

**CLOSING GACACA—ANALYSING RWANDA’S CHALLENGES WITH REGARD TO THE END OF  
GACACA COURTS**

**By**

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## ABSTRACT

In Rwanda, Gacaca courts, community-based traditional courts, were alternative solution of dealing with the legacy of genocide after the failure of modern model of justice. In 2012, Gacaca courts were repealed by the Organic Law 04 of 2012. These courts left behind a large number of cases which include, *inter alia*, suspects ranged within first category, new cases of those who were or will be extradited from ICTR or other countries, thousands of perpetrators tried *in absentia* while abroad that have the right to file opposition as well as applications for review lodged against their judgements. Today, all of these cases fall under the jurisdiction of ordinary courts along with ordinary criminal and civil litigations. This causes practical challenges of inability of domestic courts to deal with the huge number of cases. Besides, the organic Law 04 of 2012 that terminates Gacaca courts provides mechanisms to deal with other issues related to the end of Gacaca courts. However, these mechanisms result in unequal treatment of genocide suspects and violate the victims' rights. This may lead to qualify this law as discriminatory and unjust provision. Furthermore, this law remains silent vis-à-vis the issue of enforcement of sentences rendered against those tried *in absentia* while abroad and the issue of reparations. Despite the mechanisms set forth to deal with all those cases and other issues left behind by Gacaca courts, serious challenges remain. Confronting these challenges needs international cooperation to bring genocide perpetrators to trial, administrative schemes for reparations as well as legal harmonisation to adapt the domestic legislation to the post-Gacaca situation.

**KEY WORDS**

Annulment of a judgement

Compensation

Enforcement

Means of appeal

Mechanisms

Mediation committee

Ordinary courts

Selective sanctions

Trial *in absentia*

Unequal treatment



## DECLARATION

I, Etienne DUSABEYEZU, hereby declare that the work presented in this thesis entitled **“Closing Gacaca: Analysing Rwanda’s challenges with regard to the end of Gacaca courts”** is my own work and that it has not been submitted for any degree or examination in any other university or institution. All the sources used, referred to or quoted have been duly recognised.

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## LIST OF ABBREVIATIONS AND ACRONYMS

ACHPR	: African Charter on Human and People’s Rights
Art(s)	: Article (s)
C/	: contre (versus)
CDR	: Coalition pour la Défence de la République (Coalition for the Defence of the Republic)
DDR	: Disarmament, Demobilization and Reintegration (program).
Ed	: Edition
<i>et al.</i>	: <i>et alii</i> (and others)
Et seq.	: and the following (et sequens; et sequentes)
ETS	: European Treaty Series
FPR	: Front Patriotique Rwandais
G.A/Res.	: General Assembly Resolution
IDEA	: International Institute for Democracy and Electoral Assistance
i.e	: that is (id est)
ICCPR	: International Covenant on Civil and Political Rights
ICJ	: International Court of Justice
ICJ Rep	: International Court of Justice, Reports of Judgements. Advisory Opinions and Orders
ICTR	: International Criminal Tribunal for Rwanda
<i>Inter alia</i>	: among other things
MRND	: Mouvement Républicain National pour le Développement
n above	: note above

No.	: Number
Para(s).	: Paragraph (s)
PRI	: Penal Reform International
RCS	: Rwanda Correctional Service
TGI	: Tribunal de la Grande Instance (Intermediate Court)
TIG	: Travaux d'Intérêt Général (Community service)
UN Doc.	: United Nations Documents
UNHCR	: United Nations High Commissioner for Refugees
UN	: United Nations
UNTS	: United Nations Treaty Series
UWC	: University of Western Cape
V.	: Versus
Vol.	: Volume



## **DEDICATION**

**To the Almighty God**

**To my family**



**UNIVERSITY *of the*  
WESTERN CAPE**

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## CHAPTER ONE: INTRODUCTION AND OVERVIEW OF THE STUDY

### 1.1 Introduction

In 1994, the genocide perpetrated against Tutsi in Rwanda claimed over one million victims and over three million persons who fled the country.<sup>1</sup> Close to 120,000 suspects were provisionally incarcerated.<sup>2</sup> The demand for justice for both detainees and victims made the delivery of justice an urgent quest. The issue of justice was particularly raised given the fact that there was no municipal law criminalising genocide within the domestic legislation.<sup>3</sup>

Therefore, in 1996 the government of Rwanda enacted a law criminalising genocide and crimes against humanity committed since 1990, and further created special chambers in ordinary and military courts to prosecute those crimes.<sup>4</sup> Five years later, the records showed that these courts have only tried 6,000 cases.<sup>5</sup> In this regard, it would require 200 years to try only the aforementioned number of detainees while there were more suspects in the community and in exile.<sup>6</sup>

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<sup>1</sup> Jones AN *The courts of genocide: politics and the rule of law in Rwanda and Arusha* (2011) 7.

<sup>2</sup> Penal Reform International *Eight years on... A record of Gacaca courts monitoring in Rwanda* (2010) 16; Bornkamm PC *Rwanda's Gacaca courts-Between Retribution and Reparation* (2012) 78.

<sup>3</sup> Schabas WA *Genocide in International Law: The Crime of Crimes* 2ed (2009) 418.

<sup>4</sup> Prosecution of genocide crimes and other crimes against humanity committed since 1 October 1990 Organic Law 08 of 1996 (30 August 1996) in Official Gazette of the Republic of Rwanda No. 17 of 1 September 1996 (hereafter "Genocide Law"), art. 1. The Rwandan laws comprise different types of legislations and titles ranged in the following hierarchy: Constitution, Organic Laws, Laws, Decree-Laws and Orders which depend on the authority that has competence to enact the act. In addition, the Rwandan judicial system includes two types of courts: ordinary courts (Supreme Court, High Courts, Intermediate Courts and Primary Courts) and specialised courts (Military courts, Commercial courts and Gacaca courts which were repealed). For these types of courts, see Constitution of the Republic of Rwanda (2003), art. 143; see also, Organisation Functioning and Jurisdiction of Courts Organic Law 51 of 2008 (9 September 2008) in Official Gazette of the Republic of Rwanda No. special of 10 September 2008 (hereafter "Organic Law 51 of 2008"), art. 2.

<sup>5</sup> Daly E 'Between Punitive and Reconstructive Justice: The Gacaca Courts of Rwanda' (2002) 34 *New York University Journal of International Law and Politics* 369 (hereafter "Daly, 2002").

<sup>6</sup> Daly (2002:369).

For this reason, Rwanda decided to conceive Gacaca courts as an alternative mechanism to provide justice for people within reasonable time.<sup>7</sup> Gacaca Courts began their activities on 18 June 2002 and were terminated on 18 June 2012.<sup>8</sup> After one decade, Gacaca courts, with 12,000 community-based courts,<sup>9</sup> had prosecuted and tried 1,958,634 files<sup>10</sup> of suspects of genocide<sup>11</sup> and crimes against humanity<sup>12</sup> committed between 1 October 1990 and 31 December 1994.<sup>13</sup>

As a result, 38,527 perpetrators<sup>14</sup> sentenced to prison terms, life imprisonment and life imprisonment with special provisions<sup>15</sup> are currently incarcerated, 58,873 perpetrators<sup>16</sup>



<sup>7</sup> Riddell GJ *Addressing crimes against International Law: Rwanda's Gacaca in practice* (2005) 70; African Charter on Human and People's Rights (1981) 1520 UNTS 217 (hereafter "ACHPR"), art. 7(1)(d).

<sup>8</sup> National Service of Gacaca Courts *Summary of the report presented at the closing of Gacaca courts activities* (2012) 38.

<sup>9</sup> Clark P *The Gacaca Courts, Post-Genocide justice and reconciliation in Rwanda: Justice without lawyers* (2010) 74; Bornkamm (2012:26).

<sup>10</sup> National Service of Gacaca Courts (2012:34).

<sup>11</sup> The acts committed during 1994 constitute crime of genocide as they targeted Tutsi as an ethnic group with the specific intent to destroy in whole or in part this group: Statute of International Criminal Tribunal for Rwanda, annex to the UN Security Council Resolution 955 (1994) UN Doc. S/Res.995 (1994) (hereafter "ICTR Statute"), art.2; Rwandan Penal Code Organic Law 01/2012/OL (2 May 2012) in Official Gazette of the Republic of Rwanda No. special of 14 June 2012 (hereafter "Rwandan Penal Code"), art. 114; *Prosecutor v. Akayesu*, Trial Chamber I, Judgement (1998) ICTR-96-4-t-T, paras.124 et seq.

<sup>12</sup> The acts committed in 1994 constitute crimes against humanity as they consist of widespread and systematic attack on civilian population notably political opponents and moderated Hutu: ICTR Statute, art.3; Rwandan Penal Code, art 120; *Prosecutor v. Bagosora et al.*, Trial chamber I, Judgement and sentence (2008), Case No. ICTR-94-41-T, para. 2171.

<sup>13</sup> Establishing the Organisation Functioning and Competence of Gacaca courts Organic Law 16 of 2004 (19 June 2004) in Official Gazette of the Republic of Rwanda No. special of 19 June 2004 (hereafter "Gacaca Law of 2004"), art. 2.

<sup>14</sup> Rwanda Correctional Service 'Activity report quarter I-2012/2013' (2012) available at <http://rsc.gov.rw/txtpt/textpat/index.php?id=5> (accessed on 15 February 2013) (hereafter "RCS Report").

<sup>15</sup> The life imprisonment with special provisions is a penalty that replaced the death penalty after its abolition of in Rwandan legislation. The convicted person sentenced of life imprisonment is isolated and kept in prison in individual cell (area) reserved to the guilty perpetrators of inhuman crimes, sentenced person is not entitled to any kind of mercy, conditional release or rehabilitation, unless he or she has served at least twenty (20) years of imprisonment; See Amendment of Abolition of the Death Penalty Law 66 of 2008 (21 November 2008) in Official Gazette of the Republic of Rwanda No. 23 of 1 December 2008 (hereafter "Abolition of Death Penalty Law"), art. 1(3).

<sup>16</sup> This number corresponds to the number of arrest warrants issued by Gacaca courts against the perpetrators tried by those courts while abroad.

were tried *in absentia*<sup>17</sup> while abroad and 1,200,000 persons were convicted to compensate the property looted or destroyed during the genocide.<sup>18</sup> Given that genocide and crimes against humanity are imprescriptible,<sup>19</sup> the Law terminating Gacaca courts provides that the domestic courts and mediation committees<sup>20</sup> will continue the prosecution of all acts constituting genocide and crimes against humanity committed in 1994, after the closure of Gacaca courts.<sup>21</sup> Thus, this has brought about serious legal and practical challenges.

## 1.2 Background to the study

This study examines the key challenges encountered by Rwanda after the closure of Gacaca courts.<sup>22</sup> It focuses on issues related to the effectiveness of the mechanisms and domestic laws in force in dealing with the post-Gacaca situation, the capacity of domestic courts to deal with all pending genocide cases, and the enforcement of sentences rendered by Gacaca courts.



<sup>17</sup> The Rwandan laws allow the trial *in absentia*, and recognises to the defaulting party, especially the accused, the right to file opposition [Gacaca Law of 2004, art. 85; Criminal Procedure Code of Rwanda Law 13 of 2004 (17 May 2004) amended by Law 20 of 2006 (22 April 2006) (hereafter “Criminal Procedure code of Rwanda”), arts. 157 et seq.]. Under Rwandan legislations, “opposition” is understood as an objection lodged against a judgement passed by default in case the accused was absent during court hearing (Gacaca Law of 2004, art.86; Criminal Procedure Code of Rwanda, art. 158).

<sup>18</sup> National Service of Gacaca Courts (2012:34).

<sup>19</sup> Convention of the Non–Applicability of statutory Limitations to War crimes and Crimes against Humanity (1968) 754 UNTS 73, art. IV; Convention on the Prevention and Punishment of the Crime of Genocide (1948) 78 UNTS 277 (hereafter “Genocide convention”), art. I; Ntoubandi ZF ‘Amnesty for the crimes against humanity under international criminal law’ (2008) 6 *Journal of International Criminal Justice* 815 (hereafter “Ntoubandi, 2008”).

<sup>20</sup> The Mediation Committee Law stipulates that a mediation committee is an non judicial body meant for providing a framework of obligatory mediation prior to submission of a case before the first degree courts hearings (Organisation Functioning and Competence of Mediation Committee Organic Law 02 of 2010 (9 June 2010) in Official Gazette of the Republic of Rwanda 24bis of 14 June 2010(hereafter “Mediation Committee Law”), art. 3. The mediation committee composed of 12 persons of integrity known as ‘Mediators’ elected by their neighbours. The execution mediators’ decision requires the enforcement order (executory formula) of the primary court. In case one of the parties is not satisfied by the mediation committee decisions, he or she applies for appeal before the Primary Court (Mediation Committee Law, art. 17).

<sup>21</sup> Terminating Gacaca courts and determining mechanisms for solving issues which were under their jurisdiction Organic Law 04/2012/OL (15 June 2012) in Official Gazette of the Republic of Rwanda No. special of 15 June 2012 (hereafter “Law terminating Gacaca”), arts. 4 et seq.

<sup>22</sup> Gacaca courts have been officially closed on 18 June 2012.



The achievements realised by Gacaca, such as trying a big number of suspects within a reasonable time of 10 years, building a historical truth about what happened during 1994 genocide and eradicating impunity, do not mean that they had conclusively redressed all legacies of the genocide. Consequently, the Organic Law 04 of 2012<sup>23</sup> gives the ordinary courts the competence of prosecuting the acts constituting the crime of genocide such as the prosecution of pending and new cases as well as the appeals against judgements rendered by Gacaca courts.

Gacaca courts tried *in absentia*<sup>24</sup> thousands of suspects while abroad.<sup>25</sup> Therefore, the law recognises to them the right to file opposition<sup>26</sup> when they return to Rwanda.<sup>27</sup> Indeed, the victims, public prosecution and convicted persons are entitled to apply for review against the Gacaca judgements.<sup>28</sup> This may result in important legal and practical challenges.

First, the number of applications for reviews<sup>29</sup> and oppositions<sup>30</sup> as well as the need for prosecution of pending and new cases,<sup>31</sup> lead to inability of domestic courts to deal with this

<sup>23</sup> Law terminating Gacaca, art. 3(1).

<sup>24</sup> The Rwandan laws, including Gacaca Law, allow the trial *in absentia* so that the accused can be tried and convicted while abroad (Gacaca Law of 2004, arts. 86 et seq.; Criminal Procedure Code of Rwanda, art. 155).

<sup>25</sup> The handover of warrant of arrest against the perpetrators tried *in absentia* issued by Gacaca courts, between National Service of Gacaca courts and Rwanda National Police of 2012 shows that Gacaca courts have issued 58,873 arrest warrants against those who were tried *in absentia*.

<sup>26</sup> An opposition, under Rwandan legislation, is an objection lodged against a judgement passed *in absentia* (Criminal Procedure Code of Rwanda, arts. 157 et seq.; Gacaca Law of 2004, arts. 86 et seq.; Law terminating Gacaca, art. 9).

<sup>27</sup> Law terminating Gacaca, art. 9.

<sup>28</sup> Law terminating Gacaca, art.10 *in fine*.

<sup>29</sup> Ministry of Internal Security *Report on the respect and implementation of the rights of detainees and prisoners in the prisons of Rwanda* (2012) 12. This report shows that 2,836 prisoners have applied for review and 1,438 have applied for appeal.

<sup>30</sup> The number of those tried *in absentia* who have the right to file the opposition is estimated to 58,873 (see also n 23 above).

<sup>31</sup> Currently, there are pending cases since last year still in court, namely, *Prosecutor v. Jean Uwinkindi*, High Court of Rwanda (2012); *Prosecutor General v. Leon Mugesera*, High Court of Rwanda (2012), Case No. RS/Const/PEN/0003/CS; Law terminating Gacaca, art. 1.

huge number of cases. It is evident that prosecutions may take at least decades, and necessitate enormous costs. Moreover, in the prosecution of acts constituting the crime of genocide by ordinary courts, the law provides some prerogatives to certain suspects<sup>32</sup> which are not recognised to others.<sup>33</sup> For example, the domestic laws in general state that the extradited suspect shall not be punishable by penalty of life imprisonment with special provisions while other suspects, to be prosecuted after the closure of Gacaca courts, should be subject to this heaviest penalty within the domestic criminal legislation.<sup>34</sup>

Furthermore, in case the person extradited to be tried in Rwanda has been sentenced by a Gacaca court, the decision of the Gacaca court shall first be nullified by that court.<sup>35</sup> This may lead to unequal treatment of suspects and violate the principle of equality before the law.<sup>36</sup> It may also affect the victims' rights acquired through compensation of property awarded in execution of the judgment that has been nullified thereafter. Here, it is also important to think about the value of testimonies given in this judgment nullified, in case the witness is not alive anymore.

Secondly, there are important lacunas within the Law terminating Gacaca courts with regard to the enforcement of Gacaca judgements. As mentioned, Gacaca courts had tried and sentenced *in absentia* tens of thousands perpetrators and issued arrest warrants against

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<sup>32</sup> Law 33/bis of 2003, art.20; Rwandan Penal Code, art. 114.

<sup>33</sup> Schabas (2009:416); Transfer of Cases to the Republic of Rwanda from International Criminal Tribunal for Rwanda and other States Organic Law 11 of 2007 (16 March 2007), in Official Gazette of the Republic of Rwanda No. special of 19 March 2007(hereafter "Transfer Law"), art. 3; Abolition of the Death Penalty Law, art.1(3).

<sup>34</sup> Rwandan Penal Code, art. 114.

<sup>35</sup> Law terminating Gacaca, art. 8.

<sup>36</sup> Constitution of the Republic of Rwanda, 2003, art.16; Universal Declaration of Human Rights (1948) UN Doc.A/810, 71 (1948) (hereafter "UDHR"), art.7; International Covenant on Civil and Political Rights (1966) 999UNTS 171 (hereafter "ICCPR"), art.14(1); see also Drumbl MA 'Prosecution of Genocide v. The Fair Trial Principal' (2010) 8 *Journal of International Criminal Justice* 289 (hereafter "Drumbl, 2010").

them. However, the law does not provide their enforcement<sup>37</sup> while most of them got asylum in African and as well as in European countries.<sup>38</sup> Normally, the enforcement of these sentences requires the extradition of those tried *in absentia*.<sup>39</sup> Since the official closure of Gacaca courts, no one has been arrested or extradited in order to enforce the sentences rendered by Gacaca courts.

This may lead to the result that the sentences remain unenforced and the perpetrators go unpunished. Moreover, the gaps related to the enforcement of the Gacaca judgements also remain a serious issue to the victims' rights to reparation. Most of those that were convicted of looting property are indigent so that they are unable to pay out the compensation awarded by Gacaca courts. In addition to this, the genocide victims have no right to reparation because of lack of legal basis and political will to pass a law governing reparations.<sup>40</sup> As a result, the genocide victims remain uncompensated regarding their property looted and harm incurred.

### 1.3 Significance of the study

This research paper is significant because it gives an analysis of domestic legislations and mechanisms in force to deal with the post-Gacaca issues. Gacaca courts were established as an alternative mechanism of dealing with the legacies of genocide against Tutsi, and as a tool of delivering justice to victims and suspects. However, it is clear now that Rwanda will struggle to deal with the legacies of Gacaca courts.

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<sup>37</sup> Platto C *Enforcement of foreign judgment worldwide* (1989) 64.

<sup>38</sup> Union Africaine *Rwanda: Le génocide qu'on aurait pu éviter* (2000) 73.

<sup>39</sup> Bassiouni MC *International extradition and world public order* (1974) 6.

<sup>40</sup> Since the end of genocide (in 1994), domestic legislation stipulates that civil damages resulting from the crime of genocide shall be determined by a law until now no legislation with regard to reparation.

Moreover, many of the refugees, whom UNHCR is now repatriating, have been sentenced by Gacaca courts. On their return, they have the right to appeal against these sentences. As a result, given that there is a limited number of judges, the domestic courts would encounter challenges to deal with these cases and to deliver justice within reasonable time.<sup>41</sup> Indeed, the mechanisms in force may lead to unequal treatment of suspects, undermine the judgments rendered by Gacaca courts in general, and affect the rights of victims and suspects rather than providing solutions.

