

A CRITICAL ANALYSIS OF THE TRANSITIONAL JUSTICE MEASURES INCORPORATED BY RWANDAN GACACA AND THEIR EFFECTIVENESS

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I INTRODUCTION

During the 1994 Rwandan genocide approximately 800,000 Tutsi and moderate Hutus were killed, resulting in mass arrests and extensive criminal prosecution overwhelming an already devastated justice sector.¹ To speed up genocide trials and reduce prison population the government launched approximately 11,000 local community courts, referred to as *gacaca*.² These *gacaca* courts were meant to deal with ‘less serious’ genocide related crimes,³ combining prosecution with national unity and reconciliation.⁴

Gacaca is often referred to as Rwanda’s answer to demands of transitional justice.⁵ Waldorf describes *gacaca* as ‘the most ambitious transitional justice measure ever attempted’.⁶ Nevertheless, he argues that it almost exclusively focuses on accountability for the 1994 genocide, whilst neglecting other instruments of transitional justice.⁷ The International Center of Transitional Justice (ICTJ) holds that in order to be effective, transitional justice needs to include several measures that complement one another.⁸ This is supported by Boraine and Valentine who introduce a ‘holistic approach to transitional jus-

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¹ Lars Waldorf, ‘Transitional Justice and DDR: The Case of Rwanda’ 2009 *The International Center for Transitional Justice (ICTJ)* <, 19.

² *Ibid* 20.

³ Mark R Amstutz, ‘Is Reconciliation Possible After Genocide?: The Case of Rwanda’ (2006) 48.3 *Journal of Church and State* 541, 542.

⁴ Olivia Ward, ‘Flawed Rwandan courts diminish hope for justice’, *The Star* (online), 2009 <<http://www.ictj.org/en/news/coverage/article/2507.html>>.

⁵ Phil Clark, ‘Hybridity, Holism, and “Traditional” Justice: The Case of the *gacaca* Courts in Post-Genocide Rwanda’ (2007) 39.4 *The George Washington International Law Review* 765.

⁶ Waldorf, above n 1, 4.

⁷ *Ibid* 16.

⁸ International Center for Transitional Justice (ICTJ), *What is Transitional Justice?* (2008) <http://www.ictj.org/static/Factsheets/ICTJ_TJ_fs2009.pdf>

tice’, combining retributive justice with restorative justice.⁹ After clarifying the term “transitional justice” and introducing the characteristics of *gacaca*, this essay is seeking to analyse whether *gacaca* represents a holistic approach by firstly determining the range of transitional justice instruments incorporated by *gacaca* and secondly by assessing their effectiveness.

II TRANSITIONAL JUSTICE

Boraine and Valentine acknowledge that the term transitional justice is not easily defined.¹⁰ Bickford suggests understanding the term as ‘justice during transition’, rather than a form of altered justice.¹¹ He defines it as “a field of activity and inquiry focused on how societies address legacies of past human rights abuses, mass atrocity, or other forms of severe social trauma, including genocide or civil war in order to build a more democratic, just or peaceful future”.¹² It is thus assumed that transitional justice consists of a combination of certain instruments and processes with the aim of achieving a range of goals relating to democracy, justice and peace. The following evaluation of *gacaca* as a transitional justice project will distinguish between measures and objectives of transitional justice.

Similar to Bickford’s definition of the objectives of transitional justice, the ICTJ describes the purpose of a holistic approach to transitional justice as ‘the recognition of victims and the promotion of peace, reconciliation and democracy’.¹³ These objectives will serve as a guideline for the analysis of *gacaca*’s achievements.

Clark explains how within a holistic approach to transitional justice multiple political, social, and legal institutions work together and complement each other, contributing ‘more effectively to the reconstruction of the entire society than a single institution’.¹⁴ The ICTJ further claims that a holistic approach requires the consideration of ‘the full range of factors that may have contributed to abuse’ including sensitivity to gender issues in personal, family, and social

⁹ Alex Boraine and Sue Valentine, ‘Defining Transitional Justice: Tolerance in the search for justice and peace’ in Alex Boraine and Sue Valentine (eds), *Transitional Justice and Human Security* (International Center for Transitional Justice, 2006).

¹⁰ Ibid.

¹¹ Louis Bickford, ‘Transitional Justice’ in *The Encyclopedia of Genocide and Crimes Against Humanity* (Macmillan Reference USA, 2004).

¹² Ibid.

¹³ ICTJ, above n 8.

¹⁴ Clark, above n 5, 765.

relations.¹⁵ This will also be considered when analysing the effectiveness of *gacaca*.

Boraine and Valentine explain how countries undergoing transition need to combine judicial measures to re-establish the rule of law with the rebuilding of societies to enhance reconciliation.¹⁶ They determine accountability, truth recovery, reconciliation, reparations, and institutional reform as the five key pillars of a holistic approach.¹⁷

This essay will assess which of these five initiatives are taken into account by the *gacaca* court system and will then analyse in how far *gacaca* manages to achieve the purpose of transitional justice as defined by ICTJ (see above).¹⁸

III *Gacaca* COURTS

A. Background

Following the end of the 1994 genocide, tens of thousands of suspects were arrested and accused of participating in the atrocities.¹⁹ Crimes were divided into four categories.²⁰ Category 1 suspects including mass murders, rapists and persons who helped plan and execute the genocide were initially allocated to Rwanda's conventional courts.²¹ Category

2-4 included people

- whose criminal acts or participation caused death (category 2)
- who were guilty of other serious assault (category 3)
- who committed an offense against someone's property (category 4).²²

The presumed leadership accused of the most serious violations of international humanitarian law was prosecuted by the UN-backed International Criminal Tribunal for Rwanda (ICTR).²³ The ICTR was dealing with a vanishingly

¹⁵ ICTJ, above n 8.

