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Partners or Rivals in Reconciliation? The ICTR and Rwanda's Gacaca Courts

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Partners or Rivals in Reconciliation? The ICTR and Rwanda's *Gacaca* Courts

LEO C. NWOYE*

A major question for post-conflict governments to consider is how best to shape reconciliation efforts. This Article examines two transitional justice mechanisms that were utilized in Rwanda's post genocide era and assesses their contributions to reconciliation. The two principal approaches which emerged in the Rwandan context were the establishment of International Criminal Tribunal for Rwanda (ICTR), via the international political community whilst grassroots efforts within Rwanda were channeled through the *gacaca* court system. While each of these systems, though unintended and incoherent hybrid justice strategies, possessed strengths and weaknesses, this legal pluralist structure nevertheless yielded positive reconciliation results.

The Article posits that this legal pluralist system did not represent a perfect mechanism for attaining all reconciliation goals. It did, however, function to facilitate reconciliation as a process that demands transitional justice individually and collectively, as well as highlight gaps in the system that were largely and ostensibly filled by a number of constructive initiatives instituted by the Rwandan government in their continued reconstruction of Rwanda.

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I. INTRODUCTION

Between April and July 1994,¹ about eight hundred thousand² of approximately seven million people were massacred in what one author described as the fastest genocide in history.³ The Rwandan genocide also ranks among the worst mass carnage ever perpetrated in history, particularly with its use of 'low-tech' weaponry and the socio-cultural similarities of the perpetrators, complicit bystanders, and victims.⁴ Most

1. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 106–11 (Sept. 2, 1998); ALISON DES FORGES, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 1 (1999); Paul J. Magnarella, *The Background and Causes of the Genocide in Rwanda*, 3 J. INT'L CRIM. JUST. 801, 815–17 (2005) [hereinafter *The Background and Causes of the Genocide*].

2. According to the literature and sources reviewed, there is considerable controversy over the exact number of Tutsis (and politically moderate Hutus) murdered between April and July 1994. The Trial Chamber in *Akayesu* stated that the “estimated total number of victims in the conflict varies from 500,000 to 1,000,000 or more.” *Akayesu*, Case No. ICTR-96-4-T ¶ 111. At a U.N. Security Council (“UNSC”) meeting, Rwanda’s Representative, Manzi Bakuramutsa, estimated the number of dead in the course of the genocide to be over 1 million. U.N. SCOR, 49th Sess., 3453d mtg. at 14, U.N. Doc. S/PV.3453 (Nov. 8, 1994) [hereinafter *SC Verbatim Record 3453*]. The Special Rapporteur of the Commission on Human Rights, René Degni-Ségui, estimated that by late June 1994, between 200,000 and 500,000 persons were killed. See U.N. Comm’n Human Rights, *Report of the Situation of Human Rights in Rwanda submitted by Mr R Degni-Séqui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Commission resolution E/CN.4/S-3/1 of 25 May 1994*, 51st sess., ¶ 24, U.N. Doc. E/CN.4/1995/7 (June 28, 1994) [hereinafter *Human Rights in Rwanda*]. In her comprehensive study of the Rwandan genocide, Des Forges estimated that 500,000 Tutsi were murdered. DES FORGES, *supra* note 1, at 15–16. Prunier, however, calculates the approximate number of deaths to be between 800,000 and 850,000. See GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 265 (1995) [hereinafter *HISTORY OF A GENOCIDE*]. Kuperman argues that the total Tutsi population of Rwanda was estimated at 650,000 with 500,000 being killed in the genocide. See Alan J. Kuperman, *Rwanda in Retrospect*, 79 FOREIGN AFF. 94, 101 (2000). Nevertheless, most writers regard the number of deaths during the genocide to be in the range of 500,000 to 1 million. The precise numbers, however, are not crucial to this Article.

3. “[T]he dead of Rwanda accumulated at nearly three times the rate of the Jewish dead during the Holocaust. It was the most efficient mass killing since the atomic bombings of Hiroshima and Nagasaki.” See PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES* 4 (1998) [hereinafter *TOMORROW WE WILL BE KILLED*].

4. See e.g., Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 29 (2006) (citations omitted) [hereinafter *Mass Justice for Mass Atrocity*]; Jackson Nyamuya Maogoto, *The International Criminal Tribunal for Rwanda: A Paper Umbrella in the Rain? Initial Pitfalls and Brighter Prospects*, 73 NORDIC J. INT’L L. 187, 188, 192 (2004) (citations omitted).

of the victims were civilians from the Tutsi ethnic group.⁵ The perpetrators included government officials, soldiers, police, militia members, and civilians, mostly of Hutu ethnicity. Equally, it was reported that several thousand civilians, most of whom were Hutus,⁶ were killed by Rwandan Patriotic Front (“RPF”) soldiers after the genocide period.⁷

Accordingly, post-genocide Rwanda required the establishment of an effective post-conflict scheme,⁸ particularly in regard to reconciliation. The situation raised many questions. What types of processes and institutions would represent an appropriate response? How effective or complete are the approaches both individually as well as collectively? Is authentic reconciliation possible after the genocide or will it have to be imposed? Who reconciles with whom? How is reconciliation defined and measured? Further, the mass involvement of the general population in perpetrating the genocide gave the post-conflict Rwandan government an extremely delicate challenge; namely, that the victims and perpetrators had no choice other than to coexist with each other.

Typically, transitional societies like Rwanda—when emerging from regimes marked by grave human rights abuses, particularly where they seek to rebuild in the aftermath of total devastation—face a process of reconciliation that is very difficult. Current examples include Iraq and Libya.⁹ With the complexities of reconciliation exacerbated by the lack of a widely accepted interpretation and meaning for the term, extensive arguments over what transitional justice entails are inevitable.

Yet it seems that certain transitional approaches have become somewhat standardized. For example, the truth commissions of Central and South

5. *Akayesu*, Case No. ICTR-96-4-T ¶¶ 111, 127, 157–69, 173, 259. *Human Rights in Rwanda*, *supra* note 2, at ¶ 21. Kuperman, *supra* note 2.

6. Human Rights Watch (“HRW”) estimated that RPF killed between 25,000 and 45,000 Hutu civilians during and immediately after the genocide. DES FORGES, *supra* note 1, at 728, 733; GÉRARD PRUNIER, *AFRICA’S WORLD WAR: CONGO, THE RWANDAN GENOCIDE AND THE MAKING OF A CONTINENTAL CATASTROPHE* 16–19 (2009) [hereinafter *AFRICA’S WORLD WAR*]; *see also* EDOUARD KAREMERA, *DRAME RWANDAIS L’AUTRE FACE DU GENOCIDE* 464 (2012) [hereinafter *DRAME RWANDAIS*].

7. An investigative team from the United Nations High Commissioner for Refugees (“UNHCR”) concluded in late 1994 that in the months directly following the genocide, the RPF killed “thousands of civilians per month.” U.N. High Commissioner for Refugees, Note, *La Situation au Rwanda*, confidential, Sept. 23, 1993, *quoted in* DES FORGES, *supra* note 1, at 728.

8. Peter Uvin & Charles Mironko, *Western and Local Approaches to Justice in Rwanda*, 9 *GLOBAL GOVERNANCE* 219, 219 (2003) [hereinafter *Western and Local Approaches*].

9. HUMAN RIGHTS WATCH, *AT A CROSSROADS—HUMAN RIGHTS IN IRAQ YEARS AFTER THE U.S.-LED INVASION* 1–4 (Feb. 2011). HUMAN RIGHTS WATCH, *WORLD REPORT 2014: IRAQ*, <http://www.hrw.org/world-report/2014/country-chapters/iraq?page=2> (last visited Oct. 13, 2014). HUMAN RIGHTS WATCH, *WORLD REPORT 2014L LIBYA*, <http://www.hrw.org/world-report/2014/country-chapters/libya> (last visited Oct. 13, 2014).

America in the 1980s and 1990s sought to ascertain the truth about the crimes committed by the political and social elites and, for the most part, offered amnesty in exchange for the truth.¹⁰ The architects of these truth commissions contended that it was not feasible to punish perpetrators if they were to obtain the truth about their crimes.¹¹

Similarly, the South African Truth and Reconciliation Commission (“TRC”) offered amnesty to apartheid leaders in exchange for information about their crimes against the black majority.¹² Reconciliation was a key objective of the TRC, which believed punishing apartheid leaders was likely to arouse civil conflict.¹³ As such, a political compromise like offering amnesty for the truth about crimes and for national reconciliation was deemed more appropriate.¹⁴

Conversely, the U.N.¹⁵ Security Council (“UNSC”) has recognized the “need to eschew one-size-fits-all formulas and the importation of foreign model.”¹⁶ Moreover, different transitional societies choose dissimilar and diverse objectives and often pursue them in very different ways, usually because of post-conflict political, social, economic, and legal constraints. For example, reconciliation and justice were incongruent and irreconcilable goals for South Africa.¹⁷ For Rwanda, reconciliation was unthinkable without some level of justice. As Rwanda’s President, Paul Kagame articulated: “I don’t understand what reconciliation would mean unless some of those responsible were brought to justice.”¹⁸

A foremost theme in post-conflict reconstruction and transitional justice has been legal pluralism, through which multiple legal systems

10. Priscilla Hayner, *Fifteen Truth Commissions: —1974-1994 A Comparative Study*, 16 HUM. RTS. Q. 597, 597, 613–14, 621–23, 627–29, 653–55 (1994).

11. *Id.*

12. PHIL CLARK, *THE GACACA COURTS, POST-GENOCIDE JUSTICE AND RECONCILIATION IN RWANDA: JUSTICE WITHOUT LAWYERS* 30–31 (2010) [hereinafter *THE GACACA COURTS, POST-GENOCIDE JUSTICE*].

13. *Id.* This approach represented a global shift in both transitional notions of justice as well as transnational practices and has since become a benchmark—albeit implicitly—in other post-conflict environments like Sierra Leone and Timor-Leste, which are seeking reconciliation.

14. Jeremy Sarkin, *The Trials and Tribulations of South Africa's Truth and Reconciliation Commission*, 12 S. AFR. J. ON HUM. RTS., 617, 620–22 (1996).

15. U.N. is United Nations.

16. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶¶ 38–48, U.N. Doc S/2004/616 (Aug. 23, 2004) [hereinafter *The Rule of Law and Transitional Justice*].

17. *THE GACACA COURTS, POST-GENOCIDE JUSTICE*, *supra* note 12, at 31.

