Introduction

In late May 2009 the Kigali-based, government-funded daily *The New Times* reported that many genocide survivors were frustrated with the work of the Gacaca courts. The survivors had voiced their dissatisfaction in connection with the conviction of a man whom they believed to be innocent. A survivor was quoted as saying that he or she felt 'intimidated because Gacaca judges here don't want to hear the truth. We are ready to tell the world'.[1] The reporter was, however, unable to research the background of the conviction and the reasons for the widespread frustration. This article still makes for interesting reading though, as it raises some critical issues at a time when many in Rwanda, particularly the government-friendly press, are asserting that the process of coming to terms with the past is now complete. The wish to declare this process closed is understandable. For the past 15 years, Rwandans have been struggling to find a way to confront their past, with their efforts to do so putting an enormous strain on both government resources and many ordinary citizens. As the Gacaca trials are now coming to a close, the ordinary courts are left only with a handful of pending cases, and the International Criminal Tribunal for Rwanda (ICTR) is approaching its completion deadline, it would seem like an appropriate time to make a provisional appraisal of the entire process. However, this does not mean an end to the need for further research. At the present time it is extremely difficult to assess the long-term repercussions of the Gacaca trials with regard to the future stability of Rwanda and the region. I hope that this study will aid future research efforts concerning the outcome of the Rwandan transition.

1. Gacaca: Transitional Justice in Rwanda

When the Gacaca courts became operational throughout Rwanda in 2006, judicial attempts to deal with the aftermath of the genocide had already been going on for a decade. Yet the classic approach of relying on criminal trials and civil damages claims had failed to provide an adequate solution to the enormous challenges the country was facing. Tens of thousands of suspects had been held in detention pending trial, often for several years at a time. While the government had raised victims' hopes of receiving justice, truth, and reparation, attempts to achieve these aims had failed. Creating the Gacaca courts was supposed to remedy this untenable situation.

http://www.pbookshop.com

[1] See 'Genocide Survivors in Kanombe Up in Arms over Gacaca Ruling', *The New Times*, 29 May 2009.

Gacaca was inspired by traditional African methods for resolving disputes and represents a form of grassroots justice. In 2001, a law was passed to provide for the creation of Gacaca courts in every community throughout the country. The courts were presided over by respected members of the community as elected by the community itself. With the help of the local population, these lay judges then investigated all the crimes relating to the genocide that had occurred in their community and subsequently put the suspects on trial. If a defendant confessed to having committed crimes, they would be treated with relative clemency, receiving a shorter prison term supplemented or even replaced by community service. Defendants who refused to confess, however, would be punished to the full extent of the law. Yet creating the Gacaca courts was not only aimed at prosecuting the perpetrators. Rwandan officials also argued that Gacaca would reveal what had happened in each community, allow victims to be heard, help reintegrate perpetrators into their communities, and form the basis for a reparation scheme.

Rwanda's quest for transitional justice[2] reflects the recent shift in focus within the debate on how societies should come to terms with their violent pasts in times of political transformation. At the start of this discourse, the challenges faced by societies in transition were commonly associated with dichotomies such as 'truth versus justice' or 'justice versus peace',[3] which characterize the debates and conflicts many Latin American countries went through in their transitions to democracy. The South African Truth and Reconciliation Commission created in 1995 provided an innovative synthesis of these conflicting concepts.

Breaking down transitional justice to a trade-off between truth, justice, and peace, however, turned out to be a simplistic view of the complex challenges transforming societies were facing. The 1990s brought about a number of new developments that would further enrich the debate on transitional justice. First, the establishment of international criminal tribunals has created a framework within which states are under pressure to prosecute grave human rights violations. Granting blanket amnesties, such as those implemented in several Latin American states in the 1980s, has become difficult if not impossible. In addition, developments in these countries have shown that trading justice for peace is not a sustainable option for societies in transition. In countries such as Argentina, Chile, or Uruguay, debates over past human rights abuses have resurfaced. Members of the former military dictatorships there are now facing justice.