¹⁶ Boraine and Valentine, above n 9.

¹⁷ Ibid.

¹⁸ See ICTJ, above n 8.

¹⁹ Leslie Haskell, 'Justice Compromised - The Legacy of Rwanda's Community-Based *Gacaca* Courts' Human Rights Watch, 2011.

²⁰ Maya Sosnov, 'The Adjudication of Genocide: *gacaca* and the Road to Reconciliation in Rwanda' (2008) 36. *Denver Journal of International Law and Policy* 125, 131.

²¹ Haskell, above n 18.

²² For a more detailed description of the categories see appendix 1.

²³ Amstutz, above n 3, 552.

small number of accused, about 70, while Rwanda's national courts were left with a myriad of genocide suspects.²⁴ By 1998 Rwanda's prisons, designed for about 12,000 detainees, were bursting with around 130,000 suspects.²⁵ As Rwanda's national courts had only managed to try around 1300 suspects between 1996 and 1998, it was estimated that genocide trials would continue for about 200 years if dealt with at the same pace by the conventional courts.²⁶

Responding to the enormous administrative and judicial challenge, Rwanda's government chose *gacaca* to try category 2-4 accused.²⁷ In 2002 *gacaca* courts started as a pilot project, and in July 2006, trials began throughout the country.²⁸ As *gacaca* moved at a much faster pace than the conventional courts, most of the remaining "category 1" cases including at least 8000 rape and sexual violence cases, were transferred to *gacaca* in 2008.²⁹ On the 18th June 2012, one decade after its launch, the *gacaca* jurisdiction was formally closed, having tried more than 1.9 million suspects during its ten years of existence.³⁰

B. Characteristics and Objectives of gacaca

When *gacaca* was launched as a pilot project in 2002 Vice-President Kagame introduced five core objectives of *gacaca*:³¹

- Reveal the truth
- Accelerate genocide trials
- Eradicate the culture of impunity
- Reconcile Rwandans and reinforce their unity
- Prove that Rwandans has the capacity to resolve their own problems

The name *gacaca* means grass and refers to the place where dispute resolution

²⁴ Ibid.

²⁵ Haskell, above n 19.

²⁶ Sarah L. Wells, 'Gender, Sexual Violence and Prospects for Justice at the Gacaca Courts in Rwanda' (2005) 167. *California Law Review & Women's Studies* 179. See also Haskell, above n 19.

²⁷ Haskell, above n 19.

²⁸ Allison Corey and Sandra F. Joireman, 'Retributive Justice: The *gacaca* Courts In Rwanda' (2004) 103. *African Affairs* 73, 83. See also Waldorf, above n 1, 20.

²⁹ IRIN, *RWANDA: Rape, justice and privacy* (2011) <<http://www.irinnews.org/Report.aspx?ReportID=92876>>.

³⁰ Survivors Fund (SURF) & REDRESS, 'Survivors' concerns over imminent closure of *gacaca* courts need to be addressed' (Press Release, 15th June 2012), www.redress.org/downloads/Gacaca-PressReleaseFinal-150612.pdf.

³¹ Paul Kagame, as cited in Haskell, above n 19.

traditionally took place.³² *Gacaca* was meant to join ‘local conflict resolution traditions with a modern punitive legal system’.³³ The Rwandan government chose *gacaca* as it was thought to be “quick and informal”.³⁴ Furthermore, *gacaca*’s participatory and communal structure – *gacaca* courts depend on participation of local populations as judges, witnesses, parties and representatives – was thought to enable both the delivery of justice and the promotion of reconciliation.³⁵

Wojkowska acknowledges that the community courts adopted some of the core aims of the traditional *gacaca*.³⁶ Nevertheless, she mentions that according to some observers the modern proceedings are significantly different from the former customary courts.³⁷ Traditional *gacaca* was used for minor civil disputes such as property and inheritance relations, while modern *gacaca* has been dealing with the prosecution of lower-level genocide suspects.³⁸ In the past *gacaca* judges were community elders, whereas genocide *gacaca* judges were comparatively young elected community members.³⁹ Furthermore, genocide *gacaca* represented a hierarchical state-directed initiative applying codified rather than customary law.⁴⁰

Choosing *gacaca* to process the majority of genocide suspects, the Rwandan government had to make a number of compromises, especially regarding the rights of the accused, qualifications of *gacaca* staff and applicable legal standards.⁴¹ It was believed that the transparency of the process and the participation of the community would legitimise the process and protect the rights of all participants.⁴²

C. Gacaca and the five Key Pillars of a Holistic Approach

(a) Accountability

³² Waldorf, above n 1, 34 n 131.

³³ Haskell, above n 19.

³⁴ Ibid.

³⁵ See Wells, above n 26.

³⁶ Ewa Wojkowska, ‘Doing Justice: How informal justice systems can contribute’ United Nations Development Programme, Oslo Governance Centre, Oslo, 2006, 27.

³⁷ Ibid.

³⁸ Waldorf, above n 1.

³⁹ Ibid.

⁴⁰ Wojkowska, above n 36.

⁴¹ Haskell, above n 19.

⁴² Ibid.