18. PETER E. HARRELL, *RWANDA'S GAMBLE: GACACA AND A NEW MODEL OF TRANSITIONAL JUSTICE* 37 (2003).

coexist with one another within the context of the same social space, in order to promote principled outcomes.¹⁹ These legal systems can also coexist both domestically as well as internationally, and, despite having different functions, they can culminate in a distinct type of legal pluralism. Indeed, legal pluralism may actually be as effective as, if not more effectual than, a singular exclusive legal system in supporting reconciliation. Rwanda's post-conflict legal landscape has a type of legal pluralism that incorporates formal international trials on the one hand and domestic criminal trials as well as grassroots systems on the other.

On the international level, the UNSC established the International Criminal Tribunal of Rwanda ("ICTR"),²⁰ an ad hoc judicial body located in Arusha, Tanzania, operating independently of all national systems, including the Rwanda legal system.²¹ It was mandated to prosecute the persons responsible for genocide and other serious violations of international humanitarian law, committed in Rwanda and by Rwandan citizens in neighboring States, between January 1, 1994 and December 31, 1994.²² The Security Council believed this would "contribute to the process of national reconciliation."²³

On the national level, the Rwandan government established the *gacaca* court system in June 2002²⁴ as an addition to the domestic criminal courts.²⁵ The *gacaca* court system is separate and distinct from the ICTR and arose out of the national justice system's inability to handle the vast

19. John Griffiths, *What is Legal Pluralism?*, 24 J. OF LEGAL PLURALISM 1, 2, 38–39 (1986).

20. See S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955, (Nov. 8, 1994) (Establishing the ICTR and annexing its Statute).

21. S.C. Res. 955, *supra* note 20, at Annex, art. 8(2); NICHOLAS A. JONES, THE COURTS OF GENOCIDE: POLITICS AND THE RULE OF LAW IN RWANDA AND ARUSHA 9, 95 (2010).

22. S.C. Res. 955, *supra* note 20, at Annex, art. 1.

23. *Id.* at 1.

24. The word "*Gacaca*" is derived from the Kinyarwanda word meaning "the lawn" or "the grass," in reference to the conducting of hearings in open spaces in full view of the community. See Filip Reyntjens, *Le Gacaca ou la Justice du Gazon an Rwanda*, 40 POLITIQUE AFRICAINE 31, 32 (1990).

25. The Rwandan government created two additional courses of action including Rwandan military trials and international third-party trials taking place in foreign jurisdictions, both of which—while significant—only operated peripherally. To date, there have been prosecutions of Rwandan fugitives in connection with the 1994 Rwandan genocide in Belgium (8); Canada (1); Switzerland (1); France (1); Netherlands (1). Richard Karegyesa, Presentation at Annual Interpol Expert Meeting, *The Challenges of International Cooperation in the Prosecution of International Crimes: An ICTR Perspective*, Arusha, Tanzania (Oct. 29, 2010) (on file with author). However, this Article will not address the national courts, these supplementary mechanisms, or their contribution to reconciliation in Rwanda.

number of backlogged genocide cases in a prompt and efficient manner.²⁶ This backlog was largely caused by the fact that many judges, prosecutors and lawyers were killed or had fled the country during the bloodbath.²⁷

While the ICTR fundamentally utilizes a formal, western-style retributive system of trial and punishment procedures, *gacaca* is a relatively informal, traditional Rwandan method of conflict resolution that was adapted to meet the discerned needs of the post-genocide environment.²⁸ It was created to be different from the ICTR in many ways, principally with regards to being culturally and socially sensitive to post-genocide Rwanda in its endorsement of reconciliation and provision of transitional justice.²⁹

The legal pluralist system in Rwanda within which the ICTR and *gacaca* courts coexist, and operate to each other's mutual benefit, has more impact and is more effective in accomplishing transitional justice goals than either the ICTR or *gacaca* courts could be in isolation.

There is some controversy with respect to the efficiency and effectiveness of these incongruent systems and their alleged failure to promote transitional justice and reconciliation in Rwanda.³⁰ The ICTR has received criticism for its slow pace, its high expense, its remoteness, its distance from the place where the crimes were committed and where the victims reside, its cultural incompetence, its inability to authentically support reconciliation for the Rwandan people, and its perceived acquiescence of

26. By 2000, the Rwandan courts had only tried about 2,500 to 5000 genocide cases of the 120,000 to 130,000 suspects. The trials of many of these cases were criticized as being unfair under international standards and Rwandan law. U.N. Secretary-General, *Report of the Situation of Human Rights in Rwanda Prepared by the Special Representative of the Commission on Human Rights Pursuant to Economic and Social Council Decision 1999/288 of 30 July 1999*, ¶ 128, U.N. Doc. A/54/359 (Sept. 17, 1999) [hereinafter *Situation of Human Rights*]; Elizabeth Neuffer, *Kigali Dispatch: It Takes a Village*, 222 NEW REPUBLIC 18, 18 (2000); Max Rettig, *Gacaca: Truth, Justice and Reconciliation in Postconflict Rwanda?*, 51 AFR. STUD. REV. 25, 28 (2008).

27. For example, out of the 758 judges, 70 prosecutors, and 631 support staff of the national and provincial courts, only 244 judges, 12 prosecutors, and 137 support staff were alive and in the country in November 1994. JONES, *supra* note 21, at 84.

28. See, e.g., Megan M. Westberg, *Rwanda's Use of Transitional Justice after Genocide: The Gacaca Courts and the ICTR*, 59 U. KAN. L. REV. 331, 337–59 (2011).

29. See Peter Uvin, *The Introduction of a Modernized Gacaca for Judging Suspects of Participation in the Genocide and the Massacres of 1994 in Rwanda* (2000) (Discussion Paper) (Belg.).

30. See, e.g., Westberg, *supra* note 32, at 345–66; Amnesty Int'l, *Rwanda: Gacaca: A Question of Justice*, AI Index AFR 47/007/2002 (Dec. 2002) [hereinafter *A Question of Justice*].

victor's justice.³¹ This is all the more poignant given that the international criminal tribunals do not naturally lend themselves to the promotion of reconciliation.³²

This Article considers whether the ICTR endeavored to promote reconciliation by incorporating this non-legal, non-judicial, and quasi-political notion into its judgments. Specifically, it asks: how have the judges, trial, and appeal chambers attempted to decipher this specific, yet vague and curious assignment into their decisions? What were their understandings of the concept? In what circumstances were they inclined to apply the concept? Were any references made to the term? And if so, was it more likely to increase or reduce the sentence?

Regarding the *gacaca* courts, many observers raised concerns about government interference, perceptions of victor's justice, low standards of legal professionalism, human rights infringements, inadequate legal training and qualifications of its lay *gacaca* judges, and the fairness of proceedings held without legal representation, particularly as this afforded limited protection for defendants than in conventional courts.³³ Some highlight the complexity of this system and fundamentally misconstrue it as a somewhat archaic form of indigenous justice,³⁴ poorly equipped to meet the subjective needs of the Rwandan people.³⁵

31. Maya Goldstein-Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355, 369–71 (2005); Leslie Haskell & Lars Waldorf, *The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences*, 34 HASTINGS INT'L & COMP. L. REV. 49, 51 (Winter 2011) [hereinafter *Impunity Gap*].

32. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE at 26 (1998); *Impunity Gap*, *supra* note 31, at 78; Hideaki Shinoda, *Peace-Building by the Rule of Law: An Examination of Intervention in the Form of International Tribunals*, Presentation at the Annual Convention of International Studies Association, Chicago, (Mar. 22, 2001) and at the Centre of International Studies, University of Cambridge (May 22, 2001), http://www.gmu.edu/programs/icar/ijps/vol7_1/Shinoda.htm (last visited Oct. 19, 2014).

33. See, e.g., *Situation of Human Rights*, *supra* note 26, ¶¶ 157, 159–60; Westberg, *supra* note 32, at 353–57; HUMAN RIGHTS WATCH, JUSTICE COMPROMISED—THE LEGACY OF RWANDA'S COMMUNITY-BASED GACACA COURTS 27–82 (May 2011).

34. See, e.g., U.N. Comm'n Human Rights, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World: Report of the Situation of Human Rights in Rwanda Submitted by Special Representative, Mr. Michael Moussalli, pursuant to Resolution 1998/69, 54th Sess.*, ¶ 51, U.N. Doc. E/CN.4/1999/33 (Feb. 8, 1999); Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocity of 1994*, 18 B.U. INT'L L. J. 163, 167 (Fall 2000); Helen Scanlon & Nompumelelo Motlafi, *Indigenous Justice or Political Instrument? The Modern Gacaca Courts of Rwanda* in PEACE VERSUS JUSTICE? THE DILEMMA OF TRANSITIONAL JUSTICE IN AFRICA 308–12 (Chandra Lekha Sriram & Suren Pillay eds., 2011).

35. Angela Tobin, *Widows and Community Based Transitional Justice in Post Genocide Rwanda*, 10 BRIT. J. COMMUNITY JUST., 27, 31–32 (2012) (citing Jennie Burnet,

Contrarily, in 2004, the former U.N. Secretary General Kofi Annan emphasized that indigenous and informal traditions for administering justice or settling disputes must be given due regard in the transitional period in post-conflict society, but that this must be done in conformity with international standards.³⁶ This seems somewhat paradoxical and appears to advocate for modifying traditional systems. This Article explains that reverting to traditional justice is impermanent and in some ways, should be viewed as a compromise to relieve overburdened formal justice systems until they are in a position to take over the reins again.

In any event, a post-conflict government's domestic and international approaches to accountability, whether utilizing judicial or non-judicial mechanisms, do not always have to be mutually exclusive.³⁷ They can also serve as complementary components of a comprehensive reconciliation strategy.³⁸

This Article serves to contribute to the existing interpretations and analysis of whether the ICTR and *gacaca* contributed to reconciliation in Rwanda. Additionally, it provides further insights on the practicality of applying the concept of reconciliation in post-conflict environments, both individually and collectively. This Article also analyzes the ICTR and the *gacaca* courts at a crucial period. The ICTR is in the process of completing its last few cases³⁹ and winding down its operations.⁴⁰ The *gacaca* courts, on the other hand, have completed their mandate, having tried several thousands of genocide suspects.⁴¹

The Injustice of Local Justice: Truth, Reconciliation, and Revenge in Rwanda, 3 J. GENOCIDE STUD. & PREVENTION 173, 187 (Aug. 2008).

36. *The Rule of Law and Transitional Justice*, *supra* note 16, at ¶ 36.

37. JANE E. STROMSETH, INTRODUCTION: GOALS AND CHALLENGES IN THE PURSUIT OF ACCOUNTABILITY in ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES 3 (Jane E. Stromseth ed., 2003).

38. *Id.*

39. *Status of Cases*, INT'L CRIM. TRIBUNAL FOR RWANDA, <http://www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx> (last visited Oct. 16, 2014) [hereinafter *ICTR Status of Cases*].