More importantly, if the suspects tried *in absentia* are not arrested and extradited, those sentences will remain unenforced, and the perpetrators will go unpunished. In case the perpetrators remain free, it will be a step backwards against the culture of impunity and the prevention of genocide. This research provides possible alternative solutions to redress the raised issues such as recommending the amendment municipal norms in force relating to the prosecution of genocide and proposes alternative mechanisms to be applied in order to redress and adapt to the post-Gacaca situation.

#### **1.4 Research questions**

This study aims to address the following core questions:

- What are the causes of the challenges encountered by Rwanda after the closure of Gacaca courts?
- Are the legal mechanisms in force effective enough in dealing with the post-Gacaca situations?

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<sup>41</sup> ACHPR, art. 7(1)(d); Riddell (2005:70).

## 1.5 Argument

The current challenges Rwanda is facing may have their roots in the premature closure of Gacaca courts and the lack of appropriate and sustainable mechanisms of dealing with the legacies of Gacaca courts within Rwanda's legal order. The mechanisms currently in force remain ineffective and inadequate in providing solutions to these issues.

Therefore, there is a need for a legal harmonisation that includes the amendment of the existing laws as well as international cooperation for enforcement of Gacaca judgements and prosecution of genocide suspects. There is also a necessity of adopting administrative schemes for reparation as well as the mechanisms to speed up genocide trials within ordinary domestic courts.



## 1.6 Literature review

A voluminous body of literature on Gacaca courts exists so far. Comprehensive work has been written by many that include, *inter alia*, Phil Clark<sup>42</sup> and Paul Christoph Bornkamm.<sup>43</sup> Clark has conducted his research on Gacaca courts with the purpose “to explore the nature of Gacaca as an institution, to identify its objectives and to judge its effectiveness in responding the legacies of the genocide.”<sup>44</sup>

This scholar does not agree with international human rights activists, such as Amnesty International and Human Rights Watch, on the critics against Gacaca courts. According to him, Gacaca courts have been established to “achieve justice and reconciliation in Rwanda

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<sup>42</sup> Clark P *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* (2010).

<sup>43</sup> Bornkamm PC *Rwanda's Gacaca courts-Between Retribution and Reparation* (2012).

<sup>44</sup> Bornkamm (2012:7).

and [have been] designed not only with the aim of providing punishment but also reconstituting the Rwandan society that had been destroyed by irresponsible political leaders.”<sup>45</sup>For him, “the Gacaca law enshrines reconciliation and restorative justice as key objectives of Gacaca.”<sup>46</sup>

In contrast to Clark, Bornkamm, in his book “Rwanda’s Gacaca courts–Between Retribution and Reparation”, makes a critical analysis of the mechanisms adopted by Rwandan government to deal with the legacies of genocide. He explores in general the achievements and shortcomings of Gacaca courts as a restorative justice instrument. In his view, Gacaca’s punitive elements may defeat its restorative objectives and be an impediment to “sincere truth-telling, reconciliation and reintegration” of perpetrators.<sup>47</sup>

Another study had been conducted by Jennifer G. Riddell during the process of Gacaca courts.<sup>48</sup>This research aimed to analyse the key aims of Gacaca courts and explore whether they met the desired objectives.<sup>49</sup> In her opinion, the Gacaca procedure violated the international standards recognised by international conventions of which Rwanda is signatory.<sup>50</sup>

Therefore, such a scholarly literature contributed to develop knowledge on Gacaca courts. All of them are focussing on the impact of Gacaca courts to deal with the legacies

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<sup>45</sup> Clark (2010:348).

<sup>46</sup> Clark (2010:348).

<sup>47</sup> Bornkamm (2012:101).

<sup>48</sup> Riddell GJ *Addressing crimes against International Law: Rwanda’s Gacaca in practice* (2005).

<sup>49</sup> Riddell (2005:3).

<sup>50</sup> Riddell (2005:72 et seq.).

genocide.<sup>51</sup> Many of them stated that Gacaca courts did not fit into the post-genocide situation, and they argued that Gacaca courts were selective, unfair and victors' justice.<sup>52</sup> In addition, research on Rwandan situation had been conducted before the trial phase of Gacaca courts as well as before its official closure.

However, so far no research has been conducted on the challenges following the end of Gacaca courts that is the issue related to the effectiveness of the mechanisms and domestic laws in force in dealing with the post-Gacaca situation, the capacity of domestic courts to deal with all pending genocide cases, and the enforcement of sentences rendered by Gacaca.

### **1.7 Methodology of research**

This study adopted a desktop research methodology. Thus the research is based on primary sources such as Statutes, International Conventions, other sources of international law, Rwandan laws as well as judicial decisions. In addition, secondary sources such as books, journal articles as well as electronic sources were used.

### **1.8 Chapter outline**

This study is composed of five chapters. Chapter one gives a general introduction of the study. Chapter two explores the legacy of Gacaca courts. It presents the genesis, the implementation and the achievements of Gacaca courts. Chapter three gives an overview of the Organic Law No. 04/2012 terminating Gacaca courts. Chapter four highlights the key

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<sup>51</sup> This academic literature includes for example one of Katushabe JB *Justice, Truth and reconciliation under Rwandan domestic courts: Specific reference to the traditional Gacaca courts* (LLM Thesis, University of the Western Cape, 2002) and Osega J *Transitional justice in Rwanda: A case study of fair trial process* (LLM Thesis, University of the Western Cape, 2001).

<sup>52</sup> See as an example, Osega (2001:38).

challenges following the end of Gacaca courts. This chapter analyses critically the effectiveness and legal effects of mechanisms and laws in force of dealing with the cases which were under Gacaca courts. Chapter five concludes the study and provides recommendations.





## CHAPTER TWO: LEGACY OF GACACA COURTS

### 2.1 Introduction

Delivering justice to genocide victims on the one hand and guaranteeing a fair trial and acceptable conditions to ten thousands of detainees on the other hand was a crucial challenge that the Rwandan government faced and is still facing after the genocide.<sup>53</sup> However, as Rwanda had no domestic law criminalising the acts constituting the crime of genocide,<sup>54</sup> it was judged important to pass an act governing the prosecutions and creating special chambers to carry out prosecutions.

As ordinary courts failed to prosecute the large number of *génocidaires*<sup>55</sup> alone, Gacaca courts, “a traditional community-based mechanism”,<sup>56</sup> were established as an alternative solution of speeding up trials and promoting reconciliation.<sup>57</sup> This chapter explores the genesis, implementation and achievements of Gacaca courts.

### 2.2 Genesis of Gacaca courts

As mentioned above, the failure of ordinary courts in dealing with the big number of genocide suspects led to the decision of coming up with an alternative legal solution. In this regard, Gacaca courts were established with the purpose of providing justice within

<sup>53</sup> Human Rights Watch *Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts* (2011) 13.

<sup>54</sup> Amnesty International ‘Gacaca: A question of justice’ (2002)13 available at <http://www.amnesty.org/en/library/asset/AFR47/007/2002/en/b65d04e4-d769-11dd-b024-21932cd2170d/afr470072002en.pdf> (hereafter “Amnesty International, 2002) (accessed on 27 February 2013).

<sup>55</sup> Human Rights Watch ‘Struggling to survive: Barriers to justice for rape victims in Rwanda’ (2004) 10(16) *Human Rights Watch Report* 10; Penal Reform International (2010:16).

<sup>56</sup> Sarkin J ‘Promoting Justice, Truth and Reconciliation in Traditional Societies: Evaluating Rwanda's Approach In the New Millennium of Using Community Based Gacaca Tribunals To deal with the Past’ (2000) 2 *International Law RORUM du droit international* 118 (hereafter “Sarkin, 2000”).

<sup>57</sup> Schabas (2009:418).

reasonable time and redressing the legacies of genocide in general.<sup>58</sup> This section provides the schema of the genesis of Gacaca courts from the enactment of first law that criminalised genocide under domestic law to their establishment.

### 2.2.1 Law repressing the crime of genocide

After the genocide,<sup>59</sup> many suspects were arrested and detained in different prisons and communal *cachots*<sup>60</sup> within the territory of Rwanda. It was not intended that these detainees would stay in the incarceration without being prosecuted. However, at that time no domestic law criminalised the crime of genocide.<sup>61</sup> The Rwandan Penal Code contained murder rather than genocide.<sup>62</sup>

From this perspective, in 1996, the Rwandan Transition Parliament enacted a law criminalising the acts committed during the genocide to make prosecutions possible.<sup>63</sup> It is evident that the genocide law provided *ex post facto* punishments as it was enacted after the commission of the acts that it criminalised.<sup>64</sup> The justification resulted from the fact that

<sup>58</sup> National Service of Gacaca Courts (2012:38); Human Rights Watch (2011:1).

<sup>59</sup> The date considered as the end of genocide corresponds to the date of the inauguration of the government of national unity on 19 July 1994, but the jurisdiction *ratione temporis* of the domestic courts competent to prosecute the acts constituting the crime of genocide is extended between 1 October 1990 and 31 December 1994.

<sup>60</sup> Normally, *Cachot* is an area of provisional detention of suspects arrested by Police before bringing them to courts during the preliminary investigations, but after the end of genocide those *cachots* had been transformed into prisons because of the large number of detainees; see also Sarkin J 'The Necessity and Challenges of Establishing Truth and Reconciliation Commission in Rwanda' (1999) 21 *Human Rights Quarterly* 788 (hereafter "Sarkin, 1999").

<sup>61</sup> Schabas WA 'National courts finally begin to prosecute genocide, crime of crimes' (2003) 1 *Journal of International Criminal Justice* 40 (hereafter "Schabas, 2003").

<sup>62</sup> Code Pénal du Rwanda Décret-Loi 21 of 1977 (18 Août 1977), in *Journal de la République Rwandaise* No.13bis du 1 Juillet 1978, arts. 310 et seq.; *Ministère Public c/ Karamira Flouard*, Tribunal de la Première Instance de Kigali (R.P.006/KIG/CS-1997) in *Receuil de jurisprudence, contentieux du génocide*, Tom II (Cour Suprême, Kigali, 2002) 75 (hereafter "*Karamira case*, TPI Kigali, 1997"); Gallant SK *The Principle of Legality In International and Comparative Criminal Law* (2009) 323.

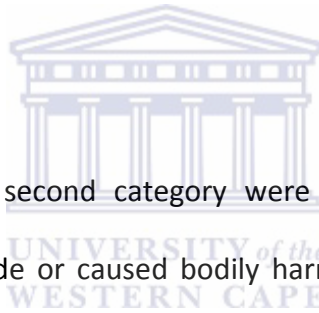
<sup>63</sup> Genocide Law, art. 1; Schabas (2009:418).

<sup>64</sup> Bornkamm (2012:24).

Rwanda was a State Party to Genocide Convention since 1975<sup>65</sup> and that the prohibition of genocide has the status of *jus cogens* and operates *erga omnes* under international law.<sup>66</sup> This Genocide Law provided the categorisation of genocide suspects and created at the same time the special chambers to prosecute them.

### 2.2.1.1 Categorisation of genocide suspects

The Genocide Law introduced four categories of suspects according to the gravity of their crimes<sup>67</sup> and criminal participation.<sup>68</sup> The first category comprised the planners, organisers, instigators, supervisors of genocide, and leaders of public and private institutions who committed the genocide, as well as rapists.<sup>69</sup> This was the category of the major genocide perpetrators.



The suspects ranged in the second category were perpetrators and accomplices who performed intentional homicide or caused bodily harm with the intent to kill.<sup>70</sup> The third category encompassed perpetrators who inflicted serious harm against victims without intent to kill.<sup>71</sup> The fourth category includes the acts against property.<sup>72</sup> Moreover, the acts of

<sup>65</sup> Ratification of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 Decree-law No. 8/75 of 12 February 1975; Genocide Convention, art. I; Schabas (2003:40).

<sup>66</sup> Werle G *Principles of International Criminal Law* 2ed (2009) 67; Tomuschat C 'The Legacy of Nuremberg' (2006) 4 *Journal of International criminal justice* 835 (hereafter "Tomuschat, 2006").

<sup>67</sup> Bornkamm (2012:24). Amnesty International Gacaca (2002:14); Smeulers A and Hoex L 'Studying the Microdynamics of the Rwandan Genocide' (2010) 50 *British Journal of Criminology* 440-51 (hereafter "Smeulers and Hoex, 2010").

<sup>68</sup> Smeulers and Hoex (2010:440).

<sup>69</sup> Genocide Law, art. 2 (a)-(d).

<sup>70</sup> Genocide Law, art. 2; *Case Byuma Francois Xavier*, Gacaca court of Biryogo Sector (2007); *Ministère Public c/ Sibomana Marc*, Tribunal de la Première Instance de Butare (RP 09/01/97-1997), in *Receuil de jurisprudence, contentieux du genocide*, Tom I (Cour Suprême, Kigali, 2002) 12.

<sup>71</sup> Genocide Law, art.2; Amnesty International (2002:14).

<sup>72</sup> Genocide Law, art.2; Amnesty International (2002:14).

training of paramilitary militia of Interahamwe and Impuzamugambi<sup>73</sup> as well as discourses held during public meetings or hate speeches aired on the radio stations were qualified as incitement to commit genocide and thus fell under the first category.<sup>74</sup> However, this perception was left out by the new Penal Code in force while there are currently pending cases before Rwandan courts in which suspects are indicted for the incitement to commit genocide.<sup>75</sup>

### 2.2.1.2 Establishment of specialised courts

In 1996, the Genocide Law established specialised chambers within the ordinary and military courts in charge of prosecuting and trying the genocide suspects.<sup>76</sup> The jurisdiction *ratione temporis* included only genocide acts committed since 1 October 1990,<sup>77</sup> the period from which Tutsis were persecuted and killed.<sup>78</sup>

By determining the penalties, the courts had to take into consideration the category of the accused persons and the confession procedure as a legal mitigating factor.<sup>79</sup> The suspects within the first category had not to benefit from the procedure of confession and guilt plea even if they formulated it.<sup>80</sup>

<sup>73</sup> Interahamwe and Impuzamugambi are paramilitary groups of Hutu ethnic from ruling party MRND and CDR, militarily trained and participated massively in 1994 genocide. Those trainings performed before 1994 are considered as genocide planning; see also Alvarez A *Genocidal Crimes* (2010) 82-4.

<sup>74</sup> *Karamira case*, TPI Kigali (1997)<sup>75</sup>; *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Barayagwiza v. The Prosecutor*, The appeals chamber, Judgement (2007), Case No. ICTR-99-52-A, paras. 303, 318,709; *The Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse*, Trial Chamber III, Judgement and sentence (2012), Case No. ICTR-98-44-T, para. 168.

<sup>75</sup> See as an example *Prosecutor v. Mugesera Leon*, High Court of Rwanda (2012) (case still in court); See also the acts constituting the crime of genocide in the Rwandan Penal Code, art. 114.

<sup>76</sup> Jones (2010:9).

<sup>77</sup> Genocide Law, art.1.

<sup>78</sup> Bornkamm (2012:24).

<sup>79</sup> For the establishment of specialised chambers, see Genocide Law, arts. 19 et seq., and for the confession and guilt plea procedure, see the Genocide Law art 14 et seq.

<sup>80</sup> Genocide Law, art. 5 *in fine*; Schabas WA, 'Genocide Trials and Gacaca Courts' (2005) 3 *Journal of International Criminal Justice* 887 (hereafter "Schabas, 2005").

The suspects within the first category were subject to the maximum penalty, the death penalty.<sup>81</sup> The output of the mentioned specialised chamber was 6,000 suspects tried within a period of five years.<sup>82</sup> At this working speed, it would have taken at least two centuries to try only the suspects incarcerated. At this point, it was crucial to think about the alternative solution, the Gacaca courts.<sup>83</sup>

### 2.2.2 Establishment of Gacaca courts.

Gacaca took origin in the Rwandan culture that was a non-codified traditional mechanism of conflict resolution and re-establishment of social order, rather than seeking for punishment against the wrongdoer.<sup>84</sup> In 1999, Gacaca courts were recommended as a tool of dealing with the legacy of the genocide by the participants in the consultative meetings organised by the Rwandan presidency office.<sup>85</sup>



Gacaca found its name from the type of grass called in Kinyarwanda “umucaca” that means ‘grass’ or ‘lawn’ where the public was sitting together to settle out the disputes among them and reconcile both parties.<sup>86</sup> As a result, it was concluded that the Gacaca proceedings

<sup>81</sup> Genocide Law, art. 15(a); Schabas (2005:887).

<sup>82</sup> Gaparayi TI ‘Justice and Social Reconstruction in the Aftermath of Genocide in Rwanda: An Evaluation of the Possible Role of the Gacaca Tribunal’ (2001) 1 *African Human Rights Law Journal* 78 (hereafter “Gaparayi, 2001”).

<sup>83</sup> Schabas (2003:46).

<sup>84</sup> Amnesty International (2002: 21); Kubai NA ‘Between justice and reconciliation: The survivors of Rwanda’ (2007) 16 *African Security Review* 55 (hereafter “Kubai, 2007”).

<sup>85</sup> Fierens J ‘Gacaca courts: Between Fantasy and Reality’ (2005) 3 *Journal of International Criminal Justice* 901 (hereafter “Fierens, 2005”).

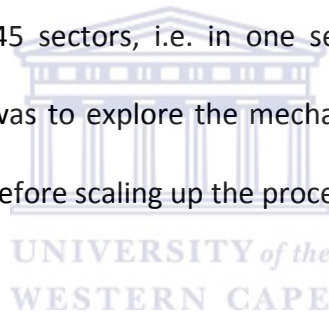
<sup>86</sup> Sarkin J ‘The Tension Between Justice and reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of Gacaca Courts in Dealing with the Human Rights’ (2001) 45 *Journal of African Law* 159 (hereafter “Sarkin, 2001”); Schabas (2009:418); Tiemessen AE ‘After Arusha: Gacaca’s justice in post-genocide Rwanda’ (2004) 8 *African Studies Quarterly* 61 (hereafter “Tiemessen, 2004”); Sarkin (2000:112).

would be conducted as court trials based on a law in order to adapt to the context of genocide perpetrated against Tutsi.<sup>87</sup>

### 2.2.2.1 Law governing Gacaca courts

Gacaca courts were created by Organic Law No. 40 of 2000.<sup>88</sup> This law also organised the prosecution of the crime of genocide and crimes against humanity committed between 1 October 1990 and 31 December 1994. Gacaca courts were established on each administrative level of the country such as cell, sector, district, province and Kigali-City.<sup>89</sup>

The Gacaca courts were officially launched on 18 June 2002 and started their activities at the pilot phase in 12 out of 1,545 sectors, i.e. in one sector in every province.<sup>90</sup> The main objective of this pilot phase was to explore the mechanisms to improve the structure and functioning of Gacaca courts before scaling up the process to the entire territory of Rwanda.



From the lessons learned from the pilot phase, the Gacaca law was amended and replaced by the Organic Law No.16 of 2004.<sup>91</sup> The latter amended the organisation, functions and competence of Gacaca courts and suppressed also the Gacaca courts at the district, province and Kigali city level.<sup>92</sup>

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<sup>87</sup> Clark (2010:74).

<sup>88</sup> Setting up Gacaca jurisdictions and organising prosecutions for offences constituting the crime of genocide or crimes against humanity committed between 1 October 1990 and 31 December 1994 Organic Law 40 of 2000 (26 January 2001) in Official Gazette of the Republic of Rwanda No. 6 of 15 March 2001 (hereafter "Gacaca Law of 2000").

<sup>89</sup> Fierens (2005:902); Gaparayi (2001:83); Gacaca Law of 2000, art. 4.

<sup>90</sup> Ratting M 'Gacaca: Truth, Justice and in Postconflict Rwanda?' (2008) 51 *African Studies Review* 40 (hereafter "Ratting, 2008").

<sup>91</sup> Establishing the Organisation Competence and Functioning of Gacaca courts Organic Law 16 of 2004 (19 June 2004) (Gacaca Law of 2004).