The idea that transitions are potentially never-ending formed another new aspect of the discussion. Initial transitional justice case studies had involved clear-cut regime changes, whether from military rule to democracy or from authoritarian communist regimes to liberal rule. Yet the panoply of transitional justice measures developed

http://www.pbookshop.com

[2] For a definition of the term, see, eg, the report of the UN Secretary General, *The rule of law and transitional justice in conflict and post-conflict societies*, UN Doc S/2004/616 of 23 August 2004, para 8. See also N. Roht-Arriaza, 'The New Landscape of Transitional Justice' in N. Roht-Arriaza and J. Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century* (2006) 1 *et seq*; R.G. Teitel, 'Transitional Justice Genealogy' 16 *HarvHRJ* (2003) 69.

[3] See E. Lutz, 'Transitional Justice' in N. Roht-Arriaza and J. Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century* (2006) 327; R.G. Teitel, ibid, 78 *et seq*, 81 *et seq*.

could also be applied to more protracted processes of political transformation or even to situations where political transformation had hardly occurred. New regimes initiating transitional justice measures were often no more democratic or liberal than their predecessors. In some places, violent conflicts lingered on while transitional justice mechanisms were already underway. The work of the International Criminal Court (ICC) may also be seen as a catalyst for a broadening notion of transitional justice. Its investigations in countries such as the Democratic Republic of Congo or Uganda concern states where little political transformation has taken place and conflicts are still going on. Nevertheless, both countries regularly appear in the debate on appropriate transitional mechanisms. Transitional justice has become 'steady-state'.[4]

As situations of political transformation became ever more varied, it became obvious that tailor-made solutions were needed. In many post-colonial states in particular, where state institutions were weak and Western-style courts were not well established, grassroots mechanisms derived from local traditions were much more likely to reach the population than distant court room procedures or formalized truth commissions.[5] In recent years, this trend has materialized in many countries, including Mozambique, northern Uganda, Sierra Leone, Burundi, and East Timor in addition to Rwanda and its Gacaca courts.[6] While traditional institutions had long been regarded both as relics from primitive times and obstacles to development, it is acknowledged today that they are often much more reliable guarantors of social peace than a professional judiciary. They can be easily accessed by the local population, are in keeping with local culture, are more transparent than court proceedings, create a sense of ownership among the population, and are therefore more likely to be complied with voluntarily.[7] Given that such procedures are only amenable to official control and legal regulation to a limited extent, these processes are strongly influenced by civil society, churches, and often by international non-governmental organizations (NGOs). Even in Rwanda, where neo-traditional Gacaca courts are under close official control, NGOs and civil society organizations

[4] R.G. Teitel, ibid, 89, see also 85.

[5] See the report of UN Secretary General, *The rule of law and transitional justice in conflict and post-conflict societies*, UN Doc S/2004/616 of 23 August 2004, para 36, as well as E. Barkan, *The Guilt of Nations* (2000) 318 *et seq*; L. Huyse, 'Tradition-Based Approaches in Peacemaking, Transitional Justice and Reconciliation Policies' in L. Huyse and M. Salter (eds), *Traditional Justice and Reconciliation after Violent Conflict* (2008) 5 *et seq*; D.F. Orentlicher, ' "Settling Accounts" Revisited' 1 *International Journal of Transitional Justice* (2007) 20 *et seq*; J. Widner, 'Courts and Democracy in Postconflict Transitions' 95 *AJIL* (2001) 65 *et seq*; I.W. Zartman, 'Introduction: African Traditional Conflict "Medicine"' in I.W. Zartman (ed), *Traditional Cures for Modern Conflict* (2000) 3 *et seq*.

[6] On traditional justice in Africa, see the contributions by B. Ingelaere, V. Igreja and B. Dias-Lambranca, J.O. Latigo, J.A.D. Alie, and A. Naniwe-Kaburahe in L. Huyse and M. Salter (eds), *Traditional Justice and Reconciliation after Violent Conflict* (2008). On East Timor, see the contribution by P. Burgess in N. Roht-Arriaza and J. Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century* (2006) 176 *et seq*.

