. The *raison d'être* of a truth and reconciliation commission is the establishment of an official record of the past atrocities based on the public accounts of both victims and perpetrators. Such a clarification of history results, according to Roy Brooks, “in a collective judgment regarding the magnitude of the injustice, including its

lingering effects, and the extent of the perpetrator's responsibility.”⁸⁷ A truth commission could explore Robert Lifton's notion of “atrocious-producing situation”⁸⁸ in the particular case of Rwanda where many “ordinary people” transformed into “ordinary killers”. The final report could describe not only the actual chain of events, but also the mechanisms of the 1994 mass murders, the characters of the planning, and the underlying forces that compelled so many Rwandans to participate in the bloodbath. Moreover, Elazar Barkan suggests that “setting the historical record straight can fuse polarized antagonistic histories into a core of shared history to which both sides can subscribe.”⁸⁹ It would help post-genocide Rwanda to create what Jürgen Habermas calls “discourse ethics,” a set of norms on which people with different interests can agree.⁹⁰ A truth commission could deal best with this crucial issue of establishing a legitimate historical record and should therefore be implemented.

Next to national and international trials which must continue to prosecute the leaders and the architects of the genocide in symbolic trials, a truth commission should operate conjunctively with *gacaca* proceedings. Although the latter are controversial as shown in this article, they constitute the only reasonable solution for post-genocide Rwanda. Thus, the truth-seeking body could foster the establishment of a new

⁸⁷ BROOKS R., *op. cit.*, p. 148.

⁸⁸ See, e.g., LIFTON R. J., *The Nazi Doctors, Medical Killing and the Psychology of Genocide*, New York, Basic Books Publishers, 1986; LIFTON R. J., MARKUSEN E., *The genocidal mentality: Nazi holocaust and nuclear threat*, New York, Basic Books Publishers, 1990.

⁸⁹ BARKAN E., *The Guilt of Nations: Restitution and Negotiating Historical Injustices*, New York, Norton, 2000, p. xx.

⁹⁰ HABERMAS J., *Moral Consciousness and Communicative Action*, Cambridge, MIT Press 1990.

narrative shared by all Rwandans on the basis of the local narratives that come out from the emotional texture of *gacaca* public hearings but which also may largely vary from one community to another, especially between majority-Hutu and majority-Tutsi communities. This new narrative could encompass the ideal of an ethnicity-free country as promoted by the Rwandan officials.⁹¹ The interaction between trials, *gacaca* and a truth commission can shed light onto collective responsibility as well as on individual responsibility. The conjunction of these three different responses to post-genocide Rwanda has the potential to engage Rwandans onto the path towards reconciliation. Furthermore, the international community, which did little while atrocities were committed, owes to Rwandans to assist them in providing support and resources to ensure that such a perilous exercise has the best chance of success.

Eventually, beside justice- and truth seeking processes, memorials and new symbols⁹² encourage the reconciliation of a united nation and above all shape favorably a new narrative which if shared by all Rwandans constitutes the best protection to the reoccurrence of radical evil.

⁹¹ see BONNER R., “Rwanda's Leaders Vow to Build a Multiparty State for Both Hutu and Tutsi”, in *The New York Times*, September 7, 1994; MCKINLEY J., “Rwanda's Past Again Vies to Be Prologue”, in *The New York Times*, November 24, 1996; LACEY M., “A Decade After Massacres; Rwanda Outlaws Ethnicity”, in *The New York Times*, February 26, 2004.

⁹² See, e.g., AGENCE FRANCE PRESSE, *In Effort To Heal, New Symbols*, January 1, 2002; LACEY M., “Memorials Dot Rwanda, Recalling '94 Carnage” in *The New York Times*, September 17, 2001; LACEY M., “10 Years Later in Rwanda, The Dead Are Ever Present”, in *The New York Times*, February 26, 2004.

ANNEXES.

Table 1: Categorization, Confessions, and Sentencing of Genocide Suspects Under *Gacaca*.

(From PITSCH A. M., “The Gacaca Law of Rwanda: Possibilities and Problems in Adjudicating Genocide Suspect”, Working Article NUR-UMD Partnership, Center for International Development and Conflict Management, University of Maryland, August, 2002, p. 6,

http://www.cidcm.umd.edu/ICT/articles/gacaca_assessment_journal.pdf, accessed on November 22, 2005)

Categories of Crimes	Confession/guilt pleading	Sentencing with or without confession)	Competent Jurisdiction
1. Planners, organizers, supervisors and instigators of the genocide; those in positions of authority; renowned murders; those committing rape and other sexual torture	Has not made a confession ----- Has made confession prior to publication of their name on the list of alleged criminals of category 1	Death or life imprisonment ----- 25 y. to life imprisonment	Specialized chamber of the modern court system
2. Authors, co-authors, accomplices of those who killed; those having the intention to kill and have caused injury, committed serious violence, but not resulting in death	Has not made a confession ----- Has made a confession at the time of trial ----- Has made confession prior to publication of the list of alleged criminals of category 2	25 y. to life imprisonment ----- 12 to 15 y. imprisonment; half of sentence spent in prison, half spent in community service ----- 7 to 12 y.; half of sentence spent in prison, half spent in community service	District (Commune) <i>Gacaca</i> Court
3. Those having committed criminal acts or participated in crimes without intending to kill	Has not made a confession ----- Has made a confession at the time of trial ----- Has made confession prior to publication of the list of alleged criminals of category 2	5 to 7 y.; half of sentence spent in prison, half spent in community service ----- 3 to 5 y.; half of sentence spent in prison, half spent in community service ----- 1 to 3 y.; half of sentence spent in prison, half spent in community service	Sector <i>Gacaca</i> Court
4. Those having committed serious infractions against property ----- Those having committed serious infractions against property, but having made an	No provisions	Restoration or reimbursement for property that was destroyed or consumed ----- If the agreement is adequate the case is not	Cell <i>Gacaca</i> Courts

agreement with the victims or before an authority		brought into the courts	
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Table 2: Comparison *Gacaca* versus Truth Commission.

Institutional Component	<i>Gacaca</i>	Truth Commission
<i>Goals</i>	Justice for reconciliation	Truth for reconciliation
<i>Institution</i>	Court	Commission
<i>Members</i>	"Honourable" community members for the Seat; the whole community for the Assembly	Independent Rwandan commissioners chosen on the basis of their competences
<i>Crimes investigated</i>	Crimes from cat. 2 to cat. 4	To be defined by the panel
<i>Punishment</i>	Imprisonment; reintegration	No punishment but recommendations
<i>Amnesty</i>	No amnesty but reduced penalty in case of full confession	To be defined by the panel
<i>Time-period</i>	From Jan. 1, 1990 to Dec. 31, 1994	To be defined by the panel
<i>Publicity</i>	Among the community	Throughout Rwanda via radio
<i>Process</i>	Trials; negotiations	Investigations; public hearings
<i>Burden of proof</i>	Testimonies; accusations	Testimonies
<i>Narrative</i>	Local narratives that can vary	One single narrative established in an official record
<i>Compensation and reparation</i>	Depends on nature of crime	To be defined by the panel
<i>Protection</i>	For victims, perpetrators, witnesses, and judges	For victims, perpetrators, witnesses, and commissioners
<i>Role of the Rwandan government</i>	Support but no interference	Support but no interference
<i>Role of the international community</i>	Support (financial and logistical) and " <i>accompagnement critique</i> "	Support (financial and logistical) and participation in the panel