<sup>92</sup> The Gacaca Law of 2004 created 9013 Gacaca courts at cell level, 1545 at sector level and 1545 Gacaca courts of appeal also at the sector level.

### 2.2.2.2 Key objectives of Gacaca courts

Gacaca courts were created as an alternative mechanism of redressing the legacies of genocide and they were considered as an “African solution to African problems”.<sup>93</sup> Hence, they had the duty to achieve the following main objectives:

- Revealing the truth about genocide;
- Speeding up the genocide trials;
- Eradicating the culture of impunity;
- Contributing to the national unity and reconciliation process;
- Demonstrating the capacity of Rwandan people to resolve their own problems.<sup>94</sup>

In this sense, Gacaca courts involved the active participation of community. This led to revealing the truth about what happened during the genocide and contributed to reconciliation as ordinary people were at the same time witnesses and judges.<sup>95</sup> Furthermore, the punitive element of Gacaca courts contributed to fight the culture of impunity and thus they were at the same time retributive and restorative justice mechanisms.<sup>96</sup>

### 2.3 Implementation of Gacaca courts

The law established a Gacaca court on every administrative entity level of cell and sector which carried out the activities in different phases namely information gathering, hearing

<sup>93</sup> ‘Remarks of President Paul Kagame at the International Peace Institute, New York (21 September 2009)’ in Human Rights Watch (2011:1); Jones (2010:8).

<sup>94</sup> Riddell (2005:96); Kubai (2007:57).

<sup>95</sup> Riddell (2005:98).

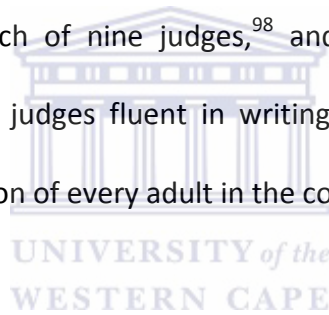
<sup>96</sup> Brandner *AK Justice and Reconciliation in Rwanda: An evaluation of judicial responses to genocide and mass atrocities* (2003) 89; Bornkamm (2012:102); Clark (2010:348); Daly (2002:378).

and appeal. This section deals with the organisation of Gacaca courts, its activities and applicable penalties which were imposed by Gacaca courts.

### 2.3.1 Organisation of Gacaca courts

By the amendment of 2004, Gacaca courts were established on cell and sector administrative level. In this regard, three types of Gacaca courts were created: Gacaca courts of cell, Gacaca courts of sector and Gacaca court of appeal on the sector level. Around 9,013 Gacaca courts of cell, 1,545 of Gacaca courts of sectors and 1,545 of Gacaca courts of appeal based in villages, were established countrywide.<sup>97</sup>

Each court comprised a bench of nine judges,<sup>98</sup> and it was headed by a coordination committee composed of five judges fluent in writing, and reading Kinyarwanda. Gacaca courts involved the participation of every adult in the community.<sup>99</sup>



With regard to the protection and independence of Gacaca judges from external influence, the law provided criminal sanctions to anyone who exercised pressures, attempted to exercise pressures or threatened with words or acts on witness or bench members of a Gacaca court in order to coerce a court into taking a decision in one way or another.<sup>100</sup>

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<sup>97</sup> Clark (2010:3).

<sup>98</sup> Gacaca Law of 2004, art. 13.

<sup>99</sup> The inhabitants of the cell who are 18 years of age and older have the obligation to participate in the process of Gacaca and this participation is mandatory and the law provides for sanctions for the one who does not cooperate (Gacaca Law of 2004, art. 29). According to the law the whole population of 18 years of age residing within the cell form the "General assembly of the cell", while the General assembly of the sector is composed of the all judges of the Gacaca courts within a sector (Gacaca Law of 2004, art. 7).

<sup>100</sup> Gacaca Law of 2004, art. 30.



### 2.3.2 Activities of Gacaca courts

Gacaca courts carried out their activities within three steps consecutively. After they had been officially launched, and after the pilot phase was over, on 25 November 2002, the pilot phase was extended to 106 other sectors, i.e. one sector in each district.<sup>101</sup>

From the lessons learned from the two pilot phases, the Gacaca law 40 of 2000 was amended and replaced by Organic Law No.16 of 2004.<sup>102</sup> Based on this organic law, countrywide information gathering was conducted from 15 January 2005 onwards.<sup>103</sup> The activities of Gacaca courts were conducted into two main stages, information gathering and trial phase.

#### 2.3.2.1 Information gathering

The gathering of information on genocide was a preliminary step of proceedings and considered as prosecution or pre-trial phase.<sup>104</sup> The process of information gathering was exclusively under the jurisdiction of a Gacaca court of a cell and involved all residents of the

<sup>101</sup> Mibenge C 'Enforcing international humanitarian law at the national level: The Gacaca jurisdictions of Rwanda' available at [http://www.asser.nl/default.aspx?site\\_id=9&level1=13337&level2=13363](http://www.asser.nl/default.aspx?site_id=9&level1=13337&level2=13363) (accessed on 15 February 2013).

<sup>102</sup> Gacaca Law of 2004. However, this law was periodically amended and completed based on the deficiencies from the public. In 2006, the law was amended and completed by the Organic Law 28 of 2006 (27 June 2006) in Official Gazette of the Republic of Rwanda of 12 July 2006. This law intervened after the administrative reform and consisted of maintaining the jurisdiction *ratione loci* of Gacaca courts on the former administrative levels. In 2007, the Gacaca Law of 2004 was amended by the Organic Law 10 of 2007 (1 March 2007) in Official Gazette of the Republic of Rwanda No. 5 of 1 March 2007 ("hereafter "Organic Law 10 of 2007). This law aimed to bring some cases of the first category into the second category and created additional benches within Gacaca courts. Other amendment was made in 2008 by the Organic Law 13 of 2008 (19 May 2008), in official Gazette No. 11 of 1 June 2008(hereafter "Organic Law 13 of 2008"). This law gave Gacaca courts the competence to try the cases of rape and sexual violence as well as cases which were pending under the ordinary courts.

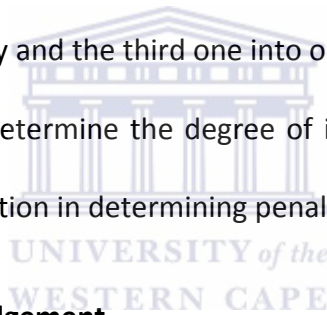
<sup>103</sup> Jones (2010:9).

<sup>104</sup> Penal Reform International *Integrated Report on Gacaca Research and Monitoring: Pilot Phase, January 2002-December 2004* (2002) 19; Interview of Mukantaganzwa Domitilla, Executive Secretary of National Service of Gacaca courts (2011) available at <http://www.rwandaembassy.org/the-embassy/229-interview/> (accessed on 15 February 2013).

cell.<sup>105</sup> This operation was carried out by gathering evidence (both charge evidence and discharge evidence) and categorising the suspects.<sup>106</sup>

The collection of evidence aimed to clarify the preparation and execution of genocide within the cell.<sup>107</sup> The information gathered was used by the court to make a comprehensive list of all suspects and to determine the category of every individual suspect.<sup>108</sup> With regard to the categorisation of genocide suspects, the Gacaca Law of 2004 repeated *verbatim* the wording of the preceding laws (Genocide Law and Gacaca Law of 2000).

By contrast, the Gacaca Law of 2004 provided three categories of genocide suspects by combining the second category and the third one into one category.<sup>109</sup> The categorisation of genocide suspects aimed to determine the degree of individual criminal responsibility and had to be taken into consideration in determining penalties.



### **2.3.2.2 Hearing and judgement**

The Gacaca hearings and judgement stage constituted the trial phase. Gacaca courts were competent to try the suspects placed within second and third category as well as some cases of the first category<sup>110</sup> alongside the ICTR and ordinary courts that were competent to

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<sup>105</sup> Gacaca Law of 2004, art. 34.

<sup>106</sup> Ratting (2008:51).

<sup>107</sup> Algard A *Does Gacaca system in Rwanda provide an effective remedy in compliance with international norms and standards?* (2005) 17.

<sup>108</sup> Algard (2005:17); Molenaar A *Gacaca grassroots justice after genocide, the key to reconciliation in Rwanda?* (2005) 93.

<sup>109</sup> The Genocide Law and Gacaca Law of 2000 provided for four categories, while the amendment made by the Gacaca Law of 2004, in its article 51 provided for three categories. The article 51 was thereafter amended in 2007 and 2008 by the Organic Law 10 of 2007, art.11 and Organic Law 13 of 2008, art. 9. The amendments of 2007 and 2008 aimed to bring some cases of the first category into the second category and created additional benches within Gacaca courts.

<sup>110</sup> Gacaca Law of 2004, art. 2 amended by the Organic Law 13 of 2008, art. 1.

prosecute the major criminals. However, the ICTR took precedence over national courts.<sup>111</sup>

The jurisdiction *ratione materiae* of Gacaca courts included the acts constituting genocide and crimes against humanity or related offences<sup>112</sup> and it ruled out isolated acts and war crimes. Gacaca sessions were public.<sup>113</sup>

However, the court could decide that the session would be held *in camera* in order to preserve the victim's dignity, especially in case of proceedings related to the rape and sexual violence.<sup>114</sup> During hearings, victims, accused and audience had the right to provide to the court evidence and other information to reveal the truth on the case.<sup>115</sup> After closing the hearing, or when it was necessary to take any decision, the court had to withdraw for deliberation or to adjourn.



### 2.3.2.3 Appeals process

The Gacaca decisions were susceptible of appeal. The law provided three ways of appeal: opposition, appeal and review.<sup>116</sup> The opposition was an objection formulated by the defaulting party, and it was brought before the court which had rendered the judgment.<sup>117</sup>

The court could admit or reject the reasons pleaded by the applicant.<sup>118</sup>

The appeal was possible against a Gacaca court decision. The decision taken by a Gacaca court of cell was subject to appeal before the Gacaca court of sector, except for decisions

<sup>111</sup> ICTR Statute, art. 8(2).

<sup>112</sup> Gacaca Law of 2004, art. 1.

<sup>113</sup> Bornkamm (2012:66).

<sup>114</sup> Instructions No. 16 of 2008 (5 June 2008) of Executive Secretary of Gacaca courts, art 7.

<sup>115</sup> Gacaca Law of 2004, arts. 64 et seq.

<sup>116</sup> The Gacaca Law of 2004 provided three ways of appeal, ordinary way of appeal (appeal) and special ways of appeal (opposition and review): see art. 85. Those three ways of appeal applied not solely to genocide cases, but also to other criminal offences (Criminal Procedure Code, arts. 157 et seq.).

<sup>117</sup> The Gacaca Law allowed the trial *in absentia* (see arts. 86 et seq.).

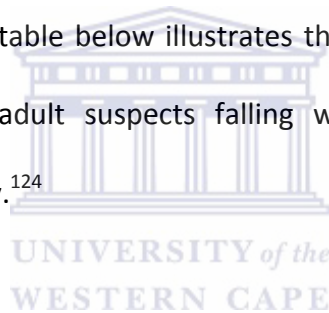
<sup>118</sup> Gacaca Law of 2004, art. 86.

related to offences committed against property. The judgments rendered by a Gacaca court of sector at the first instance were appealable before the Gacaca court of appeal.

Only parties had the right to appeal. Furthermore, the amendment of the Organic Law of 2008 brought some cases tried by the ordinary courts to be tried by Gacaca courts on the appeal level or review.<sup>119</sup> The review was applied by the parties or their descendants before the general assembly of the sector.<sup>120</sup> This body could admit or reject the application.

### 2.3.3 Penalties imposed by Gacaca courts

The sanctions varied according to the category in which the accused was placed, and the confession procedure.<sup>121</sup> The table below illustrates the penalties that a Gacaca court was allowed to impose against adult suspects falling within the first category<sup>122</sup>, second category<sup>123</sup> and third category.<sup>124</sup>



<sup>119</sup> Gacaca Law of 2004, art. 100 amended by Organic Law 13 of 2008, art. 26. Those cases included for example the *Case Laurent Munyakazi*, Gacaca court of Appeal, Rugenge sector (2010) unreported. Brigadier General Munyakazi Laurent was tried, at the first instance, by the Military High Court on appeal level. This case had been transferred to the Gacaca court of Appeal of Rugenge sector, Kigali City.

<sup>120</sup> The general assembly of the sector is composed of judges of Gacaca court of cell, sector and appeal of the sector level (Gacaca Law of 2004, art. 7).

<sup>121</sup> The Gacaca Law of 2004 provided the procedure of confession and this constituted a legal mitigating factor depending on that the accused had confessed before or after appearing on the list of the suspects made by the Gacaca court of cell (Gacaca Law of 2004, arts. 58 et seq.).

<sup>122</sup> Gacaca Law of 2004, art. 72 amended by the Organic Law 13 of 2008, art. 17; Bornkamm (2012:76).

<sup>123</sup> Gacaca Law of 2004, art. 73 amended by the Organic Law 10 of 2008, art. 20.

<sup>124</sup> Gacaca Law of 2004, art. 95.

Penalties applicable under the regime of Gacaca courts:

Category	No confession or confession rejected	Confession after appearing on the list of suspects	Confession before appearing on the list of suspects
Category 1	Life imprisonment with special provisions <sup>125</sup>	25-30 years of imprisonment	20-24 years of imprisonment
Category 2(1)-(3)	30 years or life imprisonment	25-29 years (1/3 in custody; 1/6 suspended; ½ commuted into community services)	20-24 years (1/6 in custody; 1/3 suspended; ½ commuted into community services)
Category 2 (4)-(5)	15-19 years	12-14 years (1/3 in custody; 1/6 suspended; ½ commuted into community services)	8-11 years (1/6 in custody; 1/3 suspended; ½ commuted into community services)
Category 2 (6)	5-7 years (1/3 in custody; 1/6 suspended; ½ commuted into community services)	3-4 years (1/3 in custody; 1/6 suspended; ½ commuted into community services)	1-2 years (1/6 in custody; 1/3 suspended; ½ commuted into community services)
Category 3	Return or compensation of the property.		

<sup>125</sup> For the meaning of the penalty of life imprisonment with special provisions see ( n 15 above); see also Abolition of the Death Penalty Law, art. 3.

More importantly, the Gacaca law provided for specific penalties against juvenile offenders. In general, they were punishable with a half of the adults' penalties.<sup>126</sup> A Gacaca court judgement was of immediate effect and had to be enforced if the convicted person was in the territory of Rwanda. In case the perpetrator was sentenced of both custodial sentence and community service as an alternative penalty to imprisonment, he or she would first serve the community service. If it was found that the latter was well executed the custodial sentence had to be commuted into community service.<sup>127</sup>

## **2.4 Achievements of Gacaca courts**

The achievements of Gacaca courts are explained by the realisation of its main objectives and the number of cases tried.



### **2.4.1 Achievements of Gacaca's objectives**

Gacaca courts were popularised, decentralised and community-based justice<sup>128</sup> and to this end, they involved the participation of the community. The population constituted at the same time the witnesses, judges and defence councils. The Gacaca aimed not only to punish but also to seek for truth and the reintegration of the perpetrator who confessed, and made public apology. This led to the revelation of the truth and gave an opportunity to victims to tell their stories and to know what happened to their relatives, as well as promoted reconciliation.<sup>129</sup>

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<sup>126</sup> Gacaca Law of 2004, art. 78 amended by the Organic Law 13 of 2008, art. 20.

<sup>127</sup> Gacaca Law of 2004, art. 80 amended by the Organic Law 2008, art. 21.

<sup>128</sup> Schabas (2003:46).

<sup>129</sup> Brandner (2003:89).

The convictions by Gacaca courts represented an official acknowledgement of genocide against Tutsi and thus destroyed the falsification and the denial of the historical truth. The community learned from genocide trials that the law would apply against the perpetrators and as a result, it contributed to fight the culture of impunity.<sup>130</sup>

#### 2.4.2 Cases tried by Gacaca courts

The total number of cases tried by Gacaca courts is 1,958,634. The table below gives an overview of these cases.<sup>131</sup>

Category	Number of Cases	Convicted All	Confession	Acquitted
category one	60,552	53,426	22,137	7,126
Category two	577,528	361,590	108,821	215,938
Category three	1,320,554	1,266,632	94,054	54,002
<b>Total</b>	<b>1,958,634</b>	<b>1,681,648</b>	<b>225,012</b>	<b>277,066</b>

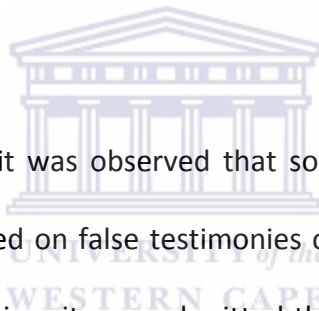
This number of cases has been tried within ten years and consequently, Gacaca courts had realised what the classic justice failed to achieve. Indeed, they revealed the truth on what happened during genocide and tried nearly two million cases. These are the proceeds of the sacrifice showed by Gacaca judges working day and night without any remuneration. Given the big number of suspects, the period of ten years is a reasonable time.

<sup>130</sup> Fierens (2005:917); Cornwell (2006:54); Sarkin (2001:168).

<sup>131</sup> National Service of Gacaca courts (2012:34).

## 2.5 Conclusion

This chapter has shown that Gacaca courts were a form of community-based justice that were created as an alternative solution after the failure of ordinary courts in dealing with the big number of genocide suspects.<sup>132</sup> Gacaca courts have achieved remarkable success by convicting hundreds of thousands genocide perpetrators and acquitting thousands of innocent people.<sup>133</sup> Gacaca courts have also facilitated the social reintegration of *génocidaires* via community services as alternative penalty to imprisonment.<sup>134</sup> To this end, these courts have revealed the truth and achieved what the ordinary courts failed to achieve and as a result, they can serve as example to the transitioning countries experiencing the same problem.



Despite those achievements, it was observed that some judgements rendered by Gacaca courts could be unlawful, based on false testimonies or fuelled by external interference or improper influence.<sup>135</sup> In addition, it was submitted that Gacaca judges lacked professional skills to carry out genuine investigations in order to find rigid and tangible facts on which they would base their decisions. Moreover, the prosecution of that huge number of genocide suspects does not mean that all perpetrators had been identified and tried, or that Gacaca courts had just redressed all legacies of genocide. Indeed, a significant number of genocide suspects had been tried and sentenced *in absentia* and today, they still have the right to appeal.

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<sup>132</sup> Sarkin (2001:159).

<sup>133</sup> RCS Report (2012:12)

<sup>134</sup> RCS (2012:12); Clark P 'Legacies of Rwanda's Gacaca courts' (2013) in *Think Africa Press* (23 March 2012) available at <http://thinkafricapress.com/rwanda/legacy-gacaca-courts-genocide> (accessed 30 March 2013).

<sup>135</sup> Gaparayi (2001:93); Bornkamm (2010: 105-7 ); Riddell (2005:76-9); Sarkin (2001:162).



## CHAPTER THREE: OVERVIEW OF THE LAW TERMINATING GACACA COURTS

### 3.1 Introduction

The idea to close Gacaca courts came up in 2007 but was postponed several times due to the big number of cases and the extension of their competence.<sup>136</sup> Finally, the Rwandan Parliament passed the Organic Law No. 04/2012 that terminated Gacaca courts and that determined the mechanisms to solve the issues which were under their jurisdiction.<sup>137</sup>

In fact, the activities of Gacaca courts were progressively closed at the sector level already before their closure at the national level. As genocide and crimes against humanity are imprescriptible,<sup>138</sup> this law states that the ordinary courts and mediation committees shall be competent to prosecute acts constituting genocide and crimes against humanity that originally were under the jurisdiction of Gacaca courts.<sup>139</sup> This chapter provides an overview of this Law terminating Gacaca courts.

### 3.2 The process of the termination of Gacaca courts

The termination of Gacaca courts appeared as not an impulsive act but rather a progressive and carefully planned development. Hence, the government proceeded to the closure of Gacaca courts at sector and national level before passing the enactment relating to their termination.

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<sup>136</sup> Human Rights Watch (2010:24).