[7] See, eg, J.A.D. Alie, 'Reconciliation and Traditional Justice' in L. Huyse and M. Salter (eds), *Traditional Justice and Reconciliation after Violent Conflict* (2008) 143 *et seq*; T. Dexter and P. Ntahombaye, *The Role of Informal Justice Systems in Fostering the Rule of Law in Post-Conflict Situations* (2005) 17 *et seq*; J.O. Latigo, 'Tradition-Based Practices in the Acholi Region' in L. Huyse and M. Salter (eds), *Traditional Justice and Reconciliation after Violent Conflict* (2008) 112 *et seq*; A. Naniwe-Kaburahe, 'The Institution of Bashingantahe in Burundi' ibid, 163 *et seq*; L. Waldorf, 'Mass Justice for Mass Atrocities' 79 *TempLRev* (2006) 3 *et seq*; E. Wojkowska, *Doing Justice* (2006) 16 *et seq*.

http://www.pbookshop.com

have still managed to actively shape the process. Transitional justice has taken on a privatized form, thus mirroring the increasing privatization of violent conflict.[8]

II. Between Retribution and Reparation: An International Legal Framework for States in Transition

The increasing variety of different settings for transitional justice combined with the broad range of challenges specific to each situation does not however mean that there is no room for a set of values and rules common to all such situations. In fact, quite the opposite is true. There is an urgent need to clarify the rights and obligations of states and victims in situations of political transformation.[9] It would clearly be unrealistic to argue that states today have free discretion in dealing with crimes committed by a prior regime or during violent conflict. There is a rich body of jurisprudence, both national and international, that obliges transitional states to pay reparation to victims of serious human rights violations, or that declares national amnesty laws to be in breach of fundamental human rights.[10] These rulings evince a persistent uncertainty among politicians, academics, and human rights activists about the scope and the nature of rights and obligations in situations of political transformation.

Nevertheless, the ability to create a legal framework for transitional justice or even the essential desirability of such a framework is far from undisputed. The argument goes that promoting the rule of law in transitional and post-conflict societies usually involves standard measures based on Western ideas which do not take local specifics into consideration. Accordingly, legal mechanisms are inevitably imposed in top down fashion, with the state claiming the ownership of the conflict while tending to ignore or even quell grassroots initiatives aimed at bringing about transitional justice.[11] Some, more pessimistic arguments even assert that the prevalent human rights discourse may be employed by repressive regimes as a means of concealing their own human rights abuses.[12] Finally, it has been proposed that promoting the use of legal instruments in transitions is usually based on a retributive understanding of justice which does not pay due regard to the potentially destabilizing effects of prosecution in transition.[13]

It goes without saying that this criticism raises a number of important points. Lawyers working on transitional justice should not overlook these considerations

[8] See also K. McEvoy, 'Letting Go of Legalism' in K. McEvoy and L. McGregor (eds), *Transitional Justice from Below* (2008) 16 *et seq*; R.G. Teitel, 'Transitional Justice Genealogy' 16 *HarvHRJ* (2003) 88. On the privatization of violent conflict, see H. Münkler, *Die neuen Kriege* (2002).

[9] See also K. Ambos, 'The Legal Framework of Transitional Justice' in K. Ambos, J. Large and M. Wierda (eds), *Building a Future on Peace and Justice* (2009) 28.

[10] For details, see the discussion in ch 3, sections I and II below.

[11] R.E. Brooks, 'The New Imperialism' 101 *MichLRev* (2002/03) 2276 *et seq*, 2301; K. McEvoy, 'Letting Go of Legalism' in K. McEvoy and L. McGregor (eds), *Transitional Justice from Below* (2008) 19 *et seq*; S. Thomson and R. Nagy, 'Law, Power and Justice' 5 *International Journal of Transitional Justice* (2011) 12–13.

[12] S. Cohen, *States of Denial* (2001) 107 *et seq*.