Rwandan genocide survivors have emphasised the need for punishment of *genocidaires* for their crimes.⁴³ This is supported by Boraine and Valentine who argue that it is of central importance to punish those who violated the law 'as far as possible'.⁴⁴

Rwanda has demonstrated a commitment to hold accountable everyone suspected of having contributed to the genocide, deriving from the understanding that there is a legal duty to prosecute.⁴⁵ Legal prosecution has the main objective of punishing those who have committed human rights violations and deterring future perpetrators.⁴⁶ According to Bickford the creation of ad hoc tribunals enhanced jurisprudence in transitional justice and achieved some visible victories for accountability.⁴⁷

Since its launch in 2002 over 1.9 million cases have been processed under *gacaca* jurisdiction.⁴⁸ In comparison, the conventional courts only tried 222 cases between January 2005 and March 2008.⁴⁹ Genocide trials held by the ICTR have proceeded even more slowly – since its creation in 1994 72 cases have been completed of which ten resulted in acquittal and 17 are on appeal.⁵⁰ One case is still in progress.⁵¹

(b) Truth Recovery

The Rwandan government rejected the idea of a truth commission.⁵² The participatory nature of *gacaca*, allowing Tutsis and Hutus to speak in public to either support an accusation or to defend an accused, was supposed to enable the uncovering of the truth.⁵³ Amstutz explains how truth telling was further

⁴³ Clark, above n 5.

⁴⁴ Boraine and Valentine, above n 9, 95.

⁴⁵ William A. Schabas, 'Genocide Trials and *gacaca* Courts' (2005) 3. *Journal of International Criminal Justice* 1, 4.

⁴⁶ Clark, above n 5.

⁴⁷ Bickford, above n 11.

⁴⁸ United Nations Development Programme Communications Office, 'Closure of *gacaca*' 2012 http://www.undp.org.rw/Article-on-Gacaca_AL-13-June-2012_NB.pdf.

⁴⁹ Haskell, above n 19.

⁵⁰ International Criminal Tribunal for Rwanda, *Status of Cases* (2012) <<http://www.unict.org/Cases/StatusofCases/tabid/204/Default.aspx>>. The numbers provided above have last been updated on 21/07/2012.

⁵¹ *Ibid.*

⁵² Lars Waldorf, 'ICTJ Research Brief - Transitional Justice and DDR: The Case of Rwanda' International Center for Transitional Justice, 2009, 3.

⁵³ Amstutz, above n 3.

fostered by plea bargaining.⁵⁴ Plea bargaining was a unique approach of *gacaca* aiming at encouraging offenders to confess in exchange for substantially reduced sentences.⁵⁵ In *gacaca*, most perpetrators confessing to their crimes were eligible to serve half their sentence doing community service.⁵⁶ A confession had to comprise a complete and detailed description of the offences that the accused committed, including information about accomplices and any other relevant fact.⁵⁷

(c) Reconciliation

Broad local participation in *gacaca* was meant to promote reconciliation by empowering communities to solve their problems themselves, in a manner consistent with Rwandan tradition.⁵⁸ Wells describes how *gacaca* was supposed to restore the social fabric of villages destroyed during the genocide by “bringing people together and making them responsible for the achievement of justice in their communities”.⁵⁹

Genocide accused were tried by *gacaca* courts located in the community where they allegedly committed the crimes to enhance reconciliation amongst victims and perpetrators.⁶⁰ *Gacaca* was meant to provide a platform for both Tutsis and Hutus to speak publicly with the objective of unearthing the truth and creating a shared account of the events to foster reconciliation.⁶¹ By granting leniency to those who admitted guilt and expressed remorse, the concept of plea bargaining was meant to foster reconciliation between survivors and suspects.⁶² One popular form of punishment during *gacaca* was community service instead of imprisonment with the aim to restore perpetrators and reintegrate them into the community.⁶³ This again was meant to support the overall reconciliation process.⁶⁴

(d) Reparations

Waldorf argues that the *gacaca* court system has provided limited reparations

⁵⁴ Ibid 552.

⁵⁵ Schabas, above n 45, 7.

⁵⁶ Waldorf, above n 1. See appendix 2 for the Gacaca Sentencing Scheme.

⁵⁷ Schabas, above n 45, 7.

⁵⁸ Wells, above n 26.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Amstutz, above n 3, 548.

⁶² Ibid.

⁶³ See *ibid* 556.

⁶⁴ Ibid.

to genocide survivors.⁶⁵ *Gacaca* offered symbolic reparations: in order to benefit from reduced sentences, those who pleaded guilty had to reveal the whereabouts of their victims' remains before they were eligible for reduced sentences.⁶⁶ Some of the most local-level *gacaca* courts awarded restitution to genocide survivors for their loss of property.⁶⁷ If convicted perpetrators were unable to reimburse victims for stolen or destroyed property, some were required to work off their debts through unpaid labour.⁶⁸

Haskell claims that *gacaca* did not provide any monetary compensation for survivors who lost relatives during the genocide or who were injured or raped.⁶⁹ This is supported by Schurr, legal advisor of the human rights organisation REDRESS, who talks about 'the lack of compensation for moral and bodily damage for survivors of genocide'.⁷⁰ According to the human rights organisations Survivors Fund (SURF) and REDRESS, "thousands of compensation and /or restitution awards" were granted by *gacaca* courts.⁷¹ However, it seems that many of them have not been enforced yet and it is unclear how they will be handled following the closure of the *gacaca* jurisdiction.