<sup>137</sup> Terminating Gacaca courts and determining mechanisms for solving issues which were under their jurisdiction Organic Law 04/2012/OL (15 June 2012), art. 1.

<sup>138</sup> Genocide Convention, art. I; Ntoubandi (2008:815); Rwandan Penal Code, art. 134.

<sup>139</sup> Law terminating Gacaca, art. 3(2).

### 3.2.1 Closure of Gacaca courts at sector level

As mentioned, Gacaca courts were created on cell and sector level.<sup>140</sup> Those courts had a different number of files to try and thus the trials were concluded within a different period of time. For example, the southern province totalised half of all *génocidaires* convicted by Gacaca courts.<sup>141</sup> For this reason, the Rwandan government decided the progressive closure of Gacaca courts at every sector depending on the end of trials within that administrative entity before finally proceeding with their end at the national level.

However, sometimes the amount of outstanding cases necessitated Gacaca judges to work day and night to meet the date of closure, and this created an impression that the Gacaca judges targeted to meet the quantity rather than quality. Before the closure ceremony at sector level, every court had to submit its final report containing full and comprehensive details on the identification of all suspects tried and the decision taken about every case. The first closing ceremony of Gacaca took place in the Juru Sector of Bugesera District (Eastern Province) on 23 October 2009, while the final one had been done in western Province, in Kagano Sector of the Nyamasheke District on 5 August 2010.<sup>142</sup>

### 3.2.2 Closure of Gacaca courts at national level

At the national level, Gacaca courts were officially closed on 18 June 2012 by the President of Rwanda. According to him this “[closing] event is not simply to mark the closure of

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<sup>140</sup> Gacaca Law of 2004, art. 3.

<sup>141</sup> National Service of Gacaca courts (2012: 36).

<sup>142</sup> National Service of Gacaca courts (2012: 39).

[Gacaca] courts, but also to recognise the enduring value of the process.”<sup>143</sup> This event marked also the handover of the final report of Gacaca courts which included all names of persons tried by Gacaca courts within different categories to the President of the Republic by the Executive Secretary of Gacaca courts.

The files of all persons tried, the copy of judgements and other documents used by the Gacaca courts are now managed and kept at national level by the ‘Research and documentation centre on genocide’ which is under control of the *Commission Nationale de Lutte contre le Génocide (CNLG)*.<sup>144</sup> Gacaca courts had also submitted the arrest warrants of those tried *in absentia* to Rwanda National Police.<sup>145</sup> The official closure of Gacaca courts was an administrative act rather than a legal one. The closing ceremonies aimed to close Gacaca courts activities not repealing them as a judicial body.

### 3.2.3 Termination of Gacaca courts as judicial body

Gacaca courts had been created by law<sup>146</sup> and were recognised as specialised courts by the constitution of the Republic of Rwanda.<sup>147</sup> As a result, they had been terminated by law.<sup>148</sup>

The organic law 04 of 2012 states that:

<sup>143</sup> ‘Remarks of President Paul Kagame at the closing ceremony of Gacaca courts’ (Kigali, 18 June 2012) available at <http://www.aljazeera.com/news/africa/2012/06/201261951733409260.html> (accessed on 7 June 2013).

<sup>144</sup> CNLG (National Commission for the Fight against Genocide) is a public institution charged with putting in place a permanent framework for the exchange of ideas on genocide, its consequence, and the strategies for its prevention and eradication [Attribution and Functioning of the National Commission for the Fight against Genocide Law 9 of 2007 (16 February 2007) in Official Gazette of the Republic of Rwanda No. special of 19 March 2007, art. 4(1)]; see also Law terminating Gacaca, art. 19.

<sup>145</sup> This handover shows that the arrest warrants issued by Gacaca courts against those tried *in absentia* are 58,873 in which many of them are currently abroad.

<sup>146</sup> Gacaca Law of 2000 amended and replaced by the Gacaca Law of 2004.

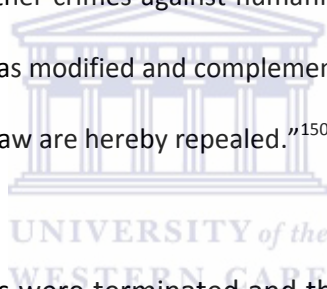
<sup>147</sup> Constitution of the Republic of Rwanda (2003), art. 152. According to this provision Gacaca courts are the form of specialised courts that include also Military courts (art. 153) and Commercial courts (art. 155).

<sup>148</sup> Law terminating Gacaca, art. 1.

“Gacaca courts charged with prosecuting and trying the persons accused of the crime of genocide perpetrated against Tutsi and other crimes against humanity committed between October 1, 1990 and December 31, 1994, are hereby terminated.”<sup>149</sup>

Gacaca courts were judicial bodies established by a law. That is a reason why they were terminated by a law which at the same time repealed the Gacaca law. In this sense, Law terminating Gacaca courts states that:

“The Organic Law No. 16/2004 of 19/06/2004 establishing the organization, competence and functioning of Gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity committed between October 1, 1990 and December 31, 1994, as modified and complemented to date and all prior legal provisions contrary to this Organic Law are hereby repealed.”<sup>150</sup>



Even though the Gacaca courts were terminated and the law governing them was repealed, their judgments remain in force.<sup>151</sup> However, Gacaca courts were terminated while there were pending appeals against its judgements and new cases.

### 3.3 Dealing with pending cases after termination of Gacaca courts

Genocide and crimes against humanity are imprescriptible.<sup>152</sup> In this regard, the Law terminating Gacaca courts determines competent courts to prosecute acts constituting genocide perpetrated against Tutsi and crimes against humanity after the end of Gacaca

<sup>149</sup> Law terminating Gacaca, art. 2.

<sup>150</sup> Law terminating Gacaca, art. 22(1).

<sup>151</sup> Law terminating Gacaca, art. 22(2).

<sup>152</sup> Convention of the Non-Applicability of statutory Limitations to War crimes and Crimes against Humanity, art. IV; Genocide Convention, art. I; Penal Code of Rwanda (2012), art.134; Ntoubandi (2008:815); Arriaza RN *Impunity and Human Rights in International Law and Practice* (1995) 64.

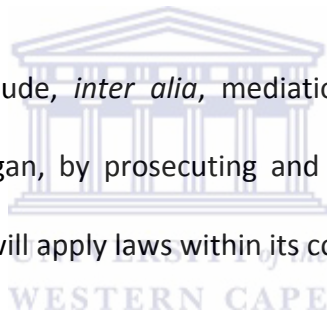
courts. In addition, this law also sets up the mechanisms to solve cases which were under the jurisdiction of Gacaca courts.<sup>153</sup> This section examines the relevant courts to prosecute pending genocide cases and the appeals against the judgements rendered by Gacaca courts.

### 3.3.1 Competent organs to prosecute pending cases

According to Organic Law 04 of 2012 which terminates Gacaca courts:

“The prosecution and punishment of acts constituting crime of genocide and [...] crimes against humanity which were committed between October 1, 1990 and December 31, 1994 within the jurisdiction of Gacaca courts shall be exercised by competent organs according to laws in force applicable to in these matters.”<sup>154</sup>

Those organs mentioned include, *inter alia*, mediation committees, primary courts and intermediate courts. Each organ, by prosecuting and trying the cases which were under jurisdiction of Gacaca courts, will apply laws within its competent jurisdiction



#### 3.3.1.1 Mediation committees

Mediation Committees were created in 2004 as administrative community-based schemes charged with dispute resolution through mediation.<sup>155</sup> According to the law governing Mediation Committees, a mediation committee is:

“[A]n organ meant for providing a framework for mandatory mediation prior to filing cases in courts hearing at first instance [civil and criminal cases within the limits determined by the law].”<sup>156</sup>

<sup>153</sup> Law terminating Gacaca, art. 1.

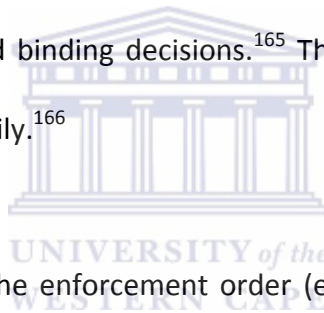
<sup>154</sup> Law terminating Gacaca, art. 3(1).

<sup>155</sup> Ingelaere B ‘The Gacaca courts in Rwanda’ in International Institute for Democracy and Electoral Assistance *Transitional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (2008) Ch. 2.

<sup>156</sup> Mediation Committee Law, arts. 3(1), 8 and 9.

Mediation Committees are similar to Gacaca courts in their structure and organisation. First, they are also established at cell level and sector level.<sup>157</sup> The mediators are laypersons of integrity who are elected by and among the cell's inhabitants<sup>158</sup> and their services are voluntary.<sup>159</sup> In contrast to Gacaca courts, mediation committees are permanent.<sup>160</sup> They deal with less important civil<sup>161</sup> and criminal cases.<sup>162</sup>

A party that is not satisfied with the decision of the Mediation Committee at cell level shall appeal to the Mediation Committee at sector level.<sup>163</sup> Furthermore, any party that is not satisfied with the decision taken by the Mediation Committee at sector level shall appeal to the Primary Court.<sup>164</sup> The mediation committees are not judicial bodies as they cannot impose criminal sanctions and binding decisions.<sup>165</sup> The mediators' decision is not binding and may be executed voluntarily.<sup>166</sup>



A forced execution requires the enforcement order (executory formula) on the mediation decision appended by President of the Primary Court.<sup>167</sup> In addition, a judgement rendered by a Primary Court on an appeal against the mediators' decision is not susceptible of

<sup>157</sup> Mediation Committee Law, art. 2.

<sup>158</sup> Mediation Committee Law, art. 4 (1).

<sup>159</sup> Molenaar (2005:102); Mediation Committee Law, art.3 (2).

<sup>160</sup> The competence of Gacaca was extended between 1 October 1990 and 31 December 1994 (Gacaca Law of 2004, art. 1) which is not the same case for the Mediation Committees that the law does not establish their jurisdiction *ratione temporis*.

<sup>161</sup> A Mediation Committee is competent to examine any civil case whose the value of the subject matter does not exceed 3million Rwandan francs = \$4,500; the commercial, administrative and social cases are excluded (Mediation Committee Law, art. 8).

<sup>162</sup> The competence of Mediation Committee as regard the criminal matters, see Mediation Committee Law, art. 9.

<sup>163</sup> Mediation Committee Law, art. 26(1).

<sup>164</sup> Mediation Committee Law, art. 27(1).

<sup>165</sup> Mediation Committee Law, art. 9.

<sup>166</sup> Mediation Committee Law, art. 24(1).

<sup>167</sup> Mediation Committee Law, art. 24(2).

appeal.<sup>168</sup> More importantly, the Law terminating Gacaca courts has extended the jurisdiction *ratione materiae* of Mediation Committees. This law stipulates:

“Notwithstanding of the value of subject matter and the address of the parties to proceedings, offences related to looting and damaging of property committed between October 1, 1994 and December 31, 1994, which were within the jurisdiction of Gacaca courts shall be tried by the Mediation Committees applying laws governing these committees regardless that they were committed by civilians, *gendarmes*<sup>169</sup> or soldiers. Offenders shall be ordered to pay compensation.”<sup>170</sup>

This provision gives the Mediation Committees the power to try acts constituting genocide and this includes crimes which were under the Jurisdiction of Gacaca court of cell such as offences related to property and review of the judgements thereto. Originally, the Mediation Committee Law limited the competence of Mediations Committees to the litigation between parties residing within the same cell, and the value of subject matter must be less than three million Rwandan francs.<sup>171</sup>

Therefore, the Law terminating Gacaca courts has extended this competence. The power of the Mediation Committees as regards the crimes committed during the 1994 genocide against property is unlimited in respect of jurisdiction *ratione materiae* and jurisdiction *ratione personae*. In other words, they are competent to try any genocide case relating to the property regardless of the value of the litigation and the parties' domicile.

<sup>168</sup> Mediation Committee Law, art. 27(1).

<sup>169</sup> *Gendarmes* are the staff of *gendarmerie*. The latter was a department of National Force Army in charge with the security in Rwanda before 1994 which was working along with the *Police communale* (Communal Police).

<sup>170</sup> Mediation Committee Law, art. 6.

<sup>171</sup> This amount (RWF 3,000,000) is currently equivalent to \$5,000; Mediation Committee Law, arts. 8 et seq.

### 3.3.1.2 Primary Courts

The primary courts are permanent ordinary courts which have jurisdiction *ratione loci* within at least three sectors.<sup>172</sup> Normally, these courts have the competence of trying the criminal cases which include the offences punishable with a penalty of an imprisonment of less than five years as well as those related to traffic rules.<sup>173</sup>

With regard to civil litigations, the primary courts have the jurisdiction to hear disputes in which the value of the litigation does not exceed three million Rwandan francs, as well as disputes related to civil status and family.<sup>174</sup> This court shall hear at the first and last resort cases tried by the mediation committees.<sup>175</sup> After the end of Gacaca, the Law terminating Gacaca extended this competence and included the genocide offences. As a result, the primary courts are competent of trying at the first instance, genocide suspects who committed homicide, sexual violence as well as the acts committed by leaders at sub-prefecture and commune level.<sup>176</sup>

It is clear here that, these acts which fall under the jurisdiction *ratione materiae* of the primary courts are the ones which were under jurisdiction of the Gacaca court of the sector.<sup>177</sup> The primary courts are also competent of trying the opposition applied by those tried *in absentia* by Gacaca courts and application for review against judgements rendered

<sup>172</sup> Administrative Entities of the Republic of Rwanda Organic Law 29 of 2005 (31 December 2005) in Official of the Republic of Rwanda No. special of 31 December 2005, arts. 2 and 3. According to this law a sector is an administrative entity divided into cells. For the seat of the primary courts, see the appendix of the Organic Law 51 of 2008).

<sup>173</sup> Organic Law 51 of 2008, art. 66(1).

<sup>174</sup> Organic Law 51 of 2008, art. 67.

<sup>175</sup> Organic Law 51 of 2008, art. 66(2).

<sup>176</sup> Law terminating Gacaca, art. 5.

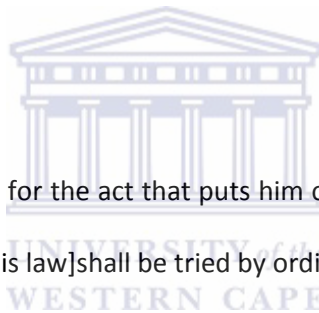
<sup>177</sup> See Gacaca Law of 2004, art. 42 and art. 51 amended by Organic Law 13 of 2008, art. 7 and 9 respectively.



by Gacaca courts falling under their jurisdiction.<sup>178</sup> In case the execution of the judgement rendered by a Gacaca court leads to disputes, it shall be settled by the primary court “which has affixed the executory formula or of the place of the execution of the judgement.”<sup>179</sup>

### 3.3.1.3 Intermediate courts

The intermediate courts are superior courts at the second echelon after the primary courts. These courts have replaced the first instances courts (*Tribunaux de la Première Instance*) after the judicial reform of 2004, which had the specialised chambers charged with trying *génocidaires* based on Genocide Law 08 of 1996. Since 2004, intermediate courts remained with the competence of trying genocide suspects alongside Gacaca courts and ICTR. The Gacaca Law of 2004 states:



“any person prosecuted for the act that puts him or her in the first category, paragraphs 1, and 2, as provided [in this law] shall be tried by ordinary or military courts”.<sup>180</sup>

However, in 2008, this provision had been changed by the amendment of the Gacaca Law. This Law stipulated that all files within the jurisdiction of Gacaca referred to ordinary courts and military courts had to be submitted to relevant Gacaca courts regardless of the stage of procedure of the case.<sup>181</sup> In accordance with the wording of this law, the Supreme Court, High Court and intermediate courts submitted those files which, according to the new law, had to be tried by competent Gacaca courts.<sup>182</sup>

<sup>178</sup> Law terminating Gacaca, arts. 8 and 9.

<sup>179</sup> Law terminating Gacaca, art. 16.

<sup>180</sup> Gacaca Law of 2004, art. 2(2), amended by the Organic Law 13 of 2008, art. 1(2); *Case Nzirasano Anastase*, Gacaca court of Rugenge Sector, Kigali City (2009) unreported.

<sup>181</sup> Gacaca Law of 2004, art.100 amended by Organic Law 13 of 2008, art. 26.

<sup>182</sup> As an example, see *case Munyakazi Laurent*, Gacaca court of appeal of Rugenge sector, Kigali City (2010) unreported.

The International Criminal Tribunal for Rwanda (ICTR) also has the competence of prosecuting the 1994 genocide, but takes precedence over national courts at any stage of procedure.<sup>183</sup> Consequently, Gacaca courts declared themselves incompetent against the suspects already indicted by the ICTR.<sup>184</sup> After the closure of Gacaca courts, the intermediate courts remain actually with the competence of trying the planners and ringleaders of genocide.<sup>185</sup>

With regard to the jurisdiction *ratione personae*, the intermediate courts have the competence of trying acts constituting genocide committed only by civilians, while soldiers and *gendarmes* offenders fall under military court jurisdiction.<sup>186</sup> The decisions taken by the intermediate courts at the first instance are appealable before the High Court.<sup>187</sup>

### 3.3.2 Procedures of appeal against judgements rendered by Gacaca courts

In contrast to Gacaca Law which provided for appeal, opposition, and review, the Organic Law 04 of 2012 recognises only two ways of appeal against the judgements rendered by Gacaca courts such as opposition and review.

#### 3.3.2.1 Filing opposition

An opposition, under the Rwandan legislation, is an objection lodged against a judgement passed *in absentia* especially in case the accused was absent during court hearing.<sup>188</sup> The

<sup>183</sup> ICTR Statute, art. 8(2).

<sup>184</sup> As an example, see *Case Col. Renzaho Tharcisse*, Gacaca court Kiyovu Cell, Kigali City (2005) unreported; *Prosecutor v. Tharcisse Renzaho*, Second amended indictment (2006), case No. ICTR-97-31-I, paras. 11 et seq.; see also *Tharcisse Renzaho v. Prosecutor*, Appeals Chamber, Judgement (2011), Case No. ICTR-97-31-A, paras. 253 et seq.

<sup>185</sup> Law terminating Gacaca, art. 4.

<sup>186</sup> Law terminating Gacaca, art. 7.

<sup>187</sup> Organic Law 51 of 2008, art. 105.

<sup>188</sup> Criminal Procedure code, art. 157; Gacaca Law of 2004, art. 86.

opposition is brought before the court which has rendered the judgement within a certain period of time from the notification of the judgement<sup>189</sup> and generates suspensive effects. Under the regime of Gacaca courts, the petitioner had to bring his or her objection before the court that rendered the judgement and provide grounds that impeded him or her from appearing in the trial in question.<sup>190</sup> Today, filing opposition is acceptable:

“If a person was sued, tried and sentenced by a Gacaca court while abroad, returns and it is found that he [or] she did not have intention to escape justice”.<sup>191</sup>

In other words, the applicant must be in the territory of Rwanda and prove that he or she did not leave the country because of that the judicial police, the Public Prosecution or a Gacaca court had already started investigations.<sup>192</sup> In addition, the applicant must file the opposition within two months from the date he or she returns to the country. The application for opposition suspends the enforcement of the sentence rendered by Gacaca court until one is found guilty or not guilty.<sup>193</sup>

The law recognises this privilege only for the persons tried while they were abroad as refugees, and provides effect when the convicted person is voluntarily repatriated. Furthermore, when a person tried *in absentia* by a Gacaca court is extradited from the ICTR

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<sup>189</sup> Criminal Procedure code, art. 158; Gacaca Law of 2004, art. 87; Organic Law 51 of 2008, art. 103.

<sup>190</sup> Gacaca Law of 2004, art. 86.

<sup>191</sup> Law terminating Gacaca, art. 9(1).

<sup>192</sup> Law terminating Gacaca, art. 9(3).