40. *Statement by Justice Hassan B. Jallow, Prosecutor UN-ICTR & UN-MICT to the United Nations Security Council*, INT'L CRIMINAL TRIBUNAL FOR RWANDA (Jun 5, 2014), <http://www.unictr.org/TABID/155/DEFAULT.ASPX?ID=1413> (last visited Oct. 19, 2014).

41. See Outreach Programme on the Rwanda Genocide and the United Nations, *Justice and Reconciliation Process in Rwanda*, UNITED NATIONS, <http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml> (last visited Oct. 19, 2014); see also *Rwanda "Gacaca" Genocide Courts Finish Work*, BBC NEWS (June 18, 2012), <http://www.bbc.co.uk/news/world-africa-18490348> (last visited Oct. 15, 2014); *Curtains fall*

The Article is organized into six main sections. The next section is an overview of the Rwandan genocide, civil conflict, the nature of Hutu-Tutsi relations, and the international context surrounding the creation of the ICTR. The third section explores the various concepts of reconciliation and legal pluralism, developing a theoretical framework for analysis. It frames reconciliation as being an outcome and a process in terms of relationship-building, conflict resolution, social transformation, and a discursive tool that can permeate the everyday lives of the population. It also assesses the role that reconciliation plays in the Rwandan context. The fourth section briefly examines the concept of legal pluralism, looking at how traditional and customary justice (both influenced by formal colonial laws) worked alongside each other, while considering the Rwandan example. The fifth section analyzes the ICTR and the *gacaca* courts, both separately and collectively as a legal pluralist system, as well as their reconciliation goals, without framing the two mechanisms in opposition to one another. It also evaluates their contributions through retributive and restorative justice in facilitating reconciliation in Rwanda. Additionally, it assesses the role reconciliation plays in the Rwandan context and briefly examines the programs established by the Rwandan government that functioned alongside the legal pluralist system of the ICTR and *gacaca* courts. Critical to this section is the assumption that the nature of reconciliation is dynamic and complex, with the international community's understanding and operationalization of reconciliation fundamentally divergent from that of the Rwandan government. Finally, the sixth section makes concluding remarks.

II. OVERVIEW OF RWANDAN HISTORY

This section explores the backdrop to the conflict in Rwanda, the genocide, and the critical historical ethno-political connection, in order to facilitate understanding transitional justice in the aftermath of the Rwandan genocide and, crucially, to put into context any reconciliation efforts thereafter.

The bloodbath that occurred in Rwanda in 1994 resulted from an “intricately interwoven ethno-political struggle,”⁴² with the influences of forces within and outside Rwanda instrumental in shaping Hutu-Tutsi⁴³ relations. An appreciation of these factors is therefore critical for

on *Gacaca*, THE INDEPENDENT (Oct. 19, 2014), <http://www.independent.co.ug/rwanda-ed/rwanda/5843-curtains-fall-on-gacaca> (last visited Oct. 19, 2014).

42. JONES, *supra* note 21, at 17.

43. Some authors have treated the terms Hutu, Tutsi, and Twa as being invariable and write these terms without the “s” plural suffix. Where appropriate in this Article, this plural suffix will be used to distinguish the singular from the plural forms.

understanding the genocide, which one author described as “the defining event in Rwandan history.”⁴⁴

There have been contentious versions of the events in Rwanda,⁴⁵ differing depending on the group in power at any particular stage.⁴⁶ Typically, in societies reliant on oral traditions, the dominant group determines which version of history is conveyed.⁴⁷ As Temple-Raston noted, “[h]istory in Rwanda has always been malleable, growing out of story lines of one’s own choosing. If one was Hutu, then the heroes were Hutu. If one was Tutsi, the opposite is true. In that story-telling, that exaggeration and embellishment came the seeds of conflict.”⁴⁸

Some have described the atrocities as exclusively or largely based on ethnic or tribal tensions between the Hutus and the Tutsi minority group.⁴⁹ However, this line of thought is somewhat flawed as “the history of divisions among Rwandans is far more complex [. . .] and is grounded in social, economic and political factors.”⁵⁰

A. Background to the Rwandan Conflict

Events in the early 1990s are important for understanding the genocide context.⁵¹ On October 1, 1990, the RPF, comprised of many descendants of Tutsi refugees who fled Hutu violence in the 1960s, invaded Rwanda from Uganda.⁵² The Rwandan government forces repelled the RPF⁵³ and a guerrilla war broke out in the northeast of the country.⁵⁴

44. Philip Gourevitch, *After Genocide: A Conversation with Paul Kagame*, 72 *TRANSITION* 162, 167 (1996).

45. See, e.g., Marie Beatrice Umutesi, *Is Reconciliation Between Hutus And Tutsis Possible?*, 60 *J. INT’L AFF.*, 157, 157–71 (2006).

46. *HISTORY OF A GENOCIDE*, *supra* note 2, at 80–81.

47. JONES, *supra* note 21, at 17.

48. DINA TEMPLE-RASTON, *JUSTICE ON THE GRASS: THREE RWANDAN JOURNALISTS, THEIR TRIAL FOR WAR CRIMES AND A NATION’S QUEST FOR REDEMPTION* 17 (2008).

49. Mariann M. Wang, *International Criminal Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact*, 27 *COLUM. HUM. RTS. L. REV.* 175, 179 (1995).

50. Wang, *supra* note 49; GEORGE W. MUGWANYA, *THE CRIME OF GENOCIDE IN INTERNATIONAL LAW: APPRAISING THE CONTRIBUTION OF THE UN TRIBUNAL FOR RWANDA* 33 (2007).

51. For a useful account of the key events in 1990, see PETER UVIN, *AIDING VIOLENCE: THE DEVELOPMENT ENTERPRISE IN RWANDA* 60–65 (1998).

52. *HISTORY OF A GENOCIDE*, *supra* note 2, at 93–126.

53. The Tutsi refugee diaspora had fled to camps located in the countries surrounding Rwanda and by the late 1890s, they had become increasingly organized. Large numbers of Tutsi refugees in Uganda had joined the victorious rebel National Resistance Movement

After nearly three years of fighting, the government and the RPF signed the Arusha Peace Accords in August 1993. On October 5, 1993, the UNSC authorized the establishment of the United Nations Assistance Mission for Rwanda (“UNAMIR”) to support the implementation of the Accords.⁵⁵ UNAMIR was given a six-month mandate to oversee a transition towards power sharing between the Hutu-dominated administration and the RPF in the Rwandan military and government.⁵⁶

Incidents that occurred inside and outside of Rwanda aggravated ethnic tensions during this period. On October 21, 1993, the assassination of the Hutu Burundian President Melchior Ndadaye, by members of the Tutsi-controlled army, led to hostilities and mass killings between Burundian Hutus and Tutsis.⁵⁷ This led to the flight of thousands of refugees to Rwanda and triggered fears among Rwandan Hutu that the violence would spill across the border.⁵⁸ Many Hutu politicians (assisted by extremist media sources such as the Hutu magazine *Kangura* and the radio station *Radio Télévision Libre des Mille Collines* (“RTLM”)) used the violence in Burundi as justification to call for the mobilization of Hutus in Rwanda.⁵⁹

In the meantime, the ruling party, *Mouvement Républicain National pour la Démocratie et le Développement* (“MRND”), recruited Hutu youths to the youth wing called *Interahamwe*.⁶⁰ During the genocide, this group perpetrated many killings of Tutsis and moderate Hutus.⁶¹

By the end of March 1994, no transition coalition government was yet set up and the situation in Rwanda was extremely tense.⁶² Mugwanya described the situation as “akin to a loaded gun that only needed someone or

during the Bush War of the 1980s and formed the Rwandan Patriotic Front (“RPF”) in 1985 as a political movement. However, because the RPF was formed largely of combat-hardened veterans, it proved to be a formidable military force when political options seemed to disappear. See MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM AND THE GENOCIDE IN RWANDA* 182–83 (2001); see also *Akayesu*, Case No. ICTR-96-4-T ¶ 95.

54. THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 13.

55. *Id.*

56. ROMEO DALLAIRE, *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA* 96–101 (2003).

57. THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 13.

58. *Id.*

59. See *Akayesu*, Case No. ICTR-96-4-T, ¶¶ 103–04; see also AFRICAN RIGHTS, RWANDA: DEATH, DESPAIR AND DEFIANCE 36–45 (1995); THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 13; JEAN-PIERRE CHRÉTIEN, UN GÉNOCIDE AFRICAÏN: DE L’IDÉOLOGIE À LA PROPAGANDE, in RAYMOND VERDIER, EMMANUEL DECAUX & JEAN-PIERRE CHRÉTIEN RWANDA: UN GÉNOCIDE DU XXÈME SIÈCLE 45–55 (1995).

60. When translated from Kinyarwanda, “Interahamwe” means, “Those who work together,” or, “Those who fight together.”

61. DES FORGES, *supra* note 1, at 4; HISTORY OF A GENOCIDE, *supra* note 2, at 242–44; *Death, Despair and Defiance*, *supra* note 59, at 54–65, 100, 573.

62. *Akayesu*, Case No. ICTR-96-4-T, ¶¶ 104, 106.

something to push the trigger and to set the whole of Rwanda ablaze.”⁶³ That trigger was the death of Rwandan President Juvénal Habyarimana on April 6, 1994.⁶⁴

Within an hour of the crash, Rwanda's Army (“*Forces Armées Rwandaises*” or “FAR”) and militias erected roadblocks and, together with the Presidential Guards, started killing Tutsis and Hutus opposed to Habyarimana's government.⁶⁵ The murders began at the roadblocks and Presidential Guards and armed militias went from household to household, executing Tutsis and Hutus accused of cooperating with Tutsis.⁶⁶

The mass killings expanded quickly beyond Kigali into other towns and villages across Rwanda.⁶⁷ A self-proclaimed interim government was also established to steer the campaign of terror.⁶⁸ Between April 6, 1994 and July 1994, members of the interim government and other Hutu authorities intensified their campaign for the extermination of all Tutsis and their alleged supporters throughout Rwanda.⁶⁹ They also distributed weapons to Hutu militias and selected Hutu civilians for the perpetration of the atrocities.⁷⁰ In the ensuing weeks, state officials incited the Hutu population to kill Tutsis, buoyed by hate broadcasts on the RTL.M.⁷¹ It

63. APPRAISING THE CONTRIBUTION OF THE UN TRIBUNAL, *supra* note 50, at 40.

64. He was returning from a heads of state meeting in Dar-es-Salaam to discuss, *inter alia*, the implementation of the peace accords and the ethnic violence in Rwanda and Burundi. See *Akayesu*, Case No. ICTR-96-4-T ¶ 106; see also 1994: *Rwanda Presidents' Plane 'Shot Down'*, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/april/6/newsid_2472000/2472195.stm (last visited Oct. 19, 2014).