(e) Institutional Reform

Waldorf explains that institutional reform was not a main concern of the Rwandan post-genocide government as most of those associated with the former Hutu government had left the country towards the end of the genocide.⁷² However, *gacaca*'s approach to institutional transformation might be revealed in the participatory nature and local ownership of *gacaca*, as well as the integration of Rwanda's traditional dispute resolution system.⁷³

IV ACHIEVEMENTS OF *GACACA* IN THE LIGHT OF A HOLISTIC APPROACH TO TRADITIONAL JUSTICE

According to Waldorf *gacaca* was generally supposed to accomplish a number of ambitious goals: unearth the truth, punish *genocidaires* and reconcile com-

⁶⁵ Waldorf, above n 52, 4.

⁶⁶ Waldorf, above n 1.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Haskell, above n 19.

⁷⁰ Schurr as cited in Survivors Fund (SURF) & REDRESS, above n 30.

⁷¹ Ibid.

⁷² Waldorf, above n 1, 16.

⁷³ See, eg, Wendy Lambourne, 'Transitional Justice and Peacebuilding after Mass Violence' (2009) 3.1 *International Journal of Transitional Justice* 28.

munities.⁷⁴ He holds that *gacaca* so far has not lived up to the expectations placed upon it, although he acknowledges that ‘the Rwandan government has accomplished the extraordinary feat of providing security and rebuilding the country’⁷⁵ There is consensus that *gacaca* managed to reduce prison population and process cases much faster than the conventional court system.⁷⁶ Furthermore it led to the release of some of those who had been falsely accused, which has supported the re-building of Rwanda and its society.⁷⁷ That said, opinions seem to differ as to whether *gacaca* was able to eradicate the pre-existing culture of impunity and if it will play a role in deterring future violence.⁷⁸

As mentioned above, ICTJ identifies the recognition of victims and the promotion of peace, democracy and reconciliation as the main purpose of transitional justice.⁷⁹ The following part of this article will discuss how effectively *gacaca* has achieved these objectives.

A. Peace

To foster peace and security, Lambourne suggests the incorporation of both retributive and restorative justice into accountability mechanisms.⁸⁰ Although the Rwandan government considered retributive justice as crucial to end the culture of impunity, which according to them led to the 1994 genocide,⁸¹ *gacaca* was introduced with the explicit objective of combining retributive and restorative elements.⁸² Amstutz describes how *gacaca* pursued restorative justice both through its process and its outcomes.⁸³ He explains how the active engagement of the community through negotiation and collaboration during *gacaca* hearings and the concept of plea bargaining resembled restorative processes.⁸⁴ Community service and compensation as punishment further highlight *gacaca*’s pursuit of restorative justice.⁸⁵ Others hold that modern *gacaca*

⁷⁴ Waldorf, above n 52, 20.

⁷⁵ Waldorf, above n 1, 15.

⁷⁶ Haskell, above n 19.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ ICTJ, above n 8.

⁸⁰ Lambourne, above n 74.

⁸¹ Waldorf, ‘Transitional Justice and DDR: The Case of Rwanda’, above n 1, 19.

⁸² Lambourne, above n 74, 39.

⁸³ Amstutz, above n 3, 556-7.

⁸⁴ Ibid.

⁸⁵ Ibid.

lost its restorative character, resembling a formal, retributive legal system.⁸⁶

B. Democracy

The community based nature and local ownership of *gacaca* suggests that the Rwandan government was trying to promote community participation and empowerment, which are concepts closely related to democracy.⁸⁷ Haskell argues that *gacaca*'s participatory concept was compromised by the prevailing political climate in Rwanda and restrictions on free speech.⁸⁸ The Rwandan government launched a campaign against "divisionism" and 'genocide ideology' which had 'a chilling effect on Rwandans' ability and willingness to express themselves'.⁸⁹ Haskell explains how many felt unable to speak freely about their genocide experience and refrained from publicly defending genocide suspects in fear of being accused of perjury or complicity.⁹⁰ Lambourne criticises Rwanda's lack of democratisation and the perception of victor's justice deriving from the official designation that in *gacaca* genocide survivors were always Tutsis while all perpetrators were Hutus.⁹¹

C. Reconciliation

Opinions amongst survivors and perpetrators differ largely regarding *gacaca*'s impact on reconciliation. Some survivors mentioned that following *gacaca* they were able again to greet their neighbours who had been involved in the events of 1994.⁹² Others regarded these encounters as superficial and found tensions and distrust between victims and perpetrators to remain.⁹³

Haskell acknowledges that *gacaca* 'may have placed Rwandans on the path to reconciliation, at least superficially,' but argues that 17 years after the genocide Rwandan communities were still characterized by distrust between the two main ethnic groups and that *gacaca* has reinforced ethnic division.⁹⁴ Schabas suggests that a focus on legal prosecution may have hampered reconciliation

⁸⁶ See, eg, Lambourne, above n 74.

⁸⁷ Jay Drydyk, *Participation, Empowerment, and Democracy: Three Fickle Friends* (n.d.) Ethics of Empowerment<<http://www.ethicsofempowerment.org/papers/DrydykGouletFest.pdf>>.

⁸⁸ Haskell, above n 19.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Lambourne, above n 74, 44.

⁹² Haskell, above n 19.

⁹³ Ibid.