<sup>193</sup> Law terminating Gacaca, art. 9 (2).

or from other States, the Gacaca judgement shall first be nullified, and the competent court shall restart the case.<sup>194</sup>

### 3.3.2.2 Application for review

Review is generally applied to revise a final judgement when new and decisive evidence has been discovered or there are other grounds to believe that a court decision is false or unlawful.<sup>195</sup> The application for review of a judgement is also recognised by Rwandan laws in both civil<sup>196</sup> and criminal cases.<sup>197</sup> The grounds to revise a judgement rendered by a Gacaca court varied and were modified as long as the Gacaca Law was periodically amended.<sup>198</sup>

Hence, after the end of Gacaca courts, their judgements are susceptible of review under some circumstances. A judgement rendered by a Gacaca court may be reviewed if new evidence proves that a Gacaca court judgement acquitting or convicting the accused person was false or the bench was corrupted.<sup>199</sup> The right to apply for review is only recognised to victims, the convicted person and public prosecution. In addition the decision revised is not

<sup>194</sup> This is the case, for example, of Charles Bandora extradited from Norway to Rwanda on 10 March 2013. The suspect has been tried *in absentia* by Gacaca court of Ruhuha Sector, Bugesera District in 2009: *Case Charles Bandora*, Gacaca court of Ruhuha sector (2009) unreported. This decision has been nullified and currently the case is pending before High Court of Rwanda: *Prosecutor v. Charles Bandora*, High Court of Rwanda (2013) case still in court; for the prohibition of the risk of double jeopardy in favour of the person extradited from ICTR and other States, see *Prosecutor v. Bernard Munyagishari*, Referral Chamber designated under Rule 11 *bis*, Judgement (2012) Case No. ICTR-95-1D-R11*bis*, para. 56; *Jean Uwinkindi v. The Prosecutor*, The Appeals Chamber, Decision on Uwinkindi's Appeal against the Referral of his Case to Rwanda and related motions (2011), Case No. ICTR-01-75-AR11*bis*, para. 41. See also Law terminating Gacaca, art.8; See Oosthuizen G 'International criminal service: Notes on Rwandan's transfer law (2010) 20, available at <http://www.iclsfoundation.org/wp-content/uploads/2012/02/icls-notesonrwndastransferlaw-25012010-final.pdf> (accessed on 11 June 2013).

<sup>195</sup> Gacaca Law of 2004, art. 93 amended by Organic Law 13 of 2008, art.24; Criminal Procedure Code of Rwanda, art.180; Law terminating Gacaca, art.10.

<sup>196</sup> Civil Commercial Labour and Administrative Procedure Law 21 of 2012 (14 June 2012), in Official Gazette of the Republic of Rwanda No. 29 of 16 July 2012, arts. 184 et seq.

<sup>197</sup> Criminal Procedure Code of Rwanda, arts. 180 et seq.; Borkamm (2012:73).

<sup>198</sup> Gacaca Law of 2000 did not provide for review. The application for review against a judgement rendered by a Gacaca court had been first introduced by the Gacaca Law of 2004, art. 93 amended by Organic Law 13 of 2008, art. 24.

<sup>199</sup> Law terminating Gacaca, art. 10.

subject to any other appeal.<sup>200</sup> Moreover, if the review is rejected, the judgement must be executed in accordance of its form and terms with no alteration whatsoever.

### 3.4 Execution of judgements rendered by Gacaca courts

One can ask oneself whether the termination of Gacaca courts affects also the judgements rendered by these courts. In this regard, the Law terminating Gacaca courts states that judgements rendered by Gacaca courts shall remain in force.<sup>201</sup> For this reason, the law set forth mechanisms relating to execution of judgements rendered by Gacaca after their termination. The law determines only the mechanisms related to enforcement of community service and compensation of property.

#### 3.4.1 Community service as an alternative penalty to imprisonment

Community service (TIG)<sup>202</sup> is deemed as a pardon by the State and at the same time as a criminal sanction.<sup>203</sup> With regard to the punishment of the acts constituting genocide perpetrated against Tutsi, community service is “a sentence issued by *Gacaca* courts for genocide perpetrators of the [s]econd [c]ategory who have confessed, which replaces half of the prison sentence.”<sup>204</sup> It is also a commutation of a prison sentence in community service as an alternative penalty to imprisonment in favour of genocide perpetrators made public confession, guilty plea, repentance and apology.<sup>205</sup>

<sup>200</sup> Law terminating Gacaca, art. 10 *in fine*.

<sup>201</sup> Law terminating Gacaca, art. 22(2)

<sup>202</sup> TIG means ‘*Travaux d’Intérêt Général*’ which is translated in English ‘Community service’.

<sup>203</sup> Penal Reform International *Monitoring and Research Report on Gacaca: Community service (TIG), Areas of reflection* (2007) 5; Birungi C *Community Service in Uganda as an Alternative to Imprisonment: A Case Study of Masaka and Mukono Districts* (LLM thesis, University of the Western Cape, 2007) 54.

<sup>204</sup> Penal Reform International (2007:2); Penal Reform International (2010:60).

<sup>205</sup> The modalities of implementation of community service as alternative penalty to imprisonment Presidential Order 66/01 of 2012 (2 November 2012), in Official Gazette of the Republic of Rwanda No. 47 of 19 November 2012, art.2 (hereafter “TIG Presidential Order”); Gacaca Law of 2004, arts. 62 et seq.; Brandner (2003:36).

Community service as an alternative penalty to imprisonment is a new criminal sanction as it has been introduced for the first time in the Rwandan legislation in 2004, in order to redress the legacies of the genocide.<sup>206</sup> The purpose of this form of penalty is to facilitate the moral and social reintegration of the convicted *génocidaires* into the community<sup>207</sup> as well as resolve the problems of the overpopulation and low budget the Rwandan prisons are facing. It was argued that the offenders can amend themselves without being incarcerated rather by carrying out the community service and can reduce recidivism.<sup>208</sup>

Today, community service is incorporated in the Penal Code and can be applied to perpetrators of ordinary offences.<sup>209</sup> Currently, around 85,000 convicted genocide perpetrators are serving community services as alternative penalty to imprisonment.<sup>210</sup> They are carrying out the penalties under the supervision of Rwanda Correctional Service (RCS).<sup>211</sup> Some of those *tigistes*<sup>212</sup> evaded the TIG camps, and others their actual residence remains unknown.

Consequently, the “[t]racking [of] persons sentenced by Gacaca courts to imprisonment and to community services as alternative penalty to imprisonment shall be carried out by the Rwanda National Police.”<sup>213</sup> However, this provision is ambiguous as it does not clarify

<sup>206</sup> Penal Reform International (2010:60); Penal Reform International (2007:6).

<sup>207</sup> Brandner (2003:36).

<sup>208</sup> Birungi (2007:42); Penal Reform International (2007:5-6).

<sup>209</sup> Rwandan Penal Code (2012), arts. 47 et seq.

<sup>210</sup> Rwanda Correctional Service (2012:12).

<sup>211</sup> TIG Presidential Order, art.7; Establishment of Functioning and Organisation of Rwanda Correctional Service (RCS) Law 34 of 2010 (12 November 2010), in Official Gazette of the Republic of Rwanda No. 04 of 24 January 2011, arts. 55 et seq.

<sup>212</sup> *Tigiste* is a name derived from “TIG-iste” attributed to those who are carrying out their community services as alternative penalty to imprisonment known as TIG (*Travaux d’Intérêt Général*).

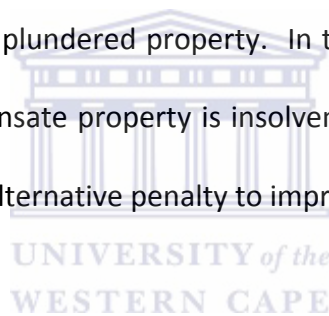
<sup>213</sup> Law terminating Gacaca, art. 11(1).

whether the duty of tracking the persons sentenced by Gacaca courts includes also those tried *in absentia* who are currently in the territories of other States.

### 3.4.2 Compensation of property looted during the genocide

Approximately one million of perpetrators have been ordered to compensate the property looted and destroyed during the genocide. A convicted person has three options of compensation, either restitution of the property looted whenever possible, monetary payment equivalent to the property's current value, or carrying out the equivalent work.<sup>214</sup>

It is observed that many of the convicted persons are indigent people that have no financial capacity of compensating the plundered property. In this regard, the law states that when the person ordered to compensate property is insolvent, the person in question shall carry out community service as an alternative penalty to imprisonment.<sup>215</sup>



### 3.4.3 Reparation

The Rwandan legislation conceives only the modalities of compensation of property pillaged or damaged during the genocide.<sup>216</sup> This compensation is also understood as a mode of reparation.<sup>217</sup> However, the Law terminating Gacaca courts limits the right to reparation to the compensation of only the property looted and destroyed during the genocide. It is evident that the municipal law regulates only the patrimonial damages and not the extra-patrimonial reparations.

<sup>214</sup> Gacaca Law of 2004, art. 95.

<sup>215</sup> Law terminating Gacaca, art. 12(2).

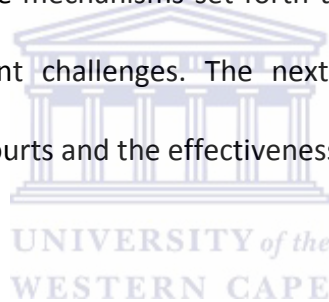
<sup>216</sup> Meyerstein A 'Between Law and Culture: Rwanda's Gacaca and Postcolonial Legality' (2007) 32 *Law & Social Inquiry* 486 (hereafter "Meyerstein, 2007").

<sup>217</sup> UN Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, United Nations General Assembly Resolution 60/147 (2005), UN Doc. A/RES/60/147 (16 December 2006), para. 20(c); Meyerstein (2007:486).

### 3.5 Conclusion

This chapter has provided an overview of the process of termination of Gacaca courts and the Organic Law 04 of 2012 which formally terminates them. This law has two the purposes, namely, repealing Gacaca courts and regulating the prosecution of pending cases and appeals against the judgements rendered by Gacaca courts.

Despite the progressive process of official closure of Gacaca courts, these courts left behind a significant number of applications for review against its judgements, as well as thousands of files of those tried in *absentia*. This huge number of files falls within the jurisdiction of ordinary courts. However, the mechanisms set forth to deal with those cases may lead to legal problems and significant challenges. The next chapter analyses the legal issues following the end of Gacaca courts and the effectiveness of those mechanisms.





## CHAPTER FOUR: KEY CHALLENGES SUBSEQUENT TO THE TERMINATION OF GACACA COURTS

### 4.1 Introduction

After the termination of Gacaca courts, the ordinary courts inherited the competence of trying pending cases and appeals against Gacaca judgements as well as new cases which might arise afterwards.<sup>218</sup> In addition, different mechanisms have been adopted in order to deal with the issues left behind by Gacaca courts.

Today, there is a significant number of pending and new genocide cases, and appeals. These cases include cases of genocide suspects extradited from the ICTR and from other countries, as well as applications for review and opposition formulated or to be formulated by those tried *in absentia*. By prosecuting those cases, the ordinary courts apply laws within their competent jurisdiction for example, Penal Code,<sup>219</sup> Criminal Procedure Code<sup>220</sup> and the Law terminating Gacaca courts.<sup>221</sup>

This chapter provides a critical analysis of challenges following the termination of Gacaca courts, the effectiveness and legal effects of the laws and other legal mechanisms set forth to deal with the cases which were under Gacaca Courts.

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<sup>218</sup> Law terminating Gacaca, art. 1(2).

<sup>219</sup> Penal Code Organic Law 01/2012/OL (02 May 2012), in Official Gazette of the Republic of Rwanda No. special of 14 June 2012 (Rwandan Penal Code).

<sup>220</sup> Criminal Procedure Code of Rwanda.

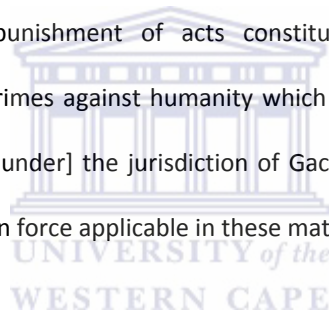
<sup>221</sup> Organic Law 04/2012/OL terminating Gacaca courts and also determines the mechanisms to the issues which were under those courts.

## 4.2 Unequal treatment of genocide suspects and violation of victims' rights

### 4.2.1 Disparate applicable penalties

The Law terminating Gacaca courts empowers the competent courts to continue with the prosecution of the cases which were under the jurisdiction of Gacaca courts and to accept new cases.<sup>222</sup> In addition, this law enumerates the acts constituting the crime of genocide which fall under the jurisdiction of intermediate courts,<sup>223</sup> primary courts<sup>224</sup> and mediation committees.<sup>225</sup> However, it does not provide a regulation of sanctions against these offences; it stipulates rather that:

“The prosecution and punishment of acts constituting the crime of genocide perpetrated against Tutsi and other crimes against humanity which were committed between October 1, 1990 and December 31, 1994 [under] the jurisdiction of Gacaca courts shall be exercised by competent organs according to laws in force applicable in these matters.”<sup>226</sup>



After the termination of Gacaca courts, the sanctions against acts constituting genocide, crimes against humanity and war crimes are laid down in the new Penal Code adopted in 2012.<sup>227</sup> The application of this new Penal Code provisions on 1994 genocide is deemed *ex post facto* in relation to punishments and thus violates the principle *nulla poena sine lege*.<sup>228</sup> Furthermore, the Penal Code contains a monistic penalty irrespective of the suspects'

<sup>222</sup> Law terminating Gacaca, art. 3(2).

<sup>223</sup> Law terminating Gacaca, art. 4.

<sup>224</sup> Law terminating Gacaca, art. 5.

<sup>225</sup> Law terminating Gacaca, art. 6.

<sup>226</sup> Law terminating Gacaca, art. 3(1).

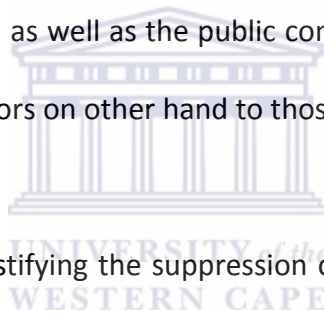
<sup>227</sup> Rwandan Penal Code, arts. 114 et seq.

<sup>228</sup> For the applicability of the principle of *nulla poena sine lege*, see Liszt VF 'The Rationale for the *Nullum Crimen* Principle' (2007) 5 *Journal of International Criminal Justice* 1012; Schabas WA 'Perverse Effects of the *Nulla Poena* Principle: National Practice and the Ad Hoc Tribunals' (2000) 11 *European Journal of International Law* 536.

degree of criminal participation and public confession. In this regard, the Penal Code stipulates that:

“Any person who commits, in time of peace or in time of war, the crime of genocide, as provided in the preceding article, shall be liable to life imprisonment with special provisions.”<sup>229</sup>

It is clear that the Penal Code does not provide any commutation of penalty such as suspension of penalty and community service, in favour of genocide suspects. Under the regime of Gacaca law, by contrast, the determination of penalties took into consideration the categorisation of suspects, as well as the public confession as legal mitigating factors on one hand and aggravating factors on other hand to those whose confession was rejected.<sup>230</sup>



There are no valid grounds justifying the suppression of commutation of a half of imposed penalty into community service as an alternative penalty to imprisonment against the suspects to be tried after the end of Gacaca courts.<sup>231</sup> Today, there is a big gap between the penalties imposed by Gacaca courts and *sui generis* monistic penalty provided for in the new Penal Code.

<sup>229</sup> Rwandan Penal Code, art. 115.

<sup>230</sup> Gacaca Law of 2004, art. 72 amended by Organic Law 13 of 2008 (art. 17), art. 73 amended by Organic Law 10 of 2007 (art. 14), art. 78 amended by Organic Law 13 of 2008 (art. 20); Riddell (2005: 63); Bornkamm (2012:76).

<sup>231</sup> The suspects to be tried after the termination of Gacaca courts include those placed in first category paragraphs 1 and 2 and those extradited or to be extradited as well as those tried *in absentia* while abroad by Gacaca courts. As examples, see *Prosecutor v. Nzirasano Anastase*, TGI Nyarugenge (2013), Case still in court. Nzirasano Anastase was Senator in Rwanda until 2011 whose the file placed within first category by Gacaca Court of Rugenge sector and submitted to Public Prosecutor in 2010. For the suspects extradited from ICTR and other countries, See *Mugesera v. Canada* (Minister of citizenship and Immigration), [2005] 2 S.C.R 100, 2005 SCC 40; *Prosecutor General v. Leon Mugesera*, High Court of Rwanda (2013)[Case still in court]; *Prosecutor v. Jean Uwinkindi*, Referral Chamber designated under Rule 11 bis, Judgement (2011), Case No. ICTR-2001-75-R11bis, para. 222; *Prosecutor v. Jean Uwinkindi*, High court of Rwanda (2013), Case still in court; *Prosecutor v. Charles Bandora*, High Court of Rwanda (2013), Case still in court.

In contrast to mild sanctions which were imposed by Gacaca courts, ordinary courts will impose heaviest penalties against the suspects to be prosecuted after the end of Gacaca, meaning that they will be subject to harsh sanctions.<sup>232</sup> This violates the suspects' rights to equality before the law and equal protection recognised by the Rwandan constitution<sup>233</sup> and international legal instruments to which Rwanda is bound.<sup>234</sup> In addition, it results in unequal treatment of genocide perpetrators and discriminatory punishments.

Furthermore, community service has been introduced not only as a criminal sanction and a reward of public confession<sup>235</sup> but also as a tool of social reintegration of genocide perpetrators.<sup>236</sup> Moreover, it is considered as a government policy to reduce the overpopulation within prisons.<sup>237</sup> Currently, approximately 57,000 prisoners are incarcerated within prisons in Rwanda.<sup>238</sup> When those tried *in absentia* shall return to their homeland,<sup>239</sup> those who will be found guilty will certainly be imprisoned given that the Penal Code does not provide any form of mercy such as community service or suspension of penalty.

As a result, the number of prisoners will go beyond the capacity of Rwandan prisons as it was the case in the 1990s.<sup>240</sup> This causes a crucial social and economic concern. One can ask

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<sup>232</sup> The suspects to be prosecuted after the end of Gacaca courts by ordinary courts shall be subject to the penalty of life imprisonment with special provisions while under Gacaca courts, the perpetrators were sentenced of, for example, a penalty of 1 year whose a half is commuted into community service and another party is suspended. For details see penalties imposed by Gacaca courts (ch.2).

<sup>233</sup> Constitution of the Republic of Rwanda, 2003, art. 16.

<sup>234</sup> ACHPR, art. 3 and 19; ICCPR, art. 14(1); UDHR, art. 7; see also Drumbl (2010: 289).

<sup>235</sup> Gacaca Law of 2004, arts. 54 et seq.

<sup>236</sup> Birungi (2007:42).

<sup>237</sup> Birungi (2007:42).

<sup>238</sup> RCS Report (2012).

<sup>239</sup> By the time of writing this paper, the Rwandan government declared that by the end of September around 7,000 refugees were repatriated from Tanzania, Congo and Uganda. This is available at <http://www.midimar.gov.rw/index.php/news/> (accessed on 3 October 2013).

<sup>240</sup> In 2000s there were in prisons of Rwanda at least 130,000 detainees, for details see Ratting (2008:51); Sarkin (1999:788), Gaparayi (2001:78).

whether the government has a significant budget to build new prisons and to take care of the future prisoners. The Rwandan government should think of sustainable solution to this issue, such as adopting the Gacaca courts model of punishment against pending genocide cases.

#### **4.2.2 Discriminatory and unjust legal provisions**

The Rwandan legislation recognises important privileges particularly to the suspects extradited from the ICTR and from other countries,<sup>241</sup> such as omission of some form of penalty and annulment of a Gacaca court judgment if any. This leads to legal issues such as selective sanctions and unequal treatment of genocide suspects as well as negative effects on the victims' rights.