65. U.N. Secretary-General, *Report of the Independent Inquiry into the Rwanda Genocide*, ¶ 66, U.N. Doc. S/1999/1257 (Dec. 15, 1999) [hereinafter *Report of the Independent Inquiry into the Rwanda Genocide*]; *Akayesu*, Case No. ICTR-96-4-T, ¶ 107; *The Background and Causes of the Genocide*, *supra* note 1, at 815; TOMORROW WE WILL BE KILLED, *supra* note 3, at 114–15; Dallaire, *supra* note 56, at 221–61.

66. THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 14.

67. *Id.*

68. *Akayesu*, Case No. ICTR-96-4-T, ¶¶ 107, 110; DES FORGES, *supra* note 1, at 196–204.

69. See *Akayesu*, Case No. ICTR-96-4-T, ¶¶ 107, 108, 110; DES FORGES, *supra* note 1, at 181–221; *The Background and Causes of the Genocide*, *supra* note 1, at 815–16, citing TOMORROW WE WILL BE KILLED, *supra* note 3, at 109. See also HISTORY OF A GENOCIDE, *supra* note 2, at 213–80; VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 53–55 (1998) [hereinafter THE ICTR].

70. Linda Melvern, The Past Is Prologue: Planning the 1994 Rwandan Genocide, in AFTER GENOCIDE: TRANSNATIONAL JUSTICE, POST-CONFLICT RECONSTRUCTION AND RECONCILIATION IN RWANDA AND BEYOND 24–27; Westberg, *supra* note 33, at 335.

71. THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 14.

was estimated that around 250,000 Tutsis were killed in the first two weeks of the genocide.⁷²

On the whole, the U.N.'s role in interceding to prevent or stop the killings was inadequate,⁷³ the UNAMIR peace-keeping forces were small and lacked the mandate to disarm the perpetrators or to take similarly drastic measures to stop the crimes.⁷⁴ While the UNSC deliberated the character of its involvement in the conflict, the RPF captured Kigali on July 4, 1994. Two weeks later, the RPF took control of the whole country and stopped the genocide.⁷⁵ Many thousands of mostly Hutu refugees fled into the Democratic Republic of the Congo ("DRC"), among them many of the main organizers and perpetrators of the genocide.⁷⁶

A lesser publicized part of the Rwandan civil conflict is that a considerable number of civilians were also killed by RPF soldiers.⁷⁷ It is estimated that the RPF killed several thousand civilians, most of whom were Hutus.⁷⁸ An investigative team from the United Nations High Commissioner for Refugees ("UNHCR") concluded in late 1994 that, in the months directly following the genocide, the RPF killed "thousands of civilians per month."⁷⁹

While the number of deaths paled in comparison to the genocidal killings, certain incidents may have been a military response to the recurring incursions from ex-FAR soldiers and *Interahamwe*.⁸⁰ According to Haskell

72. ALAN J. KUPERMAN, *THE LIMITS OF HUMANITARIAN INTERVENTION: GENOCIDE IN RWANDA* 16 (2001); DES FORGES, *supra* note 1, at 770; *THE GACACA COURTS, POST-GENOCIDE JUSTICE*, *supra* note 12, at 14.

73. *APPRAISING THE CONTRIBUTION OF THE UN TRIBUNAL*, *supra* note 50, at 41.

74. Boutros Boutros-Ghali, *THE UNITED NATIONS AND RWANDA* 38 ¶ 106 (1993-1996); *Report of the Independent Inquiry into the Rwanda Genocide*, *supra* note 65, at 31-32.

75. *THE GACACA COURTS, POST-GENOCIDE JUSTICE*, *supra* note 12, at 15. *But see Rwanda's Untold Story*, BBC News (Oct. 3, 2014), <http://www.bbc.co.uk/programmes/b04kk03t>. University of Michigan academics, Professors Allan Stam and Christian Davenport allege that the RPF did not stop the genocide. *Id.* They claim that the killing of civilians had begun and ended in many locations before the RPF arrived in the area, because most of the Tutsis had either been killed or had fled. *Id.* Yet this viewpoint ostensibly ignores the fact the RPF were engaged in a war with the FAR and could not simply match the rate at which the massacres were being perpetrated. See *supra* note 3 and accompanying text; GUY VASALL-ADAMS, *RWANDA: AN AGENDA FOR INTERNATIONAL* 37 (Oxfam 1994).

76. *Id.*; *HISTORY OF A GENOCIDE*, *supra* note 2, at 298.

77. *Impunity Gap*, *supra* note 31, at 50.

78. *AFRICA'S WORLD WAR*, *supra* note 6, at 16-19; DES FORGES, *supra* note 1, at 728, 734. HRW estimated that RPF killed between 25,000 and 45,000 Hutu civilians during and immediately after the genocide. See *DRAME RWANDAIS*, *supra* note 6, at 464; *Rwanda's Untold Story*, *supra* note 75.

79. U.N. High Commissioner for Refugees, Note, *La Situation au Rwanda*, Sept. 23, 1993, *quoted in* DES FORGES, *supra* note 1, at 728.

80. This group also included deposed interim government and other high-ranking civilian and military authorities, as well as many other extremists. See U.N. Office of the

and Waldorf, “[m]any of the killings took place after the RPF had already gained control over parts of the country; they therefore cannot be explained as ‘collateral damage’ of the conflict.”⁸¹

To comprehend how the genocide was possible, key features of Rwandan history must be explored, particularly the nature of divisions between Hutus and Tutsis.

B. Historical Overview of Hutu-Tutsi Divisions

A Tutsi aristocracy emerged and ruled Rwanda in the pre-colonial period.⁸² It established a near-feudal class system, in which the Tutsis came to dominate most facets of Rwandan life while the Hutu plunged into poverty.⁸³ Magnarella described the pre-colonial period as akin to a caste system, where the Tutsis subjugated the Hutus through two main methods, *uburetwa* (*corvee* labour service and offerings of beer in return for access to land)⁸⁴ and *ubuhake* (where poor men became clients or children of a Tutsi lord, obliged to “provide a variety of services to his patron or lord, including cultivating his fields, repairing his huts and possibly giving him wives or daughters as concubines”).⁸⁵

The nature of Hutu-Tutsi relations changed drastically under colonialism and played a role in molding the circumstances that staged the Rwandan genocide.⁸⁶ The German and Belgian colonial powers were partial to the

High Commissioner for Human Rights, *Rapport du Projet Mapping concernant les violations les plus graves des droits de l'homme et du droit international humanitaire commises entre mars 1993 et juin 2003 sur le territoire de la République démocratique du Congo* [Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed Within the Territory of the Democratic Republic of the Congo Between March 1993 and June 2003] at 50 (Aug. 2010); see also LARS WALDORF, TRANSITIONAL JUSTICE AND DDR: THE CASE OF RWANDA 6 (2009); THE ICTR, *supra* note 75, at 55–58. There were several incursions in the prefectures of Ruhengeri, Gisenyi, Gitarama, Kibuye, and Kigali targeting the genocide survivors. These incursions stopped after the dismantling of refugee camps. See François-Xavier Nsanzuwera, *The ICTR Contribution to National Reconciliation*, 3 J. INT'L CRIM. JUST. 944, 948 (2005); AFRICA'S WORLD WAR, *supra* note 6, at 55.

81. *Impunity Gap*, *supra* note 31, at 50.

82. *The Background and Causes of the Genocide*, *supra* note 1, at 802–03.

83. *Id.*; CATHARINE NEWBURY, THE COHESION OF OPPRESSION CLIENTSHIP AND ETHNICITY IN RWANDA 140–41 (1988).

84. PAUL J. MAGNARELLA, JUSTICE IN AFRICA: RWANDA'S GENOCIDE, ITS COURTS AND THE UN CRIMINAL TRIBUNAL 5 (2000) [hereinafter JUSTICE IN AFRICA]; HISTORY OF A GENOCIDE, *supra* note 2, at 12–14.

85. JUSTICE IN AFRICA, *supra* note 84, at 5.

86. JONES, *supra* note 21, at 20.

Tutsi ruling monarchy and perceived their dominance as evidence of their racial superiority.⁸⁷ The colonial powers took advantage of the practice, integrating the ‘tradition’ of indentured labor into their system,⁸⁸ thereby facilitating indirect rule.⁸⁹

As Gourevitch writes, “[n]othing so vividly defined the divide [between Hutus and Tutsis] as the Belgian regime of forced labour, which required armies of Hutus to toil en masse . . . and placed Tutsis over them as taskmasters.”⁹⁰ Arguably, this sowed the seeds of resentment among the Hutus, which was later to explode into violence and brutality against Tutsis.

During the 1920-1930s, the Belgian colonial power officially demarcated the population into three groups, with the Hutus representing about 84% of the population,⁹¹ Tutsis representing about 15% and Twas representing about 1%.⁹² In line with this segregation, it became compulsory for every Rwandan citizen to carry an identity card mentioning his or her ethnicity.⁹³ This ethnic partitioning had significant consequences in all aspects of Rwandan society, with the Tutsis gaining substantial privileges.⁹⁴ Mamdani states: “racialization [. . .] was embedded in institutions, which in turn undergirded racial privilege and reproduced racial ideology.”⁹⁵

The demarcation of Rwandans into ethnic groups and the reference to ethnic background on identity cards was maintained even after Rwanda’s independence and was only abolished after the 1994 carnage.⁹⁶ During the genocide, soldiers, militias, and other killers at roadblocks systematically checked people’s identity cards and separated Tutsis from the rest for extermination.⁹⁷

87. *Id.* at 21; see WHEN VICTIMS BECOME KILLERS, *supra* note 53, at 80; see also DES FORGES, *supra* note 1, at 36–37.

88. HISTORY OF A GENOCIDE, *supra* note 2, at 25.

89. *Akayesu*, Case No. ICTR-96-4-T ¶¶ 80–82; Prosecutor v. Nahimana (The Media Case), Case No. ICTR 99-52-T, Judgment, ¶¶ 106–08 (Dec. 3, 2003); *The Background and Causes of the Genocide*, *supra* note 1, at 806; Wang, *supra* note 49, at 179–80; THE ICTR, *supra* note 75, at 49.

90. TOMORROW WE WILL BE KILLED, *supra* note 3, at 57.

91. While the Hutus made up approximately 84% of the population, they held less than 3% of the chieftain positions and around 17% “of posts in such areas as the judiciary, agriculture and veterinary services.” JUSTICE IN AFRICA, *supra* note 84, at 10.