⁹⁴ Ibid.

and closure.⁹⁵ In contrast, Clark explains how *gacaca* courts achieved legal outcomes whilst fostering the restoration of fractured individual and communal relationships,⁹⁶ which according to Lederach should be the focus of any reconciliation process.⁹⁷

D. Reconciliation and Forgiveness

According to Mellor, Bretheron and Firth reconciliation requires both an apology and forgiveness.⁹⁸ *Gacaca*'s concept of plea bargaining was meant to encourage perpetrators to confess and to enable forgiveness.⁹⁹ Amstutz explains how many Rwandan victims expressed willingness to forgive perpetrators who admitted culpability and expressed regret for their crimes.¹⁰⁰ However, genocide survivors have criticised the lack of remorse on the part of the perpetrators, explaining that *gacaca* encouraged confessions primarily to reduce prison sentences.¹⁰¹ Lambourne further explains that the continuous denial of responsibility on the part of the perpetrators has caused difficulties for Rwanda's reconciliation process.¹⁰² Some survivors stated that they felt forced to publicly forgive those who had wronged them although they were not yet ready to forgive.¹⁰³ Clark explains that it will take many survivors a long time to overcome their feelings of distrust and resentment towards suspects, which is crucial to enable the rebuilding of relationships.¹⁰⁴

E. Reconciliation and Reparations

The lack of reparations for survivors who lost relatives during the genocide or who were injured or raped has enhanced bitterness on the part of the genocide survivors.¹⁰⁵ This suggests that *gacaca* has not been able to provide sufficient

⁹⁵ Schabas, above n 45, 3-4.

⁹⁶ Clark, above n 5.

⁹⁷ John Paul Lederach, *Building peace : sustainable reconciliation in divided societies* (United States Institute of Peace Press, 1997).

⁹⁸ David Mellor, Di Bretheron and Lucy Firth, 'Aboriginal and Non-Aboriginal Australia: The Dilemma of Apologies, Forgiveness, and Reconciliation' (2007) 13.1 *Peace and Conflict: Journal of Peace Psychology* 11, 11.

⁹⁹ Haskell, above n 19.

¹⁰⁰ Amstutz, above n 3, 559.

¹⁰¹ Haskell, above n 19.

¹⁰² Lambourne, above n 74, 41.

¹⁰³ Haskell, above n 19.

¹⁰⁴ Clark, above n 5.

¹⁰⁵ Haskell, above n 19.

recognition for victims. Lambourne argues that the lack of compensation left many survivors to live in poverty, and that Rwandans' inability to meet basic needs significantly complicates reconciliation and peace.¹⁰⁶ It seems that if material needs were met by compensations, people would be more able to reconcile.¹⁰⁷ This is supported by Bloomfield who regards reparations as one main instrument of reconciliation.¹⁰⁸ The lack of reparations also had a negative impact on the number of participants in *gacaca* trials as there was little incentive for genocide survivors to attend.¹⁰⁹

F. Reconciliation, Procedural Fairness and Human Rights

Another reconciliation measure defined by Bloomfield is a 'justice reform that is built on human rights principles, democratic practices, and international legal norms, and that promises fairness in the future'.¹¹⁰ Although accountability is one of the core achievements of *gacaca*, it also appears to be one of the most criticised initiatives of Rwanda's approach to transitional justice.

Perpetrators and external observers have criticised the shortcomings of *gacaca* relating to procedural fairness and human rights.¹¹¹ Ward argues that *gacaca* was meant to try minor disputes and is not capable of dealing with genocide crimes in an appropriate manner.¹¹² Indeed, the standards of justice of the *gacaca* courts differed largely from those of the international court system.¹¹³ According to Haskell the *gacaca* courts were seriously flawed by any international standard and were unable to guarantee a fair trial for numerous reasons.¹¹⁴ One major argument against *gacaca* is that suspects did not have legal support and were unable to prepare an adequate defence.¹¹⁵ Clark explains how the exclusion of lawyers was meant to have a positive impact on reconciliation by maximising 'the community's sense of ownership over the process'.¹¹⁶

¹⁰⁶ Lambourne, above n 74, 42.

¹⁰⁷ Ibid, citing a statement made by a Rwandan interviewee.

¹⁰⁸ D. Bloomfield, 'On Good Terms: Clarifying Reconciliation (Berghof Report No. 14)' Berghof Research Center for Constructive Conflict Management, Berlin, Germany, 2006.

¹⁰⁹ Haskell, above n 19.

¹¹⁰ Bloomfield, above n 109, 12.

¹¹¹ Haskell, above n 19.

¹¹² Ward, above n 4.

¹¹³ Ibid.

¹¹⁴ Haskell, above n 19.

¹¹⁵ Ward, above n 4. See also IRIN, above n 29.

¹¹⁶ Clark, above n 5, 796.

Most of the *gacaca* judges had insufficient formal training.¹¹⁷ They did not receive any compensation and some were reported to have been susceptible to bribery and manipulations of trials and verdicts.¹¹⁸ Although *gacaca* law required judges to be ‘Rwandans of integrity’ with ‘high morals and conduct’, critics often questioned their impartiality because judges came from the same community as the accused and were thus directly affected by the incidents.¹¹⁹ In contrast, Clark regards the close ties of judges with their community as an important adoption from traditional *gacaca* legitimising the modern proceedings.¹²⁰

According to Haskell only few survivors thought that the sentences delivered within the *gacaca* processes matched the crimes committed against them or their families.¹²¹ Furthermore, *gacaca* was unable to provide adequate protection for witnesses, which prevented many speaking in public.¹²² According to Ward, some witnesses were attacked and killed while others fled their homes in fear of violent reprisal.¹²³ The public nature of *gacaca* prevented many women from reporting and discussing cases of sexual violence in *gacaca*. This issue will be further discussed below.