[13] K. McEvoy, 'Letting Go of Legalism' in K. McEvoy and L. McGregor (eds), *Transitional Justice from Below* (2008) 24. See also M.J. Osiel, 'Why Prosecute?' 22 *HRQ* (2000) 137 *et seq*.

http://www.pbookshop.com

if they want to keep pace with the swiftly developing discourse on transitional justice. In particular, the criticism mentioned above demonstrates that combined approaches are needed. International criminal justice alone is unlikely to be able to provide a comprehensive solution to the problems of transitional societies. Instead, international efforts and local initiatives must work together to tackle the challenges a transitional or post-conflict society faces.[14] Lawyers must acknowledge that law is only one of the many facets of the modern transitional justice discourse.

Issues of law are particularly relevant to transitional justice whenever individual rights have been violated. Conflict between legal responses to violations and non-legal initiatives is most likely to occur following serious human rights abuses, with issues of prosecution and redress arising accordingly. It is precisely in such situations that legal frameworks are needed so as not to leave matters up to political discretion alone. If a society in transition leaves behind a legacy of grave human rights abuses, an official legal response to such abuses is required. Otherwise victims will always associate the institutions of the new government with having condoned past atrocities. Moreover, human rights would be of no use if they were unable to be invoked in the situations where they are most threatened.

These considerations are meant to illustrate the range of different issues a 'legal framework for transitional justice' should cover. The term used here is considerably narrower than seemingly similar notions, such as Teitel's 'transitional rule of law'.[15] Both share the idea there is a certain set of norms common to all transitions, thus providing some element of continuity in situations where normative and value systems are in flux. The framework relied on here, however, is only supposed to identify and define those binding international rules pertaining to the challenges commonly faced in transitions. While several other fields of law, such as the whole body of international criminal and human rights law, also inform transitional processes, these go far beyond the particular issues that arise in transitional contexts. The framework suggested here is limited to the question of how human rights abuses are to be addressed in transition. Transitional governments have relied on a number of different legal mechanisms to deal with past injustices, including prosecution, amnesty, truth commissions, or reparation.[16] These mechanisms are essentially governed by two sets of international norms.

The first of these is used to determine whether perpetrators of serious human rights violations are to be prosecuted and how this is to occur. The relevant norms here are the conventional and customary duties to prosecute crimes under international law as well as the human rights principles governing criminal procedures. The second set of norms pertains to the rights of victims of such abuses. This field is essentially covered by what is referred to as the right to reparation for serious

[14] This is also acknowledged by K. McEvoy, ibid, 44. See also M.A. Drumbl, *Atrocity, Punishment, and International Law* (2007) 181 *et seq*; D.L. Hafner and E.B.L. King, 'Beyond Traditional Notions of Transitional Justice' 30 *BCIntl&CompLRev* (2007) 91 *et seq*.

[15] See R.G. Teitel, 'Transitional Jurisprudence' 106 *Yale LJ* (1997) 2026 *et seq*; R.G. Teitel, *Transitional Justice* (2000) 18 *et seq*, 213 *et seq*; R.G. Teitel, 'Transitional Rule of Law' in A. Czarnota, M. Krygier and W. Sadurski (eds), *Rethinking the Rule of Law after Communism* (2005) 279 *et seq*.

[16] See G. Werle, *Principles of International Criminal Law*, 2nd edn (2009) paras 205 *et seq*; G. Werle and P. Bornkamm, 'Transitional Justice' in C. Weller (ed), *Transitional Justice und Zivile Konfliktbearbeitung* (2008) 79 *et seq*.

http://www.pbookshop.com

violations of human rights and humanitarian law.[17] It is the challenges common to all political transitions which allow these rules to be grouped under the heading of transitional justice: the need to find a balance between individual rights and collective interests or the difficulties arising from mass crimes involving great numbers of victims and perpetrators. Transitions are complex processes, in which the rights and duties of the different parties involved may not always be reconcilable. Rwanda is a typical example of such a predicament.