92. DES FORGES, *supra* note 1, at 37; *The Background and Causes of the Genocide*, *supra* note 1, at 808.

93. *Akayesu*, Case No. ICTR-96-4-T ¶ 83; Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 14 (Sept. 2, 1998); *The Background and Causes of the Genocide*, *supra* note 1, at 808.

94. APPRAISING THE CONTRIBUTION OF THE UN TRIBUNAL, *supra* note 50, at 34–35.

95. WHEN VICTIMS BECOME KILLERS, *supra* note 53, at 87.

96. *Akayesu*, Case No. ICTR-96-4-T ¶ 83.

97. DES FORGES, *supra* note 1, at 212–14; *Akayesu*, Case No. ICTR-96-4-T ¶ 123. *But cf.* Burundi example, *infra* p. 137.

Some decades after the end of World War II, there was movement in Africa towards decolonization.⁹⁸ During this period, the Tutsis attempted to free themselves from colonial repression and campaigned for Rwanda's independence.⁹⁹

The Belgian colonial government quickly withdrew their backing in order to "[t]o support Hutu aspirations for a greater role in their country's affairs, believing that minority [Tutsi] rule was unsustainable and fearful of the pan-Africanist tendencies which they discerned among the Tutsi ruling class."¹⁰⁰ The consequence of Belgians' withdrawal of support for the Tutsi minority was a growing sense of Hutu empowerment.¹⁰¹ Political parties, ranging from moderates seeking political power-sharing and inclusive politics to extremists seeking political dominance on the part of either Hutus or Tutsis, were all "ethnically rather than ideologically based."¹⁰²

In 1959, the newly formed Hutu political party, the *Parti du Mouvement de l'Emancipation des Bahutu* ("PARMEHUTU"), led by Grégoire Kayibanda, mounted a successful revolt against the Tutsi *mwami*.¹⁰³ During this transition, there were widespread massacres of Tutsis in 1959 that led to a mass exodus of the Tutsi minority to neighboring countries.¹⁰⁴

Systematic killings and the massacre of Tutsis continued even after Rwanda became independent in 1962.¹⁰⁵ Brutal clampdowns on those

98. APPRAISING THE CONTRIBUTION OF THE UN TRIBUNAL, *supra* note 50, at 35.

99. *Akayesu*, Case No. ICTR-96-4-T ¶ 85.

100. GUY VASSALL-ADAMS, RWANDA: AN AGENDA FOR INTERNATIONAL ACTION 8–9 (1994), *quoted in* Wang, *supra* note 49, at 180; *see also The Background and Causes of the Genocide*, *supra* note 1, at 5; DES FORGES, *supra* note 1, at 38–39.

101. HISTORY OF A GENOCIDE, *supra* note 2, at 42–45.

102. *Akayesu*, Case No. ICTR-96-4-T ¶ 88; DES FORGES, *supra* note 1, at 38–39; *The Background and Causes of the Genocide*, *supra* note 1, at 5. There were four main political factions, namely, *Mouvement Democratique Republicain* ("MDR"), who described themselves as a Hutu grassroots movement; *Union Nationale Rwandaise* ("UNAR"), who were comprised of Tutsi monarchists; *Association pour la Promotion Sociale de la Masse* ("APROSOMA"); and *Rassemblement Democratique Rwandais* ("RADER"). These last two groups, in terms of ideology, were in between the aforementioned two factions. APROSOMA was predominantly Hutu while RADER brought together moderates from the Tutsi and Hutu elite APPRAISING THE CONTRIBUTION OF THE UN TRIBUNAL, *supra* note 50, at 36 n.37.

103. When translated, the term refers to a king.

104. Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 350–51 (1997) [hereinafter *The Trials of Concurrent Jurisdiction*]; HISTORY OF A GENOCIDE, *supra* note 2, at 51.

105. Daphna Shraga & Ralph Zacklin, *The International Criminal Tribunal for Rwanda*, 7 EUR. J. INT'L L. 501, 502 (1996) [hereinafter *Criminal Tribunal for Rwanda*].

viewed as traitors by Hutu leaders created an atmosphere of trepidation and prevented open censures of the state.¹⁰⁶ Tutsis were systematically excluded from power and some privileges.¹⁰⁷ Over the next four decades, “the cycle of violence repeated itself on many occasions,”¹⁰⁸ particularly in 1959, 1963,¹⁰⁹ 1966, 1973, 1990, 1992, 1993 and 1994.¹¹⁰

Historians have also observed the unusual and destructive levels of popular obedience towards social and political leaders in Rwanda.¹¹¹ Some argue that this culture of obedience was vital in the government’s ability to incite the Hutu population to perpetrate the 1994 genocide.¹¹² Others have contended that the lack of accountability for crimes committed by these Hutu leaders in part afforded license to those who planned, incited, and perpetrated the genocide in 1994.¹¹³

1. Divergent Views on Pre-Colonial Hutu-Tutsi Relations

There has been much discourse among scholars and commentators on the nature of the pre-colonial Hutu-Tutsi relations.¹¹⁴ It is critical that

106. THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 18.

107. *The Background and Causes of the Genocide*, *supra* note 1, at 809–10. According to Haile-Mariam, the Habyarimana government imposed a severe quota system, which limited Tutsis to 9% of school enrolment and civil service positions and prohibited them from entering the military. Yacob Haile-Mariam, *The Quest for Justice and Reconciliations: The International Criminal Tribunal for Rwanda and the Ethiopian High Court*, 22 HASTINGS INT’L & COMP. L. REV. 667, 682 (1999).

108. Wang, *supra* note 49, at 180–81; *The Background and Causes of the Genocide*, *supra* note 1, at 5–6.

109. Wang, *supra* note 49, at 180–81. By 1963, there were deaths of some 10,000 Tutsi, while an additional 130,000 fled to neighbouring countries. HISTORY OF A GENOCIDE, *supra* note 2, at 51, 56.

110. S.C. Res. 935, ¶ 55, U.N. Doc. S/1994/1405 (Dec. 9 1994); S.C. Res. 935, ¶ 55, U.N. SCOR, U.N. Docs. S/1994/1125 at 12 (Oct. 4, 1994); U.N. Econ. and Soc. Council, *Report by B.W. Ndaye, Special Repporteur, on His Mission to Rwanda From 8 to 17 April 1993*, ¶¶ 16, 27, U.N. Doc E/CN.4/1994/7/Add.1 (Aug. 11, 1993); Wang, *supra* note 49, at 180–81; THE ICTR, *supra* note 75, at 47; APPRAISING THE CONTRIBUTION OF THE UN TRIBUNAL, *supra* note 55, at 36.

111. HISTORY OF A GENOCIDE, *supra* note 2, at 54–61.

112. HISTORY OF A GENOCIDE, *supra* note 2, at 57; DES FORGES, *supra* note 1, at 44–45; Jeremy Sarkin, *The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda*, 21 HUM. RTS. Q. 767, 772 (1999); TOMORROW WE WILL BE KILLED, *supra* note 3, at 23–25; *but see infra* p. 179.

113. *See, e.g.*, Alison Des Forges, *The Ideology of Genocide*, 23 ISSUE: J. OPINION 44, 45–46 (1995); Filip Reyntjens, *Rwanda, Ten Years On: Front Genocide to Dictatorship*, 103 AFR. AFF. 177, 208 (2004); William Schabas, *Le Rwanda, le Burundi, et la Maladie d’Impunité*, in RWANDA: UN GÉNOCIDE DU XXÈME SIÈCLE 115–23 (Raymond Verdier, Emmanuel Decaux & Jean-Pierre Chrétien eds., 1995).

114. HISTORY OF A GENOCIDE, *supra* note 2, ch.1; DES FORGES, *supra* note 1, at 31–34; Catharine Newbury, *Ethnicity and the Politics of History in Rwanda*, 45 AFR. TODAY

this polemic is reconciled particularly in the context of pursuing post-conflict reconciliation.

There are two main divergent views concerning pre-colonial relations between the Hutus and Tutsis.¹¹⁵ Corey and Joireman provide a historical account from the Hutu standpoint, “insist[ing] that ethnic discord is rooted in pre-colonial history and that these previously existing divisions were merely exacerbated by changes wrought by colonial domination.”¹¹⁶ The other view argues that Hutus and Tutsis peacefully coexisted in the pre-colonial era.¹¹⁷

There is another school of thought that contends the distinction between the Hutus and Tutsis was based on lineage or lines of kinship rather than ethnicity¹¹⁸ and that persons could change from one group to another, as one became rich or poor, or even through marriage.¹¹⁹ There were also cases of “social transformation” whereby an individual changed from being classed as Tutsi to Hutu, or vice versa, depending on how many cattle heads he or she had acquired or lost.¹²⁰ The ICTR describes the classification as “sociological categorization” as opposed to “ethnic identification,”¹²¹ which virtually amounted to “a common ethnicity.”¹²² They lived together

7, 10–11 (1998) [hereinafter *Ethnicity and the Politics of History*]; JUSTICE IN AFRICA, *supra* note 84, at 307.

115. JONES, *supra* note 21, at 18–19.

116. Allison Corey & Sandra F. Joireman, *Retributive Justice: The Gacaca Courts in Rwanda*, 103 AFR. AFF. 73, 74 (2004) [hereinafter *Retributive Justice*]. Additionally there were pre-colonial Kinyarwadan proverbs that suggested the existence of ethnic stereotypes, such as “*Umututsi iyo akize aragukirana*,” which means, “When a Tutsi becomes rich, he ignores you;” “*Umuhutu ntashimwa kabiri*,” which means, “A Hutu cannot be thanked twice;” “*Inzira nguhi yamaze abana b’abatwa*,” which means, “Twas are naturally not prudent.” See generally PIERRE CREPEAU & SIMON BIZIMANA, *PAROLE ET SAGESSE: VALEURS SOCIALES DANS LES PROVERBES DU RWANDA* (1979). Further, Magnarella posits that during Rwanda’s pre-colonial period including instances of conflict between Hutus and Tutsis, particularly during the reign of Tutsi King Rwabugari (1860-1895). See *The Background and Causes of the Genocide*, *supra* note 1, at 813.

117. HISTORY OF A GENOCIDE, *supra* note 2, at 10–20, 39.

118. *Akayesu*, Case No. ICTR-96-4-T, ¶ 81; The Media Case, Case No. ICTR 99-52-T, ¶ 106.

119. *Akayesu*, Case No. ICTR-96-4-T ¶ 81; Wang, *supra* note 49, at 179.

120. Wang, *supra* note 49, at 179; *The Background and Causes of the Genocide*, *supra* note 1, at 803. Magnarella, however, advises that statistics of such kinds of ‘social transformations’ appear to be unobtainable, citing JACQUES J. MAQUET, *THE PREMISE OF INEQUALITY IN RWANDA: A STUDY OF POLITICAL RELATIONS IN A CENTRAL AFRICAN KINGDOM* 150 (1961).