##### **4.2.2.1 Selective sanctions**

The municipal law provides for a number of privileges to a certain group of genocide suspects which are not applicable to others. In fact, the Rwandan law abolishing the death penalty stipulates that:

“In all legislative texts in force before the commencement of this organic law the death penalty is hereby substituted by life imprisonment or life imprisonment with special provisions as provided for by this organic law. However, life imprisonment with special provisions [...] shall not be pronounced in respect of cases transferred to Rwanda from International Criminal Tribunal for Rwanda and from other States”.<sup>242</sup>

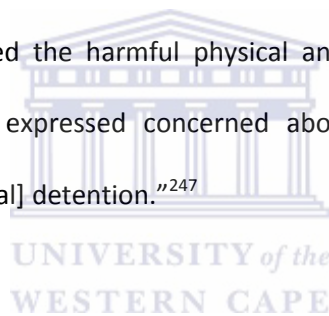
<sup>241</sup> Transfer Law, arts. 21 et seq.

<sup>242</sup> Abolition of Death Penalty Law, art. 1(3).

This provision is not applicable to other suspects, to be prosecuted after the closure of Gacaca courts, who thus should be subject to the heaviest penalty in the domestic criminal legislation. Therefore, the question arises: what are the reasons of such discriminatory and unjust legal provision? The law relating to the abolition of the death penalty states that “a sentenced person is kept in prison in an individual cell reserved to the people guilty of inhuman crimes.”<sup>243</sup>

This isolation element is contrary to the Torture Convention<sup>244</sup> and also violates the ACPR<sup>245</sup> and ICCPR<sup>246</sup> by which Rwanda is bound. In this regard, the UN Commission of Human Rights

“[H]as [also] recognized the harmful physical and mental effects of prolonged solitary confinement and has expressed concerned about its use, including as a preventive measure during [pre-trial] detention.”<sup>247</sup>



As a result, the UN has stated that “prolonged solitary confinement may amount to an act of torture and other cruel, inhuman and degrading treatment or punishment.”<sup>248</sup> Through its observations on Rwanda, it was recommended that the “state party should put an end to the sentence of solitary confinement.”<sup>249</sup> In the case of Kanyarukiga, the ICTR states that the court:

<sup>243</sup> Serving Life Imprisonment with Special Provisions Law 32 of 2010 (22 September 2010), in Official Gazette of the Republic of Rwanda, art.3 (2); the same provision is provided for in Transfer Law, art.21.

<sup>244</sup> Convention against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment of 10 December 1984, 1465 UNTS 195, art. 16(1)

<sup>245</sup> ACHPR, art. 5.

<sup>246</sup> ICCPR, art. 7.

<sup>247</sup> Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment (2011) UN Doc. A/66/268, para.31 (hereafter “Torture interim report”).

<sup>248</sup> Torture interim report, para. 32.

<sup>249</sup> Torture interim report, para. 30.

“[R]ecognises that the punishment of solitary confinement may constitute a violation of international standards if not applies as exceptional measure which is necessary, proportionate, restricted in time and includes some safeguards.”<sup>250</sup>

In this regard, the existence of punishment of solitary life imprisonment within domestic criminal laws constituted an impediment to the extradition of genocide suspects and resulted in the denial of some extradition requests.<sup>251</sup> In response to international pressure, Rwanda excluded the penalty of life imprisonment with special provisions but only in favour of extradited genocide suspects.<sup>252</sup>

Since then because of these legislative changes within municipal law, some genocide suspects were extradited to Rwanda under condition that the extradited suspect could not be subject to solitary confinement.<sup>253</sup> However, this penalty still applies against the rest of categories of *génocidaires*. This leads to selective punishment and result in unequal treatment of genocide perpetrators.

Given that the penalty of life imprisonment with special provisions violates the perpetrator’s fundamental rights, human rights activists continue to push the Rwandan government to

<sup>250</sup> *Prosecutor v. Gaspard Kanyarukiga*, The Appeals Chamber (2008), Case No. ICTR-2002-78-R11bis, para. 15.

<sup>251</sup> As an example, see *Prosecutor v. Gaspard Kanyarukiga*, Appeals Chamber (2008), Case No. ICTR-2002-78-R11bis, para.39; *Prosecutor v. Yusufu Munyakazi*, Appeals Chamber (2008), Case No. ICTR-97-36-R11bis, para. 11; *Prosecutor v. Ildephonse Hategekimana*, Appeals Chamber (2008), Case No. ICTR-00-55B-R11bis, paras.31-38; Human Rights Watch (2012:75); Schabas WA (2009:419).

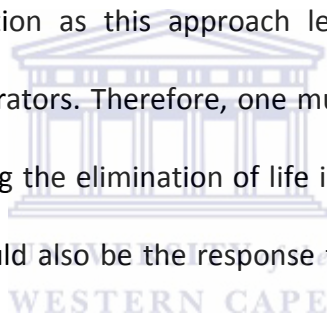
<sup>252</sup> See Transfer Law, art. 21; Abolition of Death Penalty Law, art. 1(3).

<sup>253</sup> See as example *Case of Ahorugeze v. Sweden*, European Court of Human Rights , Judgement (2011), became final on 4 June 2012, para. 127; *The Prosecutor v. Fulgence Kayishema*, Chamber designated under the Rule 11bis, Judgement (2012), Case No. ICTR-01-67-R11bis, para.40; *Prosecutor v. Phénéas Munyarugarama*, Referral Proceedings pursuant to Rule 11 bis, judgement (2012), Case No. ICTR-02-79-R11bis, para. 24.

completely eliminate solitary confinement as a punishment. For example, Human Rights Watch recommended that:

“[The Rwandan] Parliament adopted legislation on December 1, 2008, barring application of the penalty of life imprisonment in solitary confinement to criminal cases transferred from the ICTR or from abroad. Rwanda seems to recognise that the penalty of lifetime solitary confinement does not adhere to international standards and that it must be eliminated in order to have sent back to Rwanda for trial.”<sup>254</sup>

Despite those allegations and criticisms, the penalty of life imprisonment with special provisions is still applied to all genocide suspects except those extradited. This is not an adequate and effective solution as this approach leads to discrimination and unequal treatment of genocide perpetrators. Therefore, one must support the recommendations of Human Rights Watch regarding the elimination of life imprisonment with special provisions in criminal sanction. This should also be the response to this legal issue of inequitable and selective sanctions.



#### **4.2.2.2 Issue of annulment of Gacaca judgments**

The Law terminating Gacaca courts provides that in case a person extradited to be tried by Rwandan courts has been sentenced by a Gacaca court, the decision of the Gacaca court shall first be nullified by that court.<sup>255</sup> In this regard, one can ask oneself whether an extradition of a perpetrator tried by a Gacaca court should render the judgement subsequently unlawful. It is important here to analyse grounds of annulment of Gacaca judgement and effects of this annulment.

<sup>254</sup> Human Rights Watch 'Letter to Rwanda Parliament Regarding the Penalty of Life Imprisonment in Solidarity Confinement' (2009) available at <http://www.hrw.org/en/news/2009/01/29/letter-rwanda-parliament-regarding-penalty-life-imprisonment-solitary-confinement> (accessed on 27 June 2013).

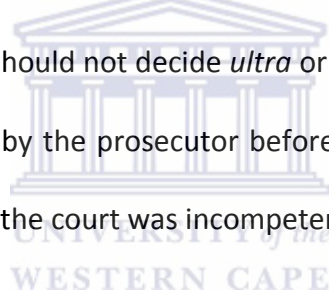
<sup>255</sup> Law terminating Gacaca, art. 8.



#### 4.2.2.2.1 Improper grounds of annulment of a Gacaca judgement

The reason for nullifying a judgment rendered by a Gacaca court results from the conditions laid down in the ICTR decision relating to the referral of cases from the ICTR to Rwanda. The Rwandan authorities are required to preserve the presumption of innocence principle vis-à-vis the accused<sup>256</sup> and to take all measures that “any accused, if transferred to Rwanda, would not run the risk of double jeopardy.”<sup>257</sup> In compliance with these conditions, the Rwandan government opted for nullifying a Gacaca judgement, if any, in case of a referral.<sup>258</sup>

However, one may argue that the law should not provide the annulment of the Gacaca decision but rather the procedure through which it should be nullified. Traditionally, the court acts under request and should not decide *ultra* or *infra petita*.<sup>259</sup> Here, it is argued that the demand may be initiated by the prosecutor before the relevant court arguing that the Gacaca decision is unlawful as the court was incompetent to try the case.



Most of those extradited from the ICTR are in the category of planners and organisers of the genocide perpetrated against Tutsi as well as notorious *génocidaires*.<sup>260</sup> For this reason, they fall out of the jurisdiction *ratione materiae* of Gacaca courts.<sup>261</sup> To this end, it is argued that the annulment of a Gacaca court decision should be pronounced by a court judgement based on request and facts presented by the public prosecution. The cancellation of Gacaca court decisions without legal grounds may undermine the value and legal effects of Gacaca

<sup>256</sup> *Prosecutor v. Charles Sikubwabo*, Referral Chamber (2012), Case No. ICTR-95-1D-R11bis (hereafter “Sindikubwabo Referral Case”), para. 17; *Prosecutor v. Jean Uwinkindi*, Referral Chamber (2011), Case No. ICTR-2001-75-R11bis (hereafter “Uwinkindi Referral Case”), para. 24.

<sup>257</sup> *Sikubwabo Referral Case*, paras.18 et seq.; *Uwinkindi Referral Case*, paras. 22 et seq.

<sup>258</sup> Law terminating Gacaca, art. 8(2).

<sup>259</sup> Tomuschat C ‘Reparations in Case of Genocide’ (2007) 5 *Journal of International criminal Justice* 909-10.

<sup>260</sup> ICTR Statute, art. 6(1); Gacaca Law of 2004, art. 51(1) amended by Organic Law 28 of 2010, art. 9.

<sup>261</sup> Gacaca Law of 2004, art.2 amended by Organic Law 28 of 2010, art. 1.

judgements in general. In addition, the court decision of annulment of a Gacaca court judgement should be misleading.

#### 4.2.2.2.2 Negative effects of annulment of a Gacaca judgement

Normally, the annulment of every legal act produces the *ex tunc* effects, and thus the accessory acts shall be also invalidated.<sup>262</sup> Under the Gacaca jurisdiction, a large number of those tried *in absentia* have been also convicted to the compensation of the property looted during genocide.

Most of the sentences rendered by Gacaca courts have been executed and the properties of those tried in absentia have been sold in public auction for compensating the looted property.<sup>263</sup> In principle, the cancellation of the judgement might be extended to the execution of the property compensation thereto. Consequently, it will affect the victims' rights acquired from the property judgement already executed.

The crucial problem is to know whether the property acquired by victims should also be returned. Here, the Law terminating Gacaca courts remains completely silent with regard to the rights already acquired from the judgement to be invalidated. This law is also silent as regard the testimonies disclosed in a judgement which must be nullified.

During Gacaca hearings, a significant truth has been revealed and victims as well as witnesses have testified about what happened during genocide perpetrated against Tutsi.

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<sup>262</sup> Ngagi A *Droit des obligations, Manuel des étudiants* (2004) 83. According to Ngagi a cancellation of any legal act produces *ex tunc* effects i.e. retroactive effects and thus is extended to the rights thereto.

<sup>263</sup> Instructions No. 14/2007 (30 March 2007) of the Executive Secretary of National Service of Gacaca courts concerning the compensation of property destroyed during genocide.

In case of the annulment of a Gacaca judgment, it is also important to think about the value of testimonies given in the annulled judgment, in case the witness is not alive anymore.

Given that testimonies, especially those related to the hearings held in camera concerning the sexual violence cases,<sup>264</sup> may be important in the trial of cases transferred from the ICTR or from other countries, it is only proper and in the interest of justice that these testimonies should not be invalidated. In this regard, the law should determine the scope of the annulment of a Gacaca judgement and limit its effects. This paper proposes that the law should include the request for annulment of a Gacaca judgment by way of appeal and also determine its procedure.

### 4.3 Inadequacy of ways of appeal against Gacaca judgements

The Law terminating Gacaca courts provides for two ways through which Gacaca decisions should be *de jure* or *de facto* attacked. These ways include the application for review and opposition against judgements rendered by Gacaca courts.

#### 4.3.1 Review of Gacaca judgement

A review is a procedure through which one can attack a final judgement, either in favour of the defendant or against the defendant.<sup>265</sup> The Law terminating Gacaca courts enumerates the reasons for which the judgements rendered by Gacaca courts shall be reviewed such as new facts proving the person's innocence; criminal responsibility; or that the bench was corrupt.<sup>266</sup> However, these grounds for review stated above are not adequate. The law

<sup>264</sup> The proceedings of rape and other sexual violence acts were conducted in camera, only the court, accused and victim were in audience ( Gacaca Law of 2004, art. 38 amended by the Organic Law 13 of 2008, art. 6).

<sup>265</sup> Bohlander (2012:278).

<sup>266</sup> Law terminating Gacaca, art. 10.

ignores important grounds, for example, that the court decision is based on false testimony or the decision is manifestly unlawful as regard the procedural or substantive law.<sup>267</sup> In the latter case, for example a perpetrator can be sentenced to a penalty of appropriate for adult perpetrators while he or she was minor when committing the crime.<sup>268</sup>

As a result, there are lacunas within the grounds for review of the Gacaca decisions. In this respect, this paper argues that the law should include a wide range of grounds for review of Gacaca judgements in order to correct procedural errors and substantive irregularities thereto.

#### 4.3.2 Lack of procedure for failing opposition

Traditionally, an opposition is brought before the court which has rendered the judgement within a certain period of time from the notification of the judgement to the perpetrator who has tried and sentenced *in absentia*.<sup>269</sup> The Law terminating Gacaca courts provides for opposition against judgements rendered by Gacaca courts before ordinary courts. This law stipulates that:

“If a person was sued, tried and sentenced by a Gacaca court while abroad, returns and it is found that he [or] she did not have intention to escape justice, he [or] she may file opposition before a competent court which has jurisdiction to try that offence as provided by this Organic Law.”<sup>270</sup>

<sup>267</sup> The Ministry of Internal Security report shows that, by June 2012, approximately 2,836 prisoners applied for review proving that their sentences are unlawful or are based on false testimony: see Ministry of internal Security (2012:34).

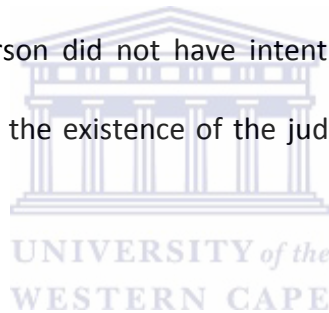
<sup>268</sup> Under Rwandan criminal law, a minor is person who is under eighteen years old (Rwandan Penal Code, art.72, Gacaca Law of 2004, art.78).

<sup>269</sup> Criminal Procedure Code, art. 158; Gacaca Law of 2004, art. 87.

<sup>270</sup> Law terminating Gacaca, art. 9(1).

From this provision, one can say that the Law terminating Gacaca courts classifies genocide perpetrators tried *in absentia* into two main categories: those extradited from the ICTR or from other countries and those who voluntarily return. However, the law does not concede identical privileges. As mentioned, a Gacaca court judgement will be nullified and the court will restart the case in favour those extradited while the judgement will remain valid against those who voluntarily repatriate.<sup>271</sup> This is discriminatory provision.

First, a person tried *in absentia*, who returns, may file an opposition within the period two months from the date he or she returns to the country.<sup>272</sup> Therefore, the law does not stipulate the procedure of filling the opposition and this leads to a number of questions. Who will decide that the person did not have intention to escape justice? How will the accused formally be aware of the existence of the judgement and sentence against her or him?



Secondly, after the closure of Gacaca courts, all files, statements of witnesses and minutes of hearings have been kept in the National Documentation and Research Centre on Genocide located in Kigali. How will the appellants have access to the copies of the judgements containing the indictments and *dispositif* of the court on which they will base the appeal? How will the prosecutor be informed? How will they know the competent court? Here, the law remains silent. In addition to this, the Gacaca procedure is different from the criminal procedure.

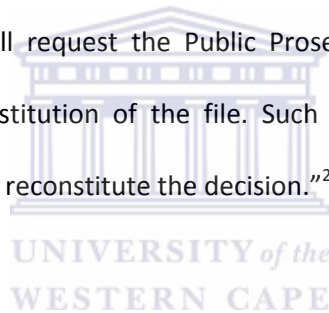
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<sup>271</sup> When a genocide suspect is extradited to Rwanda and it is found that he or she has been sentenced by Gacaca courts, the Gacaca judgment shall be nullified (Law terminating Gacaca, art. 8(2)).

<sup>272</sup> Law terminating Gacaca, art. 9(2).

Under Gacaca courts, the procedure was adversarial, i.e. the case was between the victim and accused, while the ordinary criminal procedure is inquisitorial.<sup>273</sup> Normally, Gacaca files do not contain statements of witnesses and other relevant facts so that they can constitute the basis of a court trial within ordinary courts. Here, the crucial problem is to know whether the prosecutor will recommence investigations as it would be like dealing with a new case with no statements of witnesses and victims. Indeed, it is another issue if the copy of a Gacaca judgement or the entire file is not found. In this latter case, the Law terminating Gacaca states that:

“Any person who needs a copy of a judgement rendered by a Gacaca court but which can no longer be found shall request the Public Prosecution at the Primary Level to collect information for the constitution of the file. Such information shall be submitted to the Primary Court in order to reconstitute the decision.”<sup>274</sup>



The reconstitution of a Gacaca judgement is not a simple factual act, but rather a court decision. This is additional work upon the domestic courts. This may take more than two months required by the law and could amount to practical challenges in case it would be required to provide all perpetrators tried *in absentia* with copies of the judgement.

The law should clarify or provide a specific procedure for filing an opposition. The suggestion is that the court should first notify the accused tried *in absentia* of the Gacaca decision which should clarify the indictments and conclusions as soon as he or she sets his or her foot on the territory of Rwanda.

<sup>273</sup> Criminal Procedure Code, arts. 43 et seq.

<sup>274</sup> Law terminating Gacaca, art. 20.

To make this possible, electronic data and records should be available at the lowest administrative level, Police station and migration office so that every person who returns to the country can be easily aware of the Gacaca court sentence against him or her. In addition if the person sentenced *in absentia* returns, the Public Prosecution should request the competent to submit a formal notification to the accused person who should thereafter file an opposition. By doing so, the applicant should submit the application to the competent court, within a period of two months from the day of the receiving the formal written notification of the court, and also notify the Public Prosecution.

#### **4.4 Issue of dealing with sentences *in absentia* rendered by Gacaca courts**

Despite the UNHCR's declaration of the cessation clause on Rwandan refugees, some of those convicted declared their unwillingness to repatriate because of their participation in the genocide.<sup>275</sup> They are also aware of the existence of sentences and arrest warrants over them. First, the problem is whether the domestic courts have the capacity to deal with the oppositions filed by those who do repatriate and other new cases; and secondly, how to enforce the sentences against those who remain abroad.

##### **4.4.1 Inability of domestic courts to deal with pending genocide cases**

The inability of Rwandan domestic courts to deal with all pending genocide cases is examined with regard to the large number of cases yet to be tried, and the problem of concluding trials within a reasonable time.

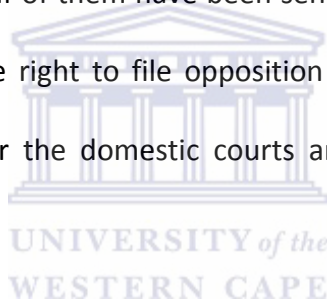
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<sup>275</sup> Integrated Regional Information Network (IRIN) 'No consensus on implementation of cessation for Rwanda refugees' (2013) available at <http://www.irinnews.org/report/98409/> (accessed on 8 October 2013).

#### 4.4.1.1 Large number of cases

The cases to be tried by ordinary courts include those ranged in the first category and new cases not prosecuted by Gacaca courts, as well as cases of those who were or will be extradited from the ICTR or from other countries. They also include cases of those tried *in absentia* who file oppositions,<sup>276</sup> as well as applications for review against the Gacaca judgements.<sup>277</sup>

In fact, since 1 July 2013, the UNHCR ruled for the cessation clause for the Rwandan refugees and recommended their repatriation.<sup>278</sup> Among tens of thousands refugees<sup>279</sup> whom UNHCR is now repatriating at least half of them have been sentenced by Gacaca courts. When they will return, they will have the right to file opposition against those sentences. Here, it is important to analyse whether the domestic courts are really equipped to carry out the prosecution of these cases.