The legal framework for transitional justice discussed in this study is derived from customary international law and the various human rights conventions to which Rwanda is a party, namely the Genocide Convention,[18] the ICCPR,[19] the Banjul Charter,[20] and the Torture Convention.[21] In discussing the obligations of states in transition, I shall rely on jurisprudence by international human rights bodies, including the Inter-American and European Court of Human Rights. While their jurisprudence is very important in the interpretation of international human rights law, it goes without saying that it does not have a direct effect on Rwanda.

http://www.pbookshop.com

III. Scope of the Study

In recent years, a considerable quantity of academic writing has been published on Gacaca courts and the Rwandan transition in general. Most of these contributions are relatively short articles that provide an overview or try to shed light on a particular aspect of the process. In addition, NGOs have issued a number of very insightful reports. To the best of my knowledge, only one large monograph on the Gacaca process has been published in English until now.[22] The present study provides a detailed analysis of the Gacaca legislation and practice as well as a comprehensive

[17] See also K. Ambos, 'The Legal Framework of Transitional Justice' in K. Ambos, J. Large and M. Wierda (eds), *Building a Future on Peace and Justice* (2009) 19 *et seq*; G. Werle and P. Bornkamm, ibid, 85 *et seq*.

[18] *Convention on the Prevention and Punishment of the Crime of Genocide* of 9 December 1948, 78 UNTS 277. Rwanda ratified the Convention by *Décret-loi no 08/75 du 12 février 1975 approuvant et ratifiant diverses Conventions Internationales relatives aux droits de l'homme, au désarmement, à la prévention et à la répression de certains actes susceptibles de mettre en danger la paix entre les hommes et les nations*, Journal officiel de la République Rwandaise 1975, 230.

[19] *International Covenant on Civil and Political Rights* of 16 December 1966, 999 UNTS 171, to which Rwanda has been a party since 16 April 1975.

[20] *African Charter on Human and Peoples' Rights* of 27 June 1981, 1520 UNTS 217. Rwanda ratified the Charter on 15 July 1983.

[21] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* of 10 December 1984, 1465 UNTS 85. Rwanda ratified the Convention in 2008.

[22] P. Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers* (2010). Two such publications have appeared in German however: S. Friese, *Politik der gesellschaftlichen Versöhnung: Eine theologisch-ethische Untersuchung am Beispiel der Gacaca-Gerichte in Ruanda* (2010); S. Schilling, *Gegen das Vergessen: Justiz, Wahrheitsfindung und Versöhnung nach dem Genozid in Rwanda durch Mechanismen transitionaler Justiz: Gacaca Gerichte* (2005); there are also several short ones: P.E. Harrell, *Rwanda's Gamble: Gacaca and a New Model of Transitional Justice* (2003); A. Molenaar, *Gacaca: Grassroots Justice after Genocide* (2005); D. Rempfer, *Die Graswurzelgerichtsbarkeit gacaca: der ruandische Weg zur Aufarbeitung innerstaatlicher Gewalt* (2008); K. Weikl, *Gacaca im Spiegel der Menschenrechte: Rwandas schwieriger Weg zur Wahrheit* (2010).

appraisal of the system from the point of view of international law. In addition, it attempts to systematize the existing literature on the subject.

In the first chapter, Rwanda's recent history will be briefly outlined. Chapter two will provide a detailed commentary on, and analysis of, the legal foundations of Gacaca in light of the courts' practice as well as the external influences exerted by Rwandan institutions, civil society, and international NGOs. The third chapter will examine transitional justice in Rwanda by applying the analytical and legal framework set out above. First, the scope of Rwanda's duty to prosecute perpetrators of genocide and crimes against humanity will be discussed. Then the Gacaca system will be analysed against the backdrop of the fair trial principle and other relevant norms governing criminal procedure. Following this, the scope of the victims' right to reparation and Rwanda's practice in this field will then be examined. This covers both the forms of reparation provided within the framework of the Gacaca process and other criminal trials as well as the government's (unsuccessful) attempts to create a comprehensive reparation scheme. In the conclusion, I will discuss both the achievements and shortcomings of the approaches taken in the aftermath of the genocide.