121. *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgment, ¶ 35 (Sept. 2, 1998).

122. *Id.* ¶ 34.

without any territorial boundaries and intermarriage was commonplace.¹²³ Additionally, they shared the same language, culture, and traditional customs as well as the Roman Catholic/Protestant faith, which did not exist until the 1900s.¹²⁴

This theory is problematic for two reasons. First, it ignores the existence of the Twa and does not explain how they assimilated into Rwandan society or their social class. Second, the fact that two or more groups of people live in the same place and share certain traditions or customs does not necessarily mean that they have characteristics that equate to a common ethnicity. There are always subtle or obvious elements that differentiate them.

For example, Rwanda and Burundi share a similar language¹²⁵ and culture and have very similar demographics.¹²⁶ Burundi, post-independence, removed the identity card system that was introduced in Rwanda, yet it experienced mass killings in 1972 and 1993 and civil war from 1993-2005 on the basis of the ethno-political relations of the Tutsis and the Hutus.¹²⁷ Although there was no apparent basis for differentiating the two tribes, these groups were still able to identify one another.

Fundamentally, the historical record of a peaceful coexistence between the Hutus and Tutsis in Rwanda's pre-colonial history is not fully known.¹²⁸ Nevertheless, these significant differences of historical interpretations are crucial to the discourse about progressing forward after mass violence. There needs to be a reconciliation of history if the relations between the

123. HISTORY OF A GENOCIDE, *supra* note 2, at 5.

124. Vern Neufeld Redekop & Oscar Gasana, *Implication of Religious Leaders in Mimetic Structures of Violence*, J. OF RELIGION & SOC'Y ¶ 1 (Supp., Sept. 2, 2007), <http://moses.creighton.edu/JRS/pdf/2007-9.pdf> [hereinafter *Implication of Religious Leaders*]; *The Background and Causes of the Genocide*, *supra* note 1, at 807, 820.

125. Kinyarwanda is the official language of Rwanda and the Kirundi is the official language of neighbouring Burundi. Yet, these Bantu languages are very similar in most aspects and are mutually intelligible.

126. African Union, *Rwandan: The Preventable Genocide*, ¶ 3.22 (July 2000), <http://www.refworld.org/docid/4d1da8752.html> (last visited Oct. 20, 2014).

127. *Id* at ¶ 3.21–3.29, 7.32; *Heavy shelling in Burundi capital*, BBC NEWS (Apr. 18, 2008), <http://news.bbc.co.uk/2/hi/africa/7354005.stm> (last visited Oct. 20, 2014). See generally René Lemarchand, *The Burundi Genocide* in CENTURIES OF GENOCIDE: ESSAYS AND EYEWITNESS ACCOUNTS 321–37 (Samuel Totten, William S. Parsons & Israel W. Charny eds., 2004).

128. Rosemary Nagy, *Traditional Justice and Legal Pluralism*, in TRANSITIONAL CONTEXT: THE CASE OF RWANDA'S GACACA COURTS, IN RECONCILIATION(S): TRANSITIONAL JUSTICE IN POST-CONFLICT SOCIETIES 100 (Joanna R. Quinn ed., 2009); *Ethnicity and the Politics of History*, *supra* note 114, at 9–10; Bert Ingelaere, *The Gacaca Courts in Rwanda*, in TRADITIONAL JUSTICE AND RECONCILIATION AFTER VIOLENT CONFLICT: LEARNING FROM AFRICAN EXPERIENCES 25 (Luc Huyse & Mark Salter eds., 2008).

Hutus and the Tutsis are to be improved.¹²⁹ Indeed, how a society addresses its past has a major seminal effect on whether it will attain long-term peace and stability.¹³⁰ It is often said, “those who ignore their history are condemned to repeat it.”¹³¹ Mamdani states, “History teaching in schools has stopped [. . .] [b]ecause there is no agreement on what should be taught as history.”¹³²

The Rwandan government embarked on a process of truth telling through the *gacaca* courts.¹³³ It intended to provide an account of the genocide and its history, which was key to its argument that the colonialists were the cause for the ethnic tensions.¹³⁴ By insisting on this version of history and placing much of the blame on outsiders, the pathway to reconciliation would seem easier.¹³⁵ The outcome of this approach remains to be seen.

Additionally, the ICTR has recently sought to provide a definitive account of the Rwandan genocide, as told through its proceedings and judgments, as part of its mandate and completion strategy. This could provide a contextualized historical, albeit legal, account and would thus leave an enduring legacy for the Rwandan population and the international community.

C. International Context

It is important to note that beyond the failure of the international community to intervene during the genocide, there are two important contextual factors. First, the historical “international” response to mass atrocities that stemmed from the Nuremburg and Tokyo trials,¹³⁶ and second, the parallel establishment of the International Criminal Tribunal

129. A great deal of peace has been secured in Indonesia through non-truth (sometimes lies) and reconciliation—with the populace putting the horror of their past behind them and moving on. See JOHN BRAITHWAITE *ET AL.*, ANOMIE AND VIOLENCE: NON-TRUTH AND RECONCILIATION IN INDONESIAN PEACEBUILDING 42 (2010), available at <http://press.anu.edu.au/?p=19121>.

130. Jeremy Sarkin, *Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda's Approach In the New Millennium of Using Community Based Gacaca Tribunals To Deal With the Past*, 2 INT'L L. F. DU DROIT INT'L 112, 112 (2000).

131. Adapted from George Santayana, Vol. I, Reason in Common Sense, <http://www.gutenberg.org/files/15000/15000-h/vol1.html> (last visited Oct. 14 2014).

132. WHEN VICTIMS BECOME KILLERS, *supra* note 58, at 267.

133. Ingelaere, *supra* note 128, at 33–34; Nagy, *supra* note 128, at 87, 93.

134. Ingelaere, *supra* note 128, at 25; Nagy, *supra* note 128, at 99–100.

135. Nagy, *supra* note 128, at 99–100.

136. JONES, *supra* note 21, at 107; Westberg, *supra* note 33, at 342.

for Yugoslavia (“ICTY”).¹³⁷ These factors have played a major role in the path taken by the international community.

Des Forges and Longman state that “[when] the killing began, evidence of preparations for mass slaughter had been available to the UN, the United States, France and Belgium for several months.”¹³⁸ They further argued that the failure of the international community to take action produced a sense of collective guilt that was a major contributing factor in the development of the ICTR.¹³⁹ Zacklin refers to the setting up of the ICTR as “an act of political contrition.”¹⁴⁰

The creation and operation of a parallel ad hoc tribunal addressing crimes committed during the conflict in the former Yugoslavia provided a template for an ad hoc international tribunal for Rwanda.¹⁴¹ It is apparent that the ICTR would not have been created had it not been for the ICTY, which was established a year earlier.¹⁴²

III. RECONCILIATION IN THEORY

There are various kinds, levels, and dimensions of reconciliation. A key challenge for any post-conflict environment is the question of how to address a violent past with a view to creating a peaceful future. Depending on the nature and origins of the conflict, this will involve the coming together of three social entities of the opposing sides to the conflict, namely: (i) individuals, (ii) groups, and (iii) governments. In order to assess the reconciliation efforts of the Rwandan legal pluralist system, it is critical to carefully define the concept of reconciliation.

Reconciliation is at times conflated with notions of amnesty, forgiveness, healing, peace, harmony, justice, peace-making, peace-building, relationship-building, truth, apology, peaceful coexistence,

137. See S.C. Res. 827, at 2, U.N. Doc. S/RES/827 (May 25, 1993) (Establishing the ICTY and annexing its Statute); Westberg, *supra* note 33, at 342.

138. Alison Des Forges & Timothy Longman, *Legal Responses to Genocide In Rwanda, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* 51 (Eric Stover & Harvey M. Weinstein eds., 2004).

139. *Id.* at 51–52.

140. Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. OF INT’L CRIM. JUST. 541, 542 (2004) [hereinafter *The Failings of Ad Hoc International Tribunals*].

141. *Criminal Tribunal for Rwanda*, *supra* note 105, at 501; APPRAISING THE CONTRIBUTION OF THE UN TRIBUNAL FOR RWANDA, *supra* note 50, at 44.

142. See Richard J. Goldstone, Leslie Vinjamuri, Anthony Dworkin, & Professor Conor Gearty, *Do War Crime Trials Do More Harm Than Good?* (May 3, 2007). Richard Goldstone was the first chief prosecutor of the ICTY and ICTR from August 1994 to September 1996. William Schabas, *Genocide Trials and Gacaca Courts*, 3 J. INT’L CRIM. JUST. 879, 880 (2005); see also *Criminal Tribunal for Rwanda*, *supra* note 105, at 501; Payam Akhavan, *The International Criminal Tribunal for Rwanda: the Politics and Pragmatics of Punishment*, 90 AM. J. INT’L. L. 501, 502–03 (1996).

reconstruction, reconstitution, rehabilitation, and restoration.¹⁴³ In truth, none of these concepts are unequivocal, and they do not have contrasting meanings when compared to reconciliation. There have been attempts at clarification but a consensus of its meaning has proved elusive.¹⁴⁴

Yarn described reconciliation as the “renewal of applicable relations between persons who have been at variance”¹⁴⁵ and, as such, entails the restoration of social interactions and the diminution of social tension stemming from historical antagonistic events.¹⁴⁶

Kriesberg deems reconciliation to be a set of “processes by which parties that have experienced an oppressive relationship or destructive conflict with each other move to attain or to restore a relationship that they believe to be minimally acceptable.”¹⁴⁷ He further highlights the variability of forms of coexistence between two or more groups and emphasizes that reconciliation can influence the quality of the relationship.¹⁴⁸

A key related issue is whether reconciliation is a collective or individual occurrence. In her work on truth commissions, Hayner differentiated between reconciliation on the personal level, which involves healing and forgiveness, and reconciliation on the broader collective scale (i.e., national and political).¹⁴⁹ She emphasized the importance of communal acknowledgement of past conflict and violence.¹⁵⁰ Indeed, in any post-conflict environment, memory, whether it serves to remember or forget the past, is a crucial element in the process of reconciliation.¹⁵¹ Hayner also argues that truth commissions facilitate open dialogue about “past silenced or highly conflictive events” and establish a common truth about the past thereby promoting reconciliation on a broader collective scale.¹⁵² Yet, it

143. KLAUS BACHMANN, THOMAS SPARROW-BOTERO & PETER LAMBERTZ, WHEN JUSTICE MEETS POLITICS: INDEPENDENCE AND AUTONOMY OF AD HOC INTERNATIONAL CRIMINAL TRIBUNALS 291 (Jan. 1, 2013) [hereinafter WHEN JUSTICE MEETS POLITICS].