Rwanda has now sixty primary courts,<sup>280</sup> twelve intermediate courts,<sup>281</sup> one High Court with four chambers<sup>282</sup> as well as one Supreme Court.<sup>283</sup> All those courts have only a total of 347

<sup>276</sup> Law terminating Gacaca, art. 9.

<sup>277</sup> Law terminating Gacaca, art. 10.

<sup>278</sup> UNHCR 'Ending of refugee status for Rwanda approaching, Briefing notes' (2013) available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=51cd7df06&query=cessation%20clause%20on%20rwanda%20refugees> (accessed on 7 July 2013). See also Convention Relating to the Status of Refugees (1951) 189 UNTS 137/ [1954], art. 1(C)(5).

<sup>279</sup> Integrated Regional Information Network (IRIN) 'No consensus on implementation of cessation for Rwanda refugees' (2013) available at <http://www.irinnews.org/report/98409/> (accessed on 8 October 2013).

<sup>280</sup> Annex to the Organic Law 51 of 2008 in Official Gazette of the Republic of Rwanda No. special (10 September 2008) at 92-117.

<sup>281</sup> Annex to the Organic Law 51 of 2008 in Official Gazette of the Republic of Rwanda No. special (10 September 2008) at 120-2.

<sup>282</sup> Organic Law 51 of 2008, arts. 14 and 15.

<sup>283</sup> Rwandan Constitution, art. 144.



judges.<sup>284</sup> As mentioned in chapter three, those courts are dealing with both ordinary criminal and civil cases. In the year 2000, before the establishment of Gacaca courts, the number of judges was 841 within the whole judicial system.<sup>285</sup> It was assessed that during five years, the domestic courts were able to try only 6,000 cases.<sup>286</sup>

From this perspective, it is noted that the trial of only the oppositions filed against the judgements rendered by Gacaca courts would take at least a hundred years while there are still other cases to be transferred from the ICTR and from other countries.<sup>287</sup> As result, given that limited number of judges and the estimated number of cases, the ordinary courts lack the capacity to deal effectively with these cases.

From these reasons, the argument is that the Gacaca courts have prematurely closed as they have left behind a big number of pending cases mainly applications for review and oppositions lodged against judgements. One can ask whether Rwanda shall reopen the Gacaca courts in order to confront challenges related to inability of domestic courts to handle the volume of cases they are expected to handle.

However, as the Gacaca courts had been closed, they should not be reactivated because it can be deemed a step backwards or failure of those courts, and one should rather look for appropriate alternative solution, for example, the extension of mediation committee jurisdiction to genocide cases.

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<sup>284</sup> Supreme Court 'Annual Report of 2011-2012' (2012)10 available at <http://www.judiciary.gov.rw/sc/reports.aspx> (accessed on 7 July 2013).

<sup>285</sup> National Service of Gacaca courts (2012:26).

<sup>286</sup> Amnesty International (2002:1).

<sup>287</sup> The number of those tried and sentenced in absentia is estimated at 58,000 that have right file an opposition against the Gacaca sentences which should take decades in comparison of the outcome of the specialised chambers created by the Genocide Law of 1996.

#### 4.4.1.2 Problem of ending trials within a reasonable time

Speeding up the genocide trials was one of the main objectives of Gacaca courts and was deemed a solution not solely to cover the incapacity of specialised chambers but also to prevent the image of Rwandan justice from being seen as justice delayed and denied.<sup>288</sup>

As mentioned earlier, ordinary courts have to deal with a large number of oppositions to be filed by those tried *in absentia*, as well as new cases. Consequently, the inability of these courts to try those cases could lead to delayed justice.<sup>289</sup> Nonetheless, Rwanda is state party to international legal instruments which require delivering justice within a reasonable time.<sup>290</sup>

Rwanda is under obligation to comply with those international requirements in accordance with the *pact sunt servanda* principle<sup>291</sup> in order to conduct the genocide trials within reasonable time. In this respect, there should be a need of an alternative mechanism to speed up the trial of genocide cases, that could be, as highlighted above, to put some cases under jurisdiction of mediation committees.

#### 4.4.2 Lack of enforcement policy of default judgements

The enforcement of sentences rendered by Gacaca courts might find its legitimacy in that genocide committed in Rwanda does not solely affect the victims' dignity but also affected

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<sup>288</sup> Ridell (2005:44).

<sup>289</sup> Riddell (2005:43-4).

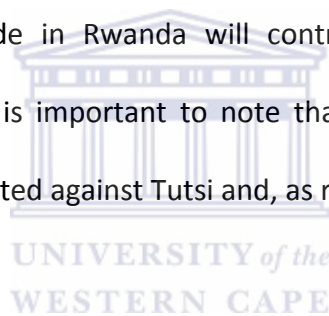
<sup>290</sup> ACHPR, art. 7(1) (d); ICCPR, art. 9(3).

<sup>291</sup> Vienna Convention of the Law of Treaties (1969) 1155 UNTS 331, art. 25.

the international community as a whole.<sup>292</sup> In this respect, the Genocide Convention states that:

“The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”<sup>293</sup>

In accordance with this provision, States have the duty to prosecute and to undertake effective punishments against genocide suspects.<sup>294</sup> Given the nature of genocide “as crime of crimes”<sup>295</sup> the prevention of such crime can only be ensured by punishing those responsible and by enforcing the sentences rendered against them.<sup>296</sup> The punishment of those responsible of genocide in Rwanda will contribute to its prevention and deter perpetrators.<sup>297</sup> Moreover, it is important to note that convictions constitute a historical truth about genocide perpetrated against Tutsi and, as result, prevent its revisionism.<sup>298</sup>



Normally, the enforcement of these penalties of imprisonment requires the presence of the convicted person on the territory of Rwanda and the national police cannot operate out of its boundaries to arrest those tried *in absentia*. The execution of Gacaca judgements in other countries can be obstructed by the fact that many countries’ legislations do not allow trials

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<sup>292</sup> Union Africaine (2000:73); Cassese A *International Criminal Law* (2003) 286.

<sup>293</sup> Genocide convention, art. I.

<sup>294</sup> Genocide Convention, art. V.

<sup>295</sup> Schabas (2009: 11 et seq.); *Prosecutor v. Kambanda*, Trial chamber, Judgement and sentence (1998), Case No. ICTR-97-23-S.

<sup>296</sup> Naftali BO and Sharon M ‘What the ICJ did not say about the Duty to Punish Genocide’ (2007) 5 *Journal of International Criminal Justice* 864 (hereafter “Naftali and Sharon, 2007”); Cornwell *JD Criminal Punishment and Restorative Justice: Past, Present and Future Perspectives* (2006) 54.

<sup>297</sup> Werle (2009:35).

<sup>298</sup> Werle (2009:35).

*in absentia*;<sup>299</sup> hence the Gacaca sentences may not be enforced against the offenders in such territories. In this respect, it can be argued that the existence of these sentences may serve as evidence to prove that the offender might be considered as fugitive of justice rather a refugee.<sup>300</sup>

Given that the prohibition of genocide operates *erga omnes* and acquired the status of *jus cogens* norms,<sup>301</sup> the host country has an obligation to take legal and administrative measures to bring genocide suspects to trial.<sup>302</sup> It was also argued that genocide perpetrators might be considered as enemies of all humankind “in whose punishment all states have an equal interest.”<sup>303</sup>

From this perspective, it was supported that the *aut dedere aut judicare* principle applies also to genocide cases.<sup>304</sup> In its judgement, the International Court of Justice ruled that States have duty to:

“arrest persons accused of genocide who are in their territory, even if the crime of which they are accused was committed outside it and, failing prosecution of them in the parties’ own courts, that they will hand them over for trial by the competent international tribunal.”<sup>305</sup>

<sup>299</sup> Kraße C ‘Universal Jurisdiction over International Crimes and *Institut de Droit international*’ (2006) 4 *Journal of International Criminal Justice* 578.

<sup>300</sup> Bantekas I and Nash S *International Criminal Law* 3ed (2007) 293.

<sup>301</sup> Naftali and Sharon (2007:864).

<sup>302</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, ICJ Reports (2007) 43 (hereafter “ICJ Bosnia Case”), para.443; Naftali and Sharon (2007:862).

<sup>303</sup> *The Attorney General of Israel v. Eichmann*, Supreme Court of Israel (1962) 36 ILR 277.

<sup>304</sup> Steenberghe VR ‘The Obligation to Extradite or Prosecute: Clarifying its nature’ (2011) 9 *Journal of International Criminal Justice* 1095.

<sup>305</sup> ICJ *Bosnia case*, para. 443.

Here, the court confirmed that States have a duty to prosecute or to extradite the genocide suspects who are in their territory. Likewise, the Inter-American Court of Human Rights reiterated that in case of gross human rights violations:

“Access to justice is a prompt norm of international law and, as such, gives rise to obligations *erga omnes* for the States to adopt all necessary measures to ensure that such violations do not remain unpunished, either by exercising their jurisdiction to apply their domestic law and international law to prosecute and, when applicable, punish those responsible, or by collaborating with other States that do so or attempt to do so.”<sup>306</sup>

The prosecution or extradition by the host States seems to be a political and diplomatic issue rather than a judicial decision. Until now no legal mechanisms have been implemented to bring to trial or to extradite genocide perpetrators sentenced *in absentia* by Gacaca courts. The absence of those legal mechanisms leads to the result that the genocide perpetrators find safe havens within host countries and will go unpunished. If the perpetrators participated in mass killings during the genocide in Rwanda remain free, it will be a step backwards against the culture of impunity and the prevention of genocide.<sup>307</sup>

It is also important to note that the punishment of the genocide perpetrators should also constitute the guarantee of non-repetition which is part of reparations of harm that the genocide victims suffered from.<sup>308</sup> The argument is that this issue should be solved by the

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<sup>306</sup> *Case of Goiburú et al. v. Paraguay*, Inter-American Courts of Human Rights, Merits, Reparations and Costs (2006), para. 131.

<sup>307</sup> Jones (2011:186).

<sup>308</sup> Hayner PB *Unspeakable Truths: Facing the Challenges of Truth Commissions* (2002) 171.

political will of both the government of Rwanda and States that have genocide perpetrators in their territories to take appropriate measures to bring them to trial.

#### 4.5 Absence of reparatory mechanisms for genocide victims

Following the end of mass violations of human rights, frequently “survivors and victims suffer a range of physical and psychological injuries.”<sup>309</sup> They live under extreme poverty “as a result of loss of the breadwinner in their family, the destruction of property or their ability to work.”<sup>310</sup> Reparations may involve a “variety of actions and activities that seek to restore the *status quo ante*” of the victims.<sup>311</sup>

They include “restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.”<sup>312</sup> The reparation in the context of the genocide against Tutsis is seen from two angles, reparation of patrimonial damages (compensation of the property) and extra-patrimonial damages (reparation of harm suffered).

##### 4.5.1 Weak reparation of patrimonial damages

Patrimonial damages are related to the compensation of property looted or destroyed during the genocide. Gacaca courts have ordered compensation of those losses against close to a million of people of compensation of these losses. As highlighted above, most of those convicted are indigent people to extent that they are not able to pay the amount ordered by

<sup>309</sup> Hayner PB *Unspeakable Truths: Confronting State Terror and Atrocity* (2001) 171.

<sup>310</sup> Hayner (2002:171); Hayner (2001:171).

<sup>311</sup> Feyter K, Parmentier S, Bossuyt M and Lemmens P *Out of the Ashes: Reparations for Victims of Gross and Systematic of Human rights Violations* (2005) 38.

<sup>312</sup> UN Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Violation of International Humanitarian Law, UN General Assembly A/RES/60/174 (2005) (hereafter “UN Basic Principles on Reparations”); Hayner (2001) 171; Hayner (2002:171); Fernandez L ‘Possibilities and limitations of reparations for the victims of human rights violations in South Africa’ in Rwelamira and Werle (1996) 67.

the Gacaca courts. In that case, the law rules that the insolvent offender shall be subjected to Community Services as alternative penalty to imprisonment.<sup>313</sup>

First, the compensation for the damage of the property consists of a monetary payment and does include a penalty of imprisonment as an alternative sanction against the insolvent offenders. Therefore, it is misleading to use the concept 'community service as an alternative penalty to imprisonment' against the insolvent offender because no imprisonment penalty is provided for the offender that fails to compensate the property. One can propose that the concept 'public works' should replace the one of 'community service as alternative penalty to imprisonment'.

Secondly, this law is ambiguous on the issue of compensation so long because it does not provide how the victim will be indemnified in case the offender is carrying out the community service as the latter does not consist of a direct benefit to the victim.<sup>314</sup>

Furthermore, the law does not stipulate the competent authority which is to assess the offender's insolvency or to substitute the monetary compensation by the community service. Despite the execution of the community service by the insolvent offender, the victim remains uncompensated.

The survivors' associations such as IBUKA,<sup>315</sup> SURF and REDRESS recommended the modification of this provision before the draft law was passed on to the parliament.<sup>316</sup>

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<sup>313</sup> Law terminating Gacaca, art. 12(2).

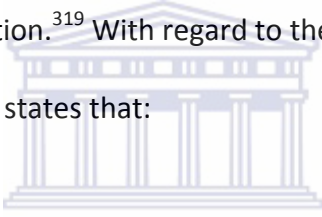
<sup>314</sup> TIG Presidential Order, art. 6.

<sup>315</sup> 'Ibuka' is a word in national language which means 'Remember'. It is an association of genocide survivors in Rwanda.

Ultimately the Rwandan parliament passed the law without any modification. This is a weakness of the Rwandan legislator which leaves the gaps or ambiguity regarding the compensation of victims. In response to this issue, it is suggested that the monetary value of the days of public works carried out by the offender should be disbursed to the victim to be compensated.

#### 4.5.2 Lack of reparations of extra-patrimonial damages

Reparation is also seen as remedy of harm suffered which include mental and bodily harm.<sup>317</sup> However, the Rwandan laws, including the Gacaca legislation, lack “appropriate mechanisms of compensation”<sup>318</sup> The Rwandan courts are only competent to hear the cases relating to property compensation.<sup>319</sup> With regard to the reparation of the harm suffered the Law terminating Gacaca courts states that:

  
 “Filing a civil case for damages resulting from the crime of genocide perpetrated against Tutsi and other crimes against humanity committed between October 1, 1990 and December 31, 1994 shall be determined by a law.”<sup>320</sup>

Such legal provision existed within the Rwandan legislation since the first enactment establishing the Gacaca courts and still exists within subsequent laws.<sup>321</sup> Reparations of harm suffered by genocide victims remains a crucial problem because of the difficulties that

<sup>316</sup> IBUKA ‘Comments submitted to Parliament of Rwanda on Draft Organic Law terminating Gacaca courts’ (2012) available at [http://survivors-fund.org.uk/wp-content/uploads/2012/05/DraftLawGacaca\\_civilsociety\\_submission1.pdf](http://survivors-fund.org.uk/wp-content/uploads/2012/05/DraftLawGacaca_civilsociety_submission1.pdf) (accessed on 5 July 2013).

<sup>317</sup> Hayner (2001:171); Mcevoy K and Mcgregor L (ed.) *Transitional Justice from Below: Grassroots Action and the Struggle for Change* (2008) 34-6.

<sup>318</sup> Schabas (2003:47).

<sup>319</sup> Wadolf L *Transitional Justice and DDR: Case of Case of Rwanda* (2009) 17.

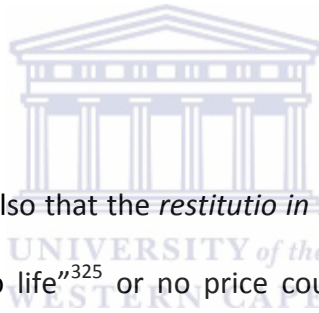
<sup>320</sup> Law terminating Gacaca, art. 3(2).

<sup>321</sup> Gacaca Law of 2000, art.91 *in fine*; Gacaca Law of 2004, art. 96; Law terminating Gacaca, art. 3(2).



may result from individual claims, namely, the insolvency of the perpetrators and the inability of courts to hear all victims' individual claims.<sup>322</sup>

However, the insolvency of genocide perpetrators that has been mentioned in this paper is not a justification for the lack of reparations for the genocide victims but rather it results from the lack of political will to set up reparations mechanisms. It almost seems as if the government intends to escape its duty to provide effective remedies to genocide victims.<sup>323</sup> In 2002, there were discussions about draft law on reparations but they failed and so far, there is no legal basis of reparations. The reason advanced by the Rwandan officials, in this regard, is that they cannot commit themselves to something which they are not able to achieve.<sup>324</sup>



In some cases, it was argued also that the *restitutio in integrum* is not possible as “the dead could not be brought back to life”<sup>325</sup> or no price could be equivalent to human life and dignity.<sup>326</sup> Nevertheless, reparations are part of the duty of the State in which the gross violations of human rights have been committed to give effective remedy to victims.<sup>327</sup> In particular, in the context of the genocide perpetrated against Tutsi, the need for the reparations for bodily and mental harm is quite significant for healing and reconciliation.<sup>328</sup>

<sup>322</sup> Tomuschat C ‘Reparations in Case of Genocide’ (2007) 5 *Journal of International Criminal Justice* 584 (hereafter “Tomuschat, 2007”).

<sup>323</sup> The state has a duty to protect human rights on its territory (ICCPR, art.2 (1); ACHPR, art. 1) Geneva Convention Relative to the Protection of Civilian in Time of War (1949) 75 UNTS 287, art. 147. and the duty to give effective remedy to victims of human rights violations (ICCPR, art. 2(3)).

<sup>324</sup> ‘Interview of Domitilla Mukantaganzwa, Executive Secretary of National Service of Gacaca courts’ (6 June 2006) in Wadolf (2009:17). In this point, the Rwandan officials emphasize on the lack of financial means to award reparations.

<sup>325</sup> Tomuschat (2007:907).

<sup>326</sup> Hayner (2002:178).

<sup>327</sup> ICCPR, art. 2(3)(a), art. 9(5) and art. 14(6); UN Basic Principles on Reparations, II (3)(d).

<sup>328</sup> Tomuschat C ‘Darfur-Compensation of the Victims’ (2005) 3 *Journal of International Criminal Justice* 588 (hereafter “Tomuschat, 2005”).

Generally, many of the victims are vulnerable, traumatised and without shelter. These victims include also women who were raped and infected with HIV-AIDS, injured people and orphans so all these people need special treatment. Therefore, the issue of reparations of harm suffered by the victims of genocide against Tutsi is complex. Likewise, as it was reported by the UN, the material reparation presents:

“Difficult questions [like] who is included among the victims to be compensated, how much compensation is to be rewarded, what kinds of harm are to be covered, how harm is to be quantified, how different kinds of harm are to be compared and compensated and how compensation is to be distributed.”<sup>329</sup>

In this regard, some States, namely South Africa, Germany, Chile and Argentina, have adopted administrative reparations schemes in order to redress the victims of past gross violations of human rights committed by their former authoritarian regimes.<sup>330</sup> From this point, to overcome these challenges, court suits are not an adequate solution to the reparations issue in the context of the genocide perpetrated against Tutsi.

Due to the big number of victims, and the limited number of judges, the domestic courts would not handle all individual claims. In addition, the insolvency of convicted offenders would constitute an obstacle to the compensation. In this respect, there is a need for

<sup>329</sup> Report of the Secretary-General on the Rule of Law and transitional Justice in Conflict and Post-Conflict Societies, UN doc. S/2004/616, 23 August 2004; Tomuschat (2005:585).

<sup>330</sup> See reparations for Apartheid victims in South Africa paid by the President’s Fund and Promotion of National Unity and Reconciliation Act 34 of 1995; Germany Federal Compensation Act for the victims of Nazi crimes: Crime victims Compensation Act as promulgated on 7 January 1985 (Federal Law Gazette IS.1), last amended by Article 1 of the Act of 25 June 2009 (Federal Law Gazette I p. 1580); Pension Funds for the victims of human rights violations that took place between 1973 to 1990 in Chile.

administrative reparations schemes to ensure compensation of harm that genocide victims suffered from and which should take into consideration the genocide context and Rwanda's financial situation.