The government’s argument ‘that popular involvement was ensuring fair trials’ was weakened by low levels of community participation.¹²⁴ Waldorf explains how genocide survivors were reluctant to incriminate their Hutu neighbours and discuss their traumatic experience in public as they feared retaliation and had low prospects of adequate compensation.¹²⁵

At the same time Hutus were hesitant to participate and challenge false testimony because they feared to be accused either as perpetrators or bystanders.¹²⁶ Hutus were not given an opportunity to discuss their own losses and seek justice, as *gacaca* only focused on accountability for the 1994 genocide while neglecting war crimes committed by Rwandan Patriotic Front (RPF) forces or revenge killings against Hutu civilians in 1994.¹²⁷ This one-sided approach

¹¹⁷ Ward, above n 4.

¹¹⁸ See Haskell, above n 19. See also Sosnov, above n 20. See also Ward, above n 4.

¹¹⁹ See Sosnov, above n 20, 148.

¹²⁰ Clark, above n 5.

¹²¹ Haskell, above n 19.

¹²² Ibid.

¹²³ Ward, above n 4.

¹²⁴ Haskell, above n 19.

¹²⁵ Waldorf, above n 1, 21.

¹²⁶ Ibid 20-1; Haskell, above n 19.

¹²⁷ Waldorf, above n 1, 16.

to accountability caused great frustration and bitterness for many Hutus and further widened the gap between Hutus and Tutsis, impeding reconciliation.

These procedural weaknesses of *gacaca* seem to have jeopardised peace and security in Rwanda.¹²⁸ A significant number of those people being interviewed for the 2011 Human Rights Watch (HRW) report voiced concerns about retaliatory actions and renewed violence, suggesting that current peace in Rwanda is perceived by many as fragile.¹²⁹

G. Reconciliation and Truth Recovery

Bloomfield regards truth recovery and healing as crucial components of reconciliation. Haskell acknowledges that at times *gacaca* supported the uncovering of the truth.¹³⁰ He explains how the majority of people who participated in *gacaca* agree that they learned some valuable information about the events of 1994.¹³¹ Survivors especially appreciated finding out about the whereabouts of their loved ones so that they could find their remains and bury them in dignity.¹³²

Others raise criticism that not all of the truth has been revealed during *gacaca* due to partial confessions and false accusations or testimonies.¹³³ Lambourne argues that many survivors are still unable to find out what happened to their loved ones.¹³⁴ She further explains how a 'real dialogue or engagement in gaining a sense of "social truth"' is lacking.¹³⁵ *Gacaca*'s truth-revealing potential was also limited by waning interest of the majority of the population to participate in the trials and by the silence of those who attended but refrained from speaking in public.¹³⁶ Women were especially reluctant to raise their voices in the public arena, compromising the development of a shared or public truth around the 1994 atrocities.¹³⁷ Lambourne concludes that for the above reasons genocide *gacaca* was failing to enhance healing or restorative truth, impeding reconciliation amongst the Rwandan society.¹³⁸

¹²⁸ Haskell, above n 19.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Lambourne, above n 74.

¹³⁵ Ibid 41.

¹³⁶ Haskell, above n 19.

¹³⁷ Wells, above n 26.

¹³⁸ Lambourne, above n 74.

H. Reconciliation and Co-existence

According to the 2011 HRW report, more people considered *gacaca* to have increased tensions between Hutus and Tutsi than believed in its reconciliatory deals.¹³⁹ Haskell concludes that reconciliation in Rwandan communities can be defined as co-existence rather than ‘genuine forgiveness that comes from the hearts of genocide victims’.¹⁴⁰

Bloomfield claims that the reconciliatory potential of co-existence should not be underestimated, as peaceful coexistence constitutes a start towards reconciliation.¹⁴¹ He explains how, for former enemies, fewer negative implications are related to the concept of coexistence than reconciliation, as co-existence does not require forgiveness, which may be particularly difficult after genocide.¹⁴² Borneman states that ‘the profound loss suffered in an ethnic cleansing ... is never fully recoupable’ exacerbating issues with forgiveness and the associated reconciliation.¹⁴³ Coexistence may have the potential to create the necessary framework to allow forgiveness to develop at a later stage.¹⁴⁴

V GENDER ISSUES

Experiences of Rwandan women, both during and since the genocide, seem to differ markedly from those of Rwandan men.¹⁴⁵ Rombouts explains how women were not very involved in conceiving Rwanda’s transitional justice mechanisms.¹⁴⁶

Initially, rape and sexual violence were classified as crimes of category 1 and were dealt with by the national court, although women were theoretically allowed to raise their claims during *gacaca*.¹⁴⁷ Due to shame, social stigmatisation, and psychological trauma Rwandan women were very reluctant to discuss their experiences during a public *gacaca* hearing.¹⁴⁸ Thus the transfer of rape cases from conventional courts to *gacaca* in 2008 caused significant

¹³⁹ Haskell, above n 19.

¹⁴⁰ Ibid.

¹⁴¹ Bloomfield, above n 109, 13-6.

¹⁴² Ibid.

¹⁴³ John Borneman, ‘Reconciliation after Ethnic Cleansing: Listening, Retribution, Affiliation’ (2002) 14.2 *Public Culture* 281, 282.

¹⁴⁴ Bloomfield, above n 109, 13-16.

¹⁴⁵ Wells, above n 26.