144. *Id.*

145. DOUGLAS H. YARN, DICTIONARY OF CONFLICT RESOLUTION 375 (1999).

146. THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 44.

147. Louis Kriesberg, *Changing Forms of Coexistence*, in RECONCILIATION, JUSTICE AND COEXISTENCE: THEORY AND PRACTICE 47, 48 (Mohammed Abu-Nimer ed., 2001).

148. *Id.* at 49–55.

149. PRISCILLA HAYNER, UNSPEAKABLE TRUTH: CONFRONTING STATE TERROR AND ATROCITY 155 (2001).

150. *Id.*

151. WHEN JUSTICE MEETS POLITICS, *supra* note 143, at 294.

152. PRISCILLA HAYNER, UNSPEAKABLE TRUTH: CONFRONTING STATE TERROR AND ATROCITY 154–69 (2001).

is questionable whether this top-down approach would eventually permeate down into people's everyday lives.

Rotberg states, “[i]f societies are to prevent recurrence of past atrocities and to cleanse themselves of the corrosive enduring effects of massive injuries to individuals and whole groups, societies must understand—at the deepest possible levels—what occurred and why.”¹⁵³ In this way, the contribution of the ICTR and the *gacaca* courts, as will be discussed later, can encourage the truth telling process and facilitate the establishment of documentary material that “may serve the (re-) construction of collective identities.”¹⁵⁴

According to Bar-Tal and Bennink, reconciliation is a psychological process for the formation of lasting peace.¹⁵⁵ It necessitates the transformation of beliefs, attitudes, and emotions regarding one's own group, the others, and the relationship between them.¹⁵⁶ Galtung states that reconciliation involves “the process of healing the traumas of both victims and perpetrators after violence, providing a closure of the bad relation. The process prepares the parties for relations with justice and peace.”¹⁵⁷ Brounéus contends that reconciliation is “a societal process that involves mutual acknowledgement of past suffering and changing of destructive attitudes and behavior into constructive relationships toward sustainable peace.”¹⁵⁸

Similarly, Lederach regards reconciliation as a “space for the acknowledging of the past and envisioning of the future [which] is the necessary ingredient for reframing the present.”¹⁵⁹ He endorses having a “relationship-centric” interpretation of reconciliation, the responses of which must permeate down to the level of individual interactions.¹⁶⁰

153. Robert I. Rotberg, *Truth Commissions and the Provision of Truth, Justice and Reconciliation*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 3 (Robert I. Rotberg & Dennis Thompson eds., 2000).

154. WHEN JUSTICE MEETS POLITICS, *supra* note 143, at 304.

155. Daniel Bar-Tal & Gemma H. Bennink, *The Nature of Reconciliation as an Outcome and as a Process*, in FROM CONFLICT RESOLUTION TO RECONCILIATION 11, 12–15, 36–37 (Yaacov Bar-Siman-Tov ed., 2005) (citations omitted) [hereinafter *The Nature of Reconciliation*].

156. *Id.*

157. Johan Galtung, *After Violence, Reconstruction, Reconciliation and Resolution: Coping with Visible and Invisible Effects of War and Violence*, in RECONCILIATION, JUSTICE AND COEXISTENCE: THEORY AND PRACTICE 3, 3 (Mohammed Abu-Nimer, ed., 2001).

158. KAREN BROUNÉUS, RETHINKING RECONCILIATION: CONCEPTS, METHODS, AND AN EMPIRICAL STUDY OF TRUTH TELLING AND PSYCHOLOGICAL HEALTH IN RWANDA, Paper I ¶ 2 (2008).

159. JOHN PAUL LEDERACH, BUILDING PEACE: SUSTAINABLE RECONCILIATION IN DIVIDED SOCIETIES 27 (1997).

160. John Paul Lederach, *Five Qualities of Practice in Support of Reconciliation Processes*, in FORGIVENESS AND RECONCILIATION: RELIGION, PUBLIC POLICY, AND CONFLICT TRANSFORMATION 183, 185–86 (Raymond G. Helmick & Rodney Petersen eds., 2001)

As an interim deduction, it seems clear that reconciliation is a complex term and there seems to be little consensus on its meaning.¹⁶¹ Yet, there are two recurring themes from the varying reconciliation definitions given above: (i) the transformation of social relationships, with psychological change being required individually and collectively in order to influence relationships and restore damaged associations; and (ii) generating, facing, and addressing the truth about the past. These themes are inextricably linked and, at the same time, mutually independent.

The term “reconciliation” is multifaceted, particularly because it is both an objective (i.e. something to attain) and a process (i.e. a means of realizing the objective). The objective of reconciliation is the creation of a harmonious state of affairs for the future.¹⁶² It necessitates a present-day approach, which means that all parties involved must work constructively towards the objective.¹⁶³

Reconciliation is an enduring and multifaceted endeavor, the tempo of which cannot be prescribed, forced, or rushed.¹⁶⁴ It entails the difficult adjustment to flawed realities which require changes in feelings, outlook and expectations.¹⁶⁵ It is also especially an all-encompassing process that applies to everyone, not only perpetrators and victims.¹⁶⁶

Indeed, there are broad interpretations of reconciliation that frame it as the rebuilding of both individual and collective relationships following a conflict, with the emphasis being on collaboration and communication between the polarized groups.¹⁶⁷ Reconciliation necessitates considerably more than peaceful coexistence and obliges the parties to cease acting violently toward each other.

[hereinafter *Five Qualities of Practice*]; THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 44.

161. See WHEN JUSTICE MEETS POLITICS, *supra* note 143, at 309.

162. David Bloomfield, *Reconciliation: An Introduction*, in RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK 12 (David Bloomfield, Teresa Barnes & Luc Huyse eds., 2003).

163. *Id.*

164. *Id.* at 13.

165. *Id.*

166. *Id.*

167. Phil Clark, *Hybridity, Holism and “Traditional” Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda*, 39 GEO. WASH. INT’L L. REV. 765, 770 [hereinafter *Hybridity, Holism and Traditional Justice*]; THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 44; National Unity and Reconciliation Comm’n, *Rwandan Reconciliation Barometer*, at 16–18 (Oct. 2010) [hereinafter *Rwandan Reconciliation Barometer*].

The absence of violence does not necessarily denote peace.¹⁶⁸ It may simply mean that the factions are shunning each other, thereby opting for polarization instead of restored relations.¹⁶⁹ Reconciliation necessitates the mending of damaged relations so that there can be future involvement between them.¹⁷⁰ Lederach states, “to enter reconciliation processes is to enter the domain of the internal world, the inner understandings, fears and hopes, perceptions and interpretations of the relationship itself.”¹⁷¹

The Rwandan populace experienced the genocide both individually and collectively.¹⁷² As such, the reconciliation measures must focus on the gap and interconnectivity between the individual and collective levels.¹⁷³ Reconciliation initiatives that concentrate on the collective level are inevitably ineffectual when the masses affected by conflict number in the millions. Purposeful endeavors cannot purely seek out groups of hundreds of thousands people concurrently without recognizing how the genocide was felt on the individual level. The reconciliation of individual social relationships can provide a meaningful entryway through which lasting reconciliation could be more broadly realized.¹⁷⁴

Reconciliation is therefore both a “backward-looking and forward-looking” process, which seeks to address the root causes of past conflict so as to create a more positive and constructive dynamic in the future.¹⁷⁵

In attempting to define reconciliation at this juncture, it is important to distinguish it from two terms (as noted above) with which it is often confused, peace and healing.¹⁷⁶ While both terms are fundamental to the reconciliation process and outcomes, neither term is adequate as a complete definition of reconciliation from a transitional justice perspective.

First, peace (or any of its correlated activities like peacekeeping or peacebuilding) is not same as reconciliation. It is a precondition for reconciliation and it is more than the mere absence of war and violence.¹⁷⁷ Hence, the broader peace-building objectives of stopping violence and

168. *Hybridity, Holism and Traditional Justice*, *supra* note 167, at 770; THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 44.

169. *Id.*

170. *Id.*

171. *Five Qualities of Practice*, *supra* note 160, at 185.

172. *Hybridity, Holism and Traditional Justice*, *supra* note 167, at 770.

173. *Id.*

174. Dan Sinh Nguyen Vo, *Reconciliation and Conflict Transformation*, BEYOND INTRACTABILITY (July 2008), <http://www.beyondintractability.org/casestudy/vo-reconciliation> [hereinafter *Reconciliation and Conflict Transformation*].

175. *Hybridity, Holism and Traditional Justice*, *supra* note 167, at 770; THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 45.

176. *Hybridity, Holism and Traditional Justice*, *supra* note 167, at 771.

177. Rep. of the Panel on U.N. Peace Operations, 55th Sess., ¶ 13, U.N. Doc. A/55/305-S/2000/809 (Aug. 21 2000); *Hybridity, Holism and Traditional Justice*, *supra* note 167, at 771.

preventing a future occurrence should lay a foundation on which “deeper, inter-personal, relationship-focused reconciliation” can occur.¹⁷⁸

Second, healing does not equate to reconciliation, even though the two terms are inherently linked.¹⁷⁹ It refers to the capacity of individuals and groups to mentally surmount traumatic ordeals, particularly when suffered during conflict.¹⁸⁰ Moreover, it is a crucial precondition for reconciliation.¹⁸¹

Reconciliation operates within a socio-cultural, socio-economic, and socio-political context. As such, any definition of meaningful reconciliation process, particularly concerning transitional justice in Rwanda, must recognize the unique post-conflict environment¹⁸² and the historical origins of the genocide.¹⁸³ In any event, according to Nguyen Vo, “[n]o single form of reconciliation effort is perfect or satisfactory to all circumstances and parties involved. Sometimes hard choices have to be made in deciding whether one form is preferable to another, depending on the specific and temporal circumstance of each conflict and society.”¹⁸⁴

A. Reconciliation, Conflict Resolution and Social Transformation

Reconciliation overlaps with conflict resolution and is closely linked to social transformation, particularly when it is framed in terms of its desired goals rather than an enduring process.¹⁸⁵ Conflict resolution entails the ending of undesired conflicts by focusing on the disputed subject matter initially causing the conflict, within a relatively short timeframe.¹⁸⁶ In contrast, social transformation—which is an ongoing process—when tied to reconciliation, requires that disputes be resolved by changing the focus

178. *Hybridity, Holism and Traditional Justice*, *supra* note 167, at 771; THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 45.

179. THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 45.

180. *Id.*

181. *Id.*

182. Marian Hodgkin, *Reconciliation in Rwanda: Education, History and the State*, 60 J. OF INT'L AFF. 199, 207–09 (2006).

183. *See Reconciliation and Conflict Transformation*, *supra* note 174, at Conflict Transformation and Reconciliation.