The study is based on the premise that a transition following mass atrocities is not only governed to a considerable extent by universal legal rules, but also that each individual process of transition modifies these legal rules, namely if they are derived from soft law or (emerging) customary international law. Determining the impact of the Rwandan transition on the development of the law is one of the objectives of this study and forms the focus of the third and fourth chapters. Another premise of this study is that the degree of adherence to these legal rules is an important indicator for the credibility and the quality of the transition in question. In this way, certain legal rules may form part of the famous 'tool box' for transitions; while compliance with these rules may not always have exclusively positive effects, they nevertheless form a central and indispensable set of guidelines for any transition.

http://www.pbookshop.com

IV. Methodology

As stated above, this study analyses the Gacaca law and its use in practice. Given that there were over 10,000 Gacaca courts in the whole country, most of them sitting weekly, it was clear from the outset that my own first-hand experience of Gacaca trials would not be sufficient to provide a representative picture of such a huge scheme. My visits were therefore aimed instead at allowing me to form my own impression of the courts, to identify and describe the structural problems faced by the courts, and to gather material to illustrate my findings. I spent a total of six months in Rwanda during 2007 and 2008, attending 16 Gacaca sessions. The sites where I visited Gacaca were chosen in consultation with observers of the NGO Avocats Sans Frontières (ASF).

Since permits allowing foreigners to observe Gacaca court proceedings are only issued for specific regions, I decided to limit my observations to two areas, one being the city of Kigali, the other being the District of Nyanza in southern

Rwanda. One court I visited regularly was the Kimihurura Gacaca court of appeal in Kigali, a very dynamic court with highly capable judges. My focus here was on continuity. By visiting the court on a weekly basis over a period of six weeks, I was able to become familiar with the judges and how they approached the various different challenges arising from individual cases. Since the court proceedings are held in Kinyarwanda, I hired an interpreter who had worked previously with other researchers and had experience of Gacaca sessions.

My observations in the District of Nyanza allowed me to gain insight into how Gacaca proceedings are conducted in rural areas. I chose this region since it has always had a large Tutsi population, has a particularly high proportion of victims and perpetrators, and is the home to many survivors today.[23] It was for these reasons that ASF staff recommended I focus on this region, since they had found the courts there to be very dynamic.

In Nyanza District, I did not limit my observations to one court, visiting instead three different courts two or three times each. This enabled me to experience Gacaca proceedings in a range of different rural settings, including the small town of Nyanza, which is accessible by a full tarmac road, as well as the two very remote communities of Nyamiyaga and Mayaga, which can only be reached via dust roads. The sites I visited were selected in consultation with my interpreter there, a lawyer who was well informed about the activities of the courts and the cases they were hearing. Given the enormous differences between urban and rural Rwanda with regard to infrastructure, standards of living, and education, it was vital to visit a variety of different settings in order to be able to understand the whole spectrum of challenges faced by the Gacaca system.

In addition, I attempted to experience a wide range of different types of cases: trials involving large numbers of witnesses as well as cases based on a bare minimum of evidence, trials stretching over two or three sessions and trials completed within two hours, cases pertaining to high-level perpetrators as well as those concerned with mere accessories, cases involving wealthy and well-connected defendants as well as cases regarding less affluent ones, first instance cases, appeals cases, and review cases, trials involving female defendants and even cases where the defendant was a Tutsi.

It goes without saying that the cases I witnessed myself only represent a small part of the overall process. Nevertheless, I was still able to gain a detailed insight into Gacaca in different settings. Together with interviews conducted with other observers and stakeholders, as well as the analysis of a great number of NGO reports on Gacaca, my observations allowed me to identify a number of structural shortcomings of the system. Most of these are discussed in chapter three. Whenever my observations reflect a general trend, I use them to illustrate the points made in the discussion. I also draw upon the transcripts of Gacaca trials published by ASF. The organization runs a large monitoring programme and has made transcripts of several hundred trials available. I rely on the *Recueil de jurisprudence* edited by the Rwandan Supreme Court and ASF with regard to the jurisprudence of ordinary Rwandan courts.

http://www.pbookshop.com

[23] National Service of Gacaca Courts, *Number of Survivors of Genocide* (2006); National Service of Gacaca Courts, *Summary of Persons Prosecuted* (2006).