¹⁴⁶ Heidy Rombouts, *Women and Reparations in Rwanda* (2006) <<http://www.ictj.org/en/research/projects/gender/country-cases/1823.html>>.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

difficulties for victims of sexual violence, seriously compromising their privacy.¹⁴⁹ The Rwandan government reacted by putting in place safeguards to enable confidentiality for rape victims, allowing them to report cases in private meetings with *gacaca* staff.¹⁵⁰ However, even though testimonies of rape cases were recorded behind closed doors, victims still feared that their identities would be revealed to their community.¹⁵¹ Haskell describes how trials were often held near administrative offices or schools and women entering a room to report rape or sexual violence could easily be seen by third parties.¹⁵²

The genocide's immense death toll among the men left many women as widows, often with few essential resources.¹⁵³ At that time, Rwanda's inheritance rules did not usually allow women to access their husband's or father's property.¹⁵⁴ An inferior public position, and low levels of literacy and education also contributed to women's vulnerability.¹⁵⁵ This may have restrained female participation in *gacaca* as vulnerable women can be assumed to be susceptible to community pressures including forces against discussing 'shameful' violations in public or identifying oneself as a victim of sexual assault.¹⁵⁶ This suggests that community courts were not the right platform to encourage women to report rape and other form of sexual violence, and were thus unable to provide justice to many women. According to Wells today many female survivors suffer primarily from a lack of financial and psychological support, suggesting that women have been impacted especially severely by the lack of reparations provided by the *gacaca* system.¹⁵⁷

It should be mentioned that until recently sexual violence was not regarded as a violation of international humanitarian legal norms and rape was not treated as a grave breach.¹⁵⁸ By characterizing rape and sexual violence as a form of genocide and as a category 1 crime, the ICTR and Rwandan National Court

¹⁴⁹ IRIN, above n 29.

¹⁵⁰ Ibid.

¹⁵¹ Haskell, above n 19.

¹⁵² Ibid.

¹⁵³ Rombouts, above n 147.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Wells, above n 26.

¹⁵⁷ Ibid.

¹⁵⁸ Katherine M. Franke, 'Gendered Subjects of Transitional Justice' (2006) 15.3 *Columbia Journal of Gender and Law* 813, 816; Yael Weitz, 'Rwandan Genocide: Taking Notes from the Holocaust Reparations Movement' (2009) 15. *Cardozo Journal of Law and Gender* 357, 364.

largely contributed to an alteration of gender violence under international law.¹⁵⁹ Nevertheless, Franke argues that although the ICTR established that sexual violence could constitute a form of genocide, it has done little to follow it up in terms of prosecuting and – along with other process related shortcomings – has been largely criticised for not investigating rape and sexual violence.¹⁶⁰

Despite *gacaca*'s shortcomings in regards to gender issues it shall be mentioned that in recent years Rwanda seems to have made significant progress advancing women's rights and roles.¹⁶¹ According to Nyirasafali, national programme officer for the United Nations Population Fund (UNFPA), 'there used to be a lot of rapes, wife beating, male domination of women, boys sent to school and not girls [but] that has all changed, even in the countryside'.¹⁶² Boseley explains how Rwandan women now 'have the right to own land and property'.¹⁶³

VI SUGGESTIONS ON HOW TO COMPLEMENT *GACACA* AS A HOLISTIC APPROACH TO TRANSITIONAL JUSTICE

Although accountability is one of the main achievements of *gacaca*, it appears that an improvement in the procedural shortcomings would have enhanced the objectives of transitional justice. Haskell suggests that certain fundamental rights should have been better protected, such as the right of the accused to be informed of the charges in adequate time to prepare a defence or the right to have a lawyer.¹⁶⁴ He also criticises the insufficient training of *gacaca* court personnel and argues that 'a stronger and more robust legal framework was needed to ensure judges' impartiality and to insist upon reasoned and fact-based judgments'.¹⁶⁵

According to Lambourne transitional justice must incorporate the transformation of political institutions and socioeconomic distribution.¹⁶⁶ Unfortunately, it is widely accepted that *gacaca* was not very successful in enhancing ei-

¹⁵⁹ Franke, above n 159, 816-7; Weitz, above n 159, 366.

¹⁶⁰ Ibid. above n 159, 817-8.

¹⁶¹ Sarah Boseley, 'Rwanda: A revolution in rights for women', *The Guardian* (online), 28 May 2010 <<http://www.guardian.co.uk/world/2010/may/28/womens-rights-rwanda>>.

¹⁶² Ibid citing Nyirasafali.

¹⁶³ Ibid.

¹⁶⁴ Haskell, above n 19.

¹⁶⁵ Ibid.

¹⁶⁶ Lambourne, above n 74, 47.

ther aspect, as Rwanda continued to face enormous political and economic challenges.¹⁶⁷ To promote broad and active community participation and thus enable fairness of the process and truth recovery *gacaca* should have been complemented by further political reform.

As explained above, *gacaca* failed to provide adequate compensation for the loss of relatives or personal injury, although reparations have been identified as one critical element of transitional justice and reconciliation.¹⁶⁸ Monetary assistance has been determined as particularly important for female genocide survivors, suggesting that it would have been crucial to complement *gacaca* with an effective form of restitution. Waldorf argues that the Rwandan government had initially planned on establishing the Compensation Fund for Victims of the Genocide and Crimes against Humanity, but failed to do so.¹⁶⁹ It shall be mentioned that according to Mary Kavitesi Blewitt, founder and former director of the UK registered charity SURF, Rwandan Government dedicates five percent of its budget for educational and healthcare needs of genocide survivors.¹⁷⁰ However, Blewitt also emphasises that this money constitutes ‘the only other sustainable and significant funding for survivors’ besides SURF.¹⁷¹

Wells argues that transitional justice needs to assist in eliminating the violence and discrimination women suffer in Rwandan society not only in conflict but also in peacetime.¹⁷² Although *gacaca* made some effort to demonstrate sensitivity towards gender issues, a range of significant changes to *gacaca* would have been crucial to enable women to achieve reconciliation. This could have included a better protection of privacy, the provision of financial and psychological support and institutional reforms to improve the general position of women in Rwandan society. As mentioned above, the position and rights of women in Rwanda seem to have changed significantly over the very last years, indicating that a number of institutional reforms have recently taken place. According to Boseley, in 2010 ‘women occupy some of the most important

¹⁶⁷ Waldorf, above n 1, for example.