#### **4.6 Conclusion**

This chapter has highlighted that the challenges that Rwanda is facing after the close of Gacaca courts have originated from the lack of harmonised domestic legislation and absence of effective mechanisms to deal with the post-Gacaca situation. The imperfections in domestic legislations result in selective sanctions and violation of victims' rights.

These legislations are criticised of violation of fundamental human rights of the accused persons and this constitutes an impediment to the extradition of genocide suspects to Rwanda. In addition, domestic legislations are deemed inappropriate to ensure the enforcement of Gacaca judgements and they ignore the issue of reparations. Despite the mechanisms set forth by the Rwandan Government to deal with all pending genocide cases and other issues left behind by the end of Gacaca courts, serious challenges remain because of their inadequacy.

## CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

### 5.1 General conclusion

Gacaca courts were community-based traditional courts established by the Rwandan government as an alternative solution to address the legacy of genocide perpetrated against Tutsi. Gacaca courts constituted a hybrid transitional justice mechanism, providing both punitive and reconciliatory justice.<sup>331</sup> It is in this context they had just achieved that the ordinary courts failed to achieve.<sup>332</sup>

In this sense, this can serve as an example for the countries that encountered the same situation to redress the legacy of past human rights abuses committed in their territories. However, in 2012, Gacaca courts were repealed by the Organic Law No.04/2012/OL while there is still a significant number of cases and appeals against their decisions. These cases now fall under the jurisdiction of ordinary courts that have originally another set of ordinary (criminal and civil) cases to prosecute or to hear.

The ordinary courts, however, lack the capacity to deal with all those cases. This confirms the hypothesis that Gacaca courts have been prematurely terminated as they left behind numerous cases. In addition, some provisions of the municipal laws, notably the new Penal Code, transfer law, the Law terminating Gacaca courts as well as the law abolishing the death penalty, applicable to the pending genocide cases, pose a significant number of legal problems.

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<sup>331</sup> Tiemessen (2004:57); Sarkin (2001:147).

<sup>332</sup> Clark (2010:348); Katushabe (2002:45).

First, they lead to the unequal treatment of genocide suspects because they provide a number of privileges, in terms of penalties and rights, to a certain group of genocide suspects which are not applicable to others. These specific rights recognised especially to those who were extradited or to be extradited are not based on legal and objective reasons but rather on subjective and political grounds. To this end, those provisions are deemed discriminatory, selective and unjust laws as well, and thus they violate the Rwandan Constitution and international conventions such as ACHPR, ICCPR, and UDHR to which Rwanda is State Party.

Secondly, those laws violate the victims' rights by providing the cancellation of the acquired rights in property compensation and the invalidation of judgments related to such compensations. Indeed, the laws mentioned above leave out the issue of reparation and property compensation in case the offender is declared insolvent. This may be deemed as second victimisation. For these reasons, it is concluded that laws in force and other mechanisms set forth remain inappropriate and ineffective in dealing with the legacy of Gacaca courts and pending genocide cases in general. In this regard, Rwanda continues to face significant challenges after the end of Gacaca courts.

## **5.2 Recommendations**

### **5.2.1 The need for international co-operation**

It is evident that most of the cases to be tried by the ordinary courts are those against perpetrators tried *in absentia* or placed in the first category that are now in the territory of other States. Originally, the primary jurisdiction lies in that a State of the commission of the

crime under the territoriality principle (*locus delicti commissi*).<sup>333</sup> International cooperation should intervene when the perpetrator is outside of the boundaries of this competent State.<sup>334</sup> From this, it is recommended that the execution of the sentences rendered *in absentia* by Gacaca courts and the extradition of the perpetrators requires international co-operation between the Rwandan government and the States that have those perpetrators in their territories.

This co-operation might be triggered by Rwanda by negotiating and requesting extradition that result in a bilateral or multilateral agreement on extradition or mutual legal assistance between its government and States that have genocide perpetrators in their territories.<sup>335</sup> In addition, in case extradition is not possible, the recommended alternative solution should be to bring to trial these perpetrators, under the universality principle, before the national courts of the State in which they are apprehended. Rwanda should be required to co-operate with the prosecuting State in criminal investigation and prosecutions. This could be to kill two birds with one stone.

First, it could reduce the big number of cases to be tried by Rwandan domestic courts and their costs. Secondly, it could constitute a waiver on diplomatic and political obstacles that could impede the extradition of genocide suspects. In this regard, it is recommended to the States that have genocide suspects in their territories to follow the good example of Switzerland,<sup>336</sup> The Netherlands,<sup>337</sup> and other countries<sup>338</sup> that have already tried Rwandan

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<sup>333</sup> Cassese A *International criminal Law* 2ed (2008) 336; see also Bantekas and Nash (2007:80).

<sup>334</sup> Naftali and Sharon (2007:874).

<sup>335</sup> Bantekas and Nash (2007:357-8).

<sup>336</sup> *Niyonteze*, Cour Militaire de Cassation (2001), Arrêts du Tribunal Militaire de Cassation 2001/2002, Office de l'Auditeur en Chef, vol. 12, 3<sup>ème</sup> fascicule, 1-32.

genocide suspects before their respective domestic courts. Consequently, as Rwandan ordinary courts would still have a large number of cases, it is recommended here that the opposition filed by those who repatriate voluntarily should be submitted to the mediation committees, and the ordinary courts should remain with the applications for review and new cases. This should contribute to speed up the remaining genocide trials and dealing with all genocide suspects within reasonable time.

### 5.2.2 The necessity of administrative compensation schemes

Prosecutions are significantly important, but it is argued that in case of gross violations of human rights such as genocide against Tutsi, reparations should also be awarded. Due to the large number of cases and perpetrators' insolvency, this paper argues that a model based on civil suits (individual claims) does not fit the Rwandan context.

Nevertheless, reparations are in the view of this paper purposely important to make up for the damages and harm that genocide victims suffered. To make this possible, it is recommended that Rwanda should adopt the model of South Africa, Germany and Chile to establish a National Compensation Fund<sup>339</sup> to award lump-sum payments to the genocide victims. In this fund, contributions from government budget, international organisations, States and individuals should be collected to award monthly instalments, at the first step, to the genocide survivors who live under extreme poverty.

<sup>337</sup> *Joseph Mpambara*, The Hague Court of Appeal, Judgement (2011), Case numbers 09/750009-06 and 09/750007-07.

<sup>338</sup> Those countries which have tried the Rwandan people, suspects of genocide against Tutsi, before their domestic courts under universal jurisdiction include, as example: USA (*case Beatrice Munyenzenzi*, Hampshire Federal Court), Norway (*case Sadi Bugingo*), Sweden (*case Stanislas Mbanenande*).

<sup>339</sup> See Reparations for Apartheid victims in South Africa paid by the President's Fund and Promotion of National Unity and Reconciliation Act 34 of 1995; Germany Federal Compensation Act for the victims of Nazi crimes: Crime victims Compensation Act as promulgated on 7 January 1985 (Federal Law Gazette IS.1), last amended by Article 1 of the Act of 25 June 2009 (Federal Law Gazette I p. 1580); Pension Funds for the victims of human rights violations that took place between 1973 and 1990 (Chile).

As far as the budget is available, the award should be extended to other victims. It is supported that the government should trace the assets, outside and inside the country, owned by the former leaders who participated in genocide, in order to recover and use it to compensate genocide victims. In relation to offenders who are subject to public works order because they cannot afford compensation due to insolvency, this paper recommends that the government should, on a monthly basis, transfer to the proposed National Compensation Fund money equivalent to the days of public works carried out by the offender in order to compensate the victim in question.

### **5.2.3 The requirement for legal harmonisation**

It is concluded that the challenges discussed above result in lack or poor adaptation of domestic legislations to the post-Gacaca situation. Gacaca is no longer there, but its legacy is still alive. Consequently, to preserve the victims' rights derived from the Gacaca judgements and to deal with remaining cases and appeals against those judgements, there is a need for specific and non-ambiguous laws.

It is recommended that Rwanda should undertake legal harmonisation to adapt to the post-Gacaca situation; to facilitate the international co-operation and to implement the proposed National Compensation Fund. This could be done by amending the existing legislations and adopting new laws. This legal harmonisation should contribute significantly to alleviating the unequal treatment of genocide suspects and unjust provisions which violate both the suspects and victims' rights.

(19,896 words)



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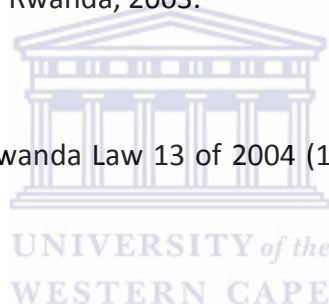
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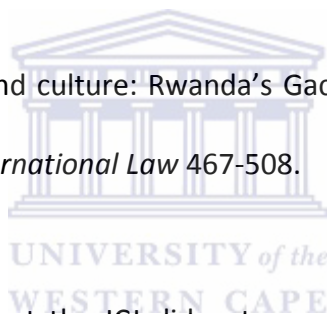
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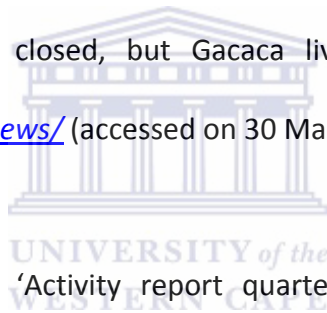
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## APPENDIX

**Organic Law No. 04/2012 of 15/06/2012 terminating Gacaca Courts and determining mechanisms for solving issues which were under their jurisdiction**

**[Extract]**

**“We, KAGAME Paul,**

President of the Republic;

**THE PARLIAMENT HAS ADOPTED AND WE SANCTION, PROMULGATE THE FOLLOWING ORGANIC LAW AND ORDER IT BE PUBLISHED IN THE OFFICIAL GAZETTE OF THE REPUBLIC OF RWANDA**



**THE PARLIAMENT:**

The Chamber of Deputies, in its session of 05 June 2012;

The Senate, in its session of 16 May 2012;

Pursuant to the Constitution of the Republic of Rwanda of 04 June 2003 as amended to date, especially in Articles 62, 66, 67, 88, 89, 90, 92, 93, 94, 95, 108, 143,150,151,152,153,159,179 and 201;

Pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948 as ratified by the Decree-law n° 8/75 of 12/02/1975; Pursuant to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968, as ratified by the Decree-law n°8/75 of 12/02/1975;

**ADOPTS:****CHAPTER ONE: GENERAL PROVISIONS****Article One: Purpose of this Organic Law**

This Organic Law terminates Gacaca Courts charged with prosecuting and trying persons accused of the crime of genocide perpetrated against Tutsi and other crimes against humanity committed between October 1, 1990 and December 31, 1994.

It also determines mechanism of solving pending issues that were under their jurisdiction and any issues, which may rise after.

**Article 2: Termination of the Gacaca Courts**

Gacaca Courts charged with prosecuting and trying persons accused of the crime of genocide perpetrated against Tutsi and other crimes against humanity committed between October 1, 1990 and December 31, 1994, are hereby terminated.

**CHAPTER II: PROSECUTION, HEARING AND THE EXECUTION OF JUDGMENTS ON THE CRIME OF GENOCIDE PERPETRATED AGAINST TUTSI AND OTHER CRIMES AGAINST HUMANITY****Section One: Prosecution and punishment of acts constituting the crime of Genocide perpetrated against Tutsi and other crimes against humanity****Article 3: Laws governing the prosecution and punishment of acts constituting the crime of Genocide perpetrated against Tutsi and other crimes against humanity**

The prosecution and punishment of acts constituting the crime of genocide perpetrated against Tutsi and other crimes against humanity which were committed between October 1,

1990 and December 31, 1994 in the jurisdiction of Gacaca Courts shall be exercised by competent organs according to laws in force applicable in these matters.

However, filing a civil case for damages resulting from the crime of genocide perpetrated against Tutsi and other crimes against humanity committed between October 1, 1990 and December 31, 1994 shall be determined by a law.

**Article 4: Acts constituting the crime of genocide perpetrated against Tutsi and other crimes against humanity within the jurisdiction of the Intermediate Court**

The following offences shall be tried at the first instance by the Intermediate Court:

1° offenses or criminal participation acts aimed at planning, organising, inciting, supervising and leading the crime of genocide or other crimes against humanity, committed by a person with his/her accomplices;

2° acts constituting the crime of genocide perpetrated against Tutsi and other crimes against humanity committed between October 1, 1990 and December 31, 1994 by a person who, at that time, was in the organs of leadership, at national and prefecture levels with his/her accomplices.

**Article 5: Acts constituting the crime of genocide perpetrated against Tutsi and other crimes against humanity which are in the jurisdiction of the Primary Court**

The following offences shall be tried at the first instance by the Primary Court:

- 1° acts constituting the crime of genocide perpetrated against Tutsi and other crimes against humanity committed between October 1, 1990 and December 31, 1994 by a person who, at that time, was in the organs of leadership at sub-prefecture or commune level : in public administration, political parties, communal police, religious denominations, or illegal militia groups or encouraged other people to commit them, with his/her accomplices;
- 2° acts of rape or sexual torture, committed by a person with his/her accomplices;
- 3° homicide;
- 4° acts of torture;
- 5° dehumanising acts on a corpse;
- 6° serious attacks against others causing death;
- 7° causing injuries or committing other serious attacks against people, with intention to kill them, even if the objective was not accomplished;
- 8° other criminal acts against persons without any intention of killing.

**Article 6: Acts constituting the crime of Genocide perpetrated against Tutsi and other crimes against humanity within the jurisdiction of Mediation Committee**

Notwithstanding of the value of the subject matter and the address of the parties to proceedings, offences related to looting and damaging of property committed between October 1, 1990 and December 31, 1994, which were within the jurisdiction of Gacaca Courts shall be tried by the Mediation Committees applying laws governing these committees regardless that they were committed by civilians, *gendarmes* or soldiers. Offenders shall be ordered to pay compensation.



**Article 7: Acts constituting the crime of genocide perpetrated against Tutsi and other crimes against humanity committed by a person who was a soldier or a gendarme**

Acts constituting the crime of genocide perpetrated against Tutsi and other crimes against humanity committed by a soldier or a gendarme between October 1, 1990 and December 31, 1994, which were within the jurisdiction of Gacaca Courts but not relating to looting and damaging property shall be tried at the first instance by the Military Tribunal.

**Article 8: Trial of an extradited person sentenced by Gacaca Courts**

A person extradited to be tried in Rwanda and who has been sentenced by Gacaca Courts shall be tried by a competent court as provided by this Organic Law.

However, the decision of the Gacaca Court shall first be nullified by that court.



**Article 9: Opposition against a judgment rendered by a Gacaca Court while the offender was abroad**

If a person was sued, tried and sentenced by a Gacaca Court while abroad, returns and it is found that he/she did not have intention to escape justice, he/she may file an opposition before a competent court which has jurisdiction to try that offence as provided by this Organic Law.

A person who wishes to file opposition must do so within two (2) months from the date he/she returns in the country and shall remain free until found guilty or not guilty.

For the purpose of this Article, “escaping justice” means leaving the country after investigation has started either by the Judicial Police, the Public Prosecution or a Gacaca Court.

**Article 10: Application for review of a judgment rendered by a Gacaca Court**

A judgment rendered by a Gacaca Court may be reviewed by a competent court due to one

(1) of the following reasons:

1° if a person is convicted of homicide by a Gacaca Court final judgment and after the person alleged to have been killed is found alive;

2° if a person is definitively convicted of homicide by a Gacaca Court and it is the only crime to which he/she is convicted, and later another person is convicted of the same crime where there is no complicity between the two;

3° if, after a person has been acquitted by a Gacaca Court final judgment, it is found beyond reasonable doubt that there is reliable information disclosed during the period of collecting information, unknown at the time of adjudicating the case and which however proves his/her criminal responsibility;

4° if a person has been convicted or acquitted by a Gacaca Court final judgment and later it is found that the bench which rendered the decision was corrupt, as decided by a competent court.

A review of the judgment can be requested only by the victim, the convicted person or the Public Prosecution.

A decision taken after a review of judgment shall not be subject to any appeal.

## **Section 2: Execution of judgments rendered by Gacaca Courts**

### **Article 11: Execution of judgments related to the penalty of imprisonment and Community Services as an alternative penalty to imprisonment**

Tracking persons sentenced by Gacaca Courts to imprisonment and to Community Services as alternative penalty to imprisonment shall be carried out by the Rwanda National Police.

Execution of penalties under Paragraph One of this Article shall be determined by relevant laws.



### **Article 12: Modalities of compensation of property**

Compensation shall be paid by the offender himself/herself or his/her property.

However, if it is evident that the offender of looting and damaging is insolvent, he/she shall be subjected to Community Services as alternative penalty to imprisonment.

### **Article 13: Requirements for execution of judgements related to property**

The decisions rendered by Gacaca Courts on the damaged or looted property must, prior to their execution, be affixed with an executory formula by the Primary Court of the place where the decision judgement was rendered upon approval by the Executive Secretary of

the Cell where the case was adjudicated through a written document submitted to the President of that Court.

**Article 14: Auctioning procedure**

Upon the time for auction, the property subject to the auction shall be sold, and the money shall be distributed among beneficiaries with copies of the judgment affixed with the executory formula.

Before giving to the beneficiary the money raised from the auction, the court bailiff shall give notice to persons holding a copy of judgment sentencing the person to whom the property is subject to the auction, to announce their debts within a period not exceeding thirty (30) days.



If the period referred to under Paragraph 2 of this Article expires, the money is given to the persons that were identified.

When the property subject to auction was fraudulently concealed, it is immediately seized regardless of the possessor and put in public auction.

**Article 15: Opposition to the auction**

Before the auction ends, any person who finds that he/she may be prejudiced by the execution of the judgment shall have the right to request its non execution before the President of the Primary Court by way of ex parte application.

In case of request for opposition to the execution of the judgment, the auction shall be suspended until a decision is made on the opposition within a period not exceeding forty-eight (48) hours.

**Article 16: Disputes arising from the execution of judgments**

Disputes arising from the execution of the judgment of Gacaca Courts without consideration of the relevant laws and regulations at the time of these judgments shall be settled by the Primary Court which has affixed the executory formula or of the place of execution of the auction.

A decision taken on such disputes shall be subject to appeal once.



**Article 17: Auction**

Without prejudice to the provisions of Article 14, 15 and 16 of this Organic Law, auction in the enforcement of Gacaca courts judgments shall be done in accordance with laws in force relating to auction.

**Article 18: Execution of the penalty of community services as an alternative penalty to imprisonment**

A Presidential Order shall define and determine modalities for the execution of the penalty of community services as an alternative penalty to imprisonment pronounced by Gacaca Courts on judgments related to genocide committed against Tutsi and other crimes against humanity.

### **CHAPTER III: MISCELLANEOUS AND FINAL PROVISIONS**

#### **Article 19: Documents of judgments rendered by Gacaca Courts**

Documents, audios, videos and others means used during the hearings of Gacaca Courts shall be transferred to the National Commission to fight against Genocide.

#### **Article 20: Reconstitution of a copy of Gacaca decision that disappeared**

Any person who needs a copy of a judgment rendered by a Gacaca Court but which can no longer be found shall request the Public Prosecution at the Primary Level to recollect information for the reconstitution of the file. Such information shall be submitted to the Primary Court in order to reconstitute the decision.

#### **Article 21: Drafting, consideration and adoption of this Organic Law**

This Organic Law was drafted, considered and adopted in Kinyarwanda.

#### **Article 22: Repealing provision**

The Organic Law n° 16/2004 of 19/06/2004 establishing the organization, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994, as modified and complemented to date and all prior legal provisions contrary to this Organic Law are hereby repealed.

However, without prejudice to the provisions of Article 8, 9 and 10 of this Organic Law judgement rendered by the Gacaca Courts in accordance with the Organic Law referred to in Paragraph One of this Article shall remain in force.

### **Article 23: Commencement**

This Organic Law shall come into force on the date of its publication in the Official Gazette of the Republic of Rwanda.

Kigali, on 15/06/2012.”<sup>340</sup>

**(Signatures)**



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<sup>340</sup> This is the English version of the Law terminating Gacaca available at <http://www.primature.gov.rw/publications>