¹⁶⁸ ICTJ, above n 8.

¹⁶⁹ Waldorf, above n 1, 17.

¹⁷⁰ Mary Kayitesi Blewitt, *SURF Annual Report 2007 (2008)* <<http://survivors-fund.org.uk/who-we-are/our-reports/annual-reports/surf-annual-report-2007/>>.

¹⁷¹ SURF was first established in 1997 by Mary Kayitesi Blewitt, a British citizen of Rwandan origin. SURF focuses on the development and deliverance of programmes relating to healthcare, house building, education entrepreneurship, etc. As SURF is not part of *gacaca* it is not considered as one of its instruments and will thus not be discussed in more detail.

¹⁷² Wells, above n 26.

government ministries make up 56% of the country's parliamentarians'.¹⁷³

VII CONCLUSION

In the beginning of this essay a holistic approach to transitional justice is described in terms of its instruments and processes (five key pillars) and its purpose and objectives (as defined by ICTJ). It has been demonstrated that *gacaca* incorporated initiatives relating to all five key pillars (accountability, truth recovery, reconciliation, reparations and institutional reform) as determined by Boraine & Valentine. The main objectives of transitional justice have been defined as the recognition of victims and the promotion of peace, democracy and reconciliation. In-depth analysis suggests that *gacaca* has at times achieved some of these goals. However, it appears that there were opportunities to complement *gacaca* with additional measures in order to improve its purpose in terms of a holistic approach to transitional justice.

Considering the scale and brutality of the 1994 genocide, the task Rwanda's government had to face was huge and involved an incredible number of perpetrators.¹⁷⁴ Since 2002 nearly two million cases have been processed, preventing the collapse of Rwanda's prisons and national court system and achieving Rwanda's commitment to holding all perpetrators of the genocide accountable.

Legal prosecution has been identified as an important means of transitional justice. However, the *gacaca* court system has been criticised for a number of shortcomings and it appears that some improvements could have increased *gacaca*'s validity and overall success.

There is also suggestion that an effective form of reparations for genocide survivors would have assisted in meeting their basic needs and would have demonstrated recognition of victims, ultimately assisting the peace and reconciliation process. A more comprehensive institutional reform would have been necessary to support both victims and perpetrators to overcome their concerns and to actively participate in *gacaca*, enabling the recovery of truth and ultimately reconciliation. The *gacaca* system has achieved a great deal of positive change in Rwandan society since the atrocities of 1994. But it appears that there were opportunities for improvement to assist Rwanda in moving towards a reconciled, more democratic society that is free from the often cited culture of impunity.¹⁷⁵

¹⁷³ Boseley, above n 162.

¹⁷⁴ Ward, above n 4, for example.

¹⁷⁵ Sosnov, above n 20, 142, for example; Haskell, above n 19.

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APPENDIX

Appendix 1

CHAPTER II – CATEGORIZATION

Article 2

Persons accused of offences set out in Article 1 of this organic law and committed during the period between 1 October 1990 and 1994 shall, on the basis of their acts of participation, be classified into one of the following categories:

Category 1:

- a) persons whose criminal acts or whose acts of criminal participation place them among the planners, organisers, instigators, supervisors and leaders of the crime of Genocide or of a crime against humanity.
- b) persons who acted in positions of authority at the National, Prefectorial, Communal, Sector or Cell level, or in a political party, the army, religious organizations or in a militia and who perpetrated or fostered such crimes.
- c) notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed.
- d) persons who committed acts of sexual torture or violence.

Category 2:

persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death;

Category 3:

persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person;

Category 4:

persons who committed offences against property.

Source: *Organic Law No. 08/1996 of 31 August 1996 on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes Against Humanity committed since 1 October 1990* [], 1 September 1996, available at: <http://www.ref-world.org/docid/3ae6b4f64.html> [accessed 8 May 2013]

Appendix 2

Gacaca Sentencing Scheme

Judgment Category	Guilty with no confession	Guilty with confession during trial	Guilty with confession before trial	Minors (14 to 18 years) when offense committed ⁹¹
2 [Sub-categories 1 & 2] (judged at secteur level; appeals to secteur level)	25–30 year prison term	12–15 year prison term; possibility of commuting half to community service	7–12 year prison term; possibility of commuting half to community service	8–10 year prison term if guilty without confession; otherwise, half of adult sentence; possibility of commuting half to community service, except when no confession is made
2 [Sub-category 3] (judged at secteur level; appeals to secteur level)	5–7 year prison term; possibility of commuting half to community service	3–5 year prison term; possibility of commuting half to community service	1–3 year prison term; possibility of commuting half to community service	Half of adult sentence; possibility of commuting half to community service
3 (judged at cellule level; appeals to secteur level)	Reparations for damage caused or equivalent community service			

Source: Clarke, 2007.