184. *Id.*

185. *Id.*

186. Herbert C. Kelman, *Reconciliation as Identity Change: A Social-Psychological Perspective*, in FROM CONFLICT RESOLUTION TO RECONCILIATION (Kindle ed., ch. 5 (Yaacov Bar-Siman-Tov ed., 2005) (citations omitted).

from the conflict itself toward the relationships undergirding the conflict, so as to generate desired outcomes.¹⁸⁷

As such, by extension, peace and conflict resolution embody the required standards for reconciliation. The role that emotion has in promoting reconciliation has been taken increasingly more seriously in the international public sphere, particularly in the last decade.¹⁸⁸

Assefa views reconciliation to be one of a number of conflict-handling mechanisms.¹⁸⁹ “The essence of reconciliation is the voluntary initiative of the conflict parties to acknowledge their responsibility and guilt [. . .] [T]he parties are not only meant to communicate one’s grievances against the actions of the adversary, but also [to] engage in self-reflection about one’s own role and behavior in the dynamic of the conflict.”¹⁹⁰

Nguyen Vo states that reconciliation is a human process to which the admission of guilt and forgiveness are central for both individual and collective healing.¹⁹¹ On the individual level, reconciliation requires a confession and repentance by the perpetrators in order to impact the victim’s psychological healing process.¹⁹² Alternatively, a confession or an apology creates a connection between the contending parties that is essential for the reconciliation to be enduring.¹⁹³

B. Politico-Legal, Discursive and the Everyday Dimensions of Reconciliation

Reconciliation is regularly credited as having a politico-legal dimension, in that it possesses a certain normative path in which it guides the political and legal affairs that may circumscribe, support, and frame it.¹⁹⁴ The core idea here is that the fortification of social equalities through *inter alia* respect for the rule of law as well as regard for political liberties, civil liberties, and social inclusiveness by political and legal institutions

187. *The Nature of Reconciliation*, *supra* note 155, ch. 1.

188. In 2000, Argentinean President Fernando de la Rúa apologized for Argentina’s indulgence of Nazi immigrants. In 2005, Japanese Prime Minister Junichiro Koizumi apologized for Japan’s aggression during World War II. One only needs to refer to the collapse of the 1993 Oslo Accords—which intended to end the conflict between Israelis and Palestinians—and the outbreak of the al-Aqsa Intifada in 2000, as tragic instances of this dynamic. See Nurit Shnabel *et al.*, *The Role of Acceptance and Empowerment in Promoting Reconciliation from the Perspective of the Needs-Based Model*, 2 SOC. ISS. & POL’Y REV. 159, 160 (2008).

189. Hizkias Assefa, *Reconciliation*, in PEACEBUILDING: A FIELD GUIDE 341 (Luc Reyhler & Thania Paffenholz eds., 2001).

190. *Id.*

191. *Reconciliation and Conflict Transformation*, *supra* note 174.

192. *Id.*

193. *Id.*

194. WHEN JUSTICE MEETS POLITICS, *supra* note 143, at 304.

should, in theory, sustain conflict resolution and thereby forestall the recurrence of hostilities.¹⁹⁵

Indeed, in the long term, the rule of law is considered to influence, shape and 'train' people's habits and inter-personal relations whether individually or collectively, which can assist reconciliation.¹⁹⁶ Yet, while a steady establishment of the rule of law into people's lives does not necessarily bring about a particular result, it must be borne in mind that legal values are not universal and should be recognized as "a product of social forces, and itself a conduit of those same forces."¹⁹⁷ As such, the law develops into a directive that permeates into the consciousness of the populace and becomes assimilated.¹⁹⁸

The influence of discussion to the generations of the populace is very dependent on the capacities for outreach into people's everyday life and practices, as well as the government's ability to penetrate into "the soil of living culture."¹⁹⁹

Rigby links reconciliation and everyday life, advocating a 'culture of reconciliation,' and claiming that it is "the only sound basis for the development of a new and resilient culture of respect for human rights and for human difference, a culture that is embodied in the everyday routines of life within the family, the school, the neighborhood, and the wider community."²⁰⁰

Indeed, this is the place where hypothetical goals and reality meet. Discourse can assist to bridge this gap, as was evident in the South African case (with its Truth and Reconciliation Committee). This was both instrumental and effective for the endorsement of reconciliation, at the grassroots level, by obliquely planting it into public consciousness with its "culture of open debate and open discussion."²⁰¹ With this in mind, it seems clear that much will depend on the ICTR and *gacaca* court's abilities to outreach and impact the populace every day.

195. *Id.*

196. *Id.* at 305.

197. Susan S. Silbey, *Legal Culture and Legal Consciousness*, in 13 INTERNATIONAL ENCYCLOPEDIA FOR THE SOCIAL AND BEHAVIOR SCIENCES 8623–24 (Neil J. Smelser & Paul B. Baltes eds., 2001).

198. WHEN JUSTICE MEETS POLITICS, *supra* note 143, at 304.

199. *Id.* at 307.

200. ANDREW RIGBY, JUSTICE AND RECONCILIATION: AFTER THE VIOLENCE 180, 183–92 (2001).

201. ANNELIES VERDOOLAEAGE, RECONCILIATION DISCOURSE: THE CASE OF THE TRUTH AND RECONCILIATION COMMISSION 17–18, 60–61 (2008).

C. Upshot: Reconciliation, A Broad Definition

From the above, it seems clear that reconciliation has a wide definition and it is not a universal or clear concept.²⁰² Reconciliation can be seen as a number of interconnected and overlapping variables that can exist in a distinctive configuration in any unique post-conflict environment. The weight attached to each variable can change over time and geography. Reconciliation can also be seen as a goal as well as a process. It can also be a long, slow, and arduous process, but every step forward is rewarded by the reinforcement of sustainable peace.

1. The Rwandan Context of Reconciliation

The historical rift between the Hutus and Tutsis significantly catalyzed the genocide.²⁰³ As such, any reconciliation efforts within Rwanda which suppress the knowledge and understanding of past events create systemic hurdles to transitional justice and, more narrowly, the role of reconciliation within such a framework.

There is seemingly no nationally accepted version of Rwanda's history.²⁰⁴ Indeed, there have been contentious versions of the events in Rwanda,²⁰⁵ differing depending on the group, whether or not they are in power at any particular stage.²⁰⁶ It is arguable that these variances in opinions could open the door to revisionism.²⁰⁷

It is clear from literature that there are differences in the way international organizations and domestic organizations define and frame reconciliation in the Rwandan context. For example, the U.N. describes the Rwandan reconciliation process more broadly in terms of: (1) the reconstruction of the Rwandan identity and (2) the balance of justice, peace, truth, and security in the nation.²⁰⁸

202. *Supra* section III., III.A. and III.B.; *see also* WHEN JUSTICE MEETS POLITICS, *supra* note 143, at 309.

203. *Supra* sections II.A. and II.B.

204. *Supra* section II.B.1.

205. *See e.g.*, Marie Beatrice Umutesi, *Is Reconciliation Between Hutus and Tutsis Possible?*, 60 J. INT'L AFF. 157, 164–65 (2006).

206. HISTORY OF A GENOCIDE, *supra* note 2, at 80. Typically, in societies reliant on oral traditions, the dominant group determines which version of history is conveyed. As Temple-Raston noted, “[h]istory in Rwanda has always been malleable, growing out of story lines of one’s own choosing. If one was Hutu, then the heroes were Hutu. If one was Tutsi, the opposite is true. In that story-telling, that exaggeration and embellishment came the seeds of conflict.” TEMPLE-RASTON, *supra* note 48, at 17.

207. *See e.g.*, INTERNATIONAL CRISIS GROUP, END OF TRANSITION IN RWANDA: A NECESSARY POLITICAL LIBERALISATION, AFRICA REPORT N°53, 16–18 (Nov. 13, 2002).

208. U.N., *Background Information on the Justice and Reconciliation Process in Rwanda*, <http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml> (last visited Sept. 23, 2014).

The Rwandan government created the National Unity and Reconciliation Commission (“NURC”) in March 1999 and gave them the broad mandate of promoting and nurturing reconciliation among Rwandans.²⁰⁹ NURC has been seeking public opinion through surveys on various aspects of social cohesion since 2002.²¹⁰ Specifically, it frames reconciliation on a domestic level, positing that reconciliation in Rwanda is informed by six variables: political culture, human security, citizenship and identity, transitional justice, historical understanding, and social cohesion.²¹¹

Political culture is essential to reconciliation in Rwanda, particularly in light of possible suspicions emanating from the fact from the former regime’s role in endorsing the genocide.²¹² Citizens must view their political leaders as both legitimate and effectual.²¹³ Commitment to national reconciliation processes, including those relative to transitional justice, is dependent upon the feeling of material, physical, and cultural security.²¹⁴ Further, there is a realization that socio-economic pressures were also instrumental to the genocide’s origin.²¹⁵ The “conditions of scarcity,” which predated the genocide, aggravated, and magnified the deeply-entrenched ethnic frictions.²¹⁶

Restructuring Rwanda’s national identity is widely framed as a key component of the reconciliation process by primarily domestic sources.²¹⁷ The NURC implicitly points out that this area of reconciliation is inherently problematic.²¹⁸ In a quantitative survey of over 3,000 Rwandan citizens from across cultural boundaries, more than 97% underscored the importance

209. NURC was created by Organic Law N° 03/1999 of Mar. 12, 1999. This was later amended under Law Organic Law N° 35/2002 of Nov. 14, 2002. NURC, *Background of the National Unity and Reconciliation Commission*, <http://www.nurc.gov.rw/index.php?id=83> (last visited Oct. 15, 2014).

210. NURC, *Social Cohesion in Rwanda—An Opinion Survey, Results Survey 2005-2007*, NURC.GOV 1 (March 2008) (on file with author) [hereinafter *Social Cohesion in Rwanda*].

211. *Rwandan Reconciliation Barometer*, *supra* note 167, at 86.

212. *Id.* at 9–10, 32.

213. *Id.* at 9–10.

214. *Id.* at 10.

215. *The Background and Causes of the Genocide*, *supra* note 1, at 817–18; Moise Jean, *The Rwandan Genocide: The True Motivations for Mass Killings*, 1 EMORY ENDEAVORS IN WORLD HIST. 1, 6–7 (2007).

216. *Rwandan Reconciliation Barometer*, *supra* note 167, at 10; *The Background and Causes of the Genocide*, *supra* note 1, at 817–21.

217. Hodgkin, *supra* note 182, at 203; *Rwandan Reconciliation Barometer*, *supra* note 167, at 10.

218. *Rwandan Reconciliation Barometer*, *supra* note 167, at 53–54.

of having a national identity and national values.²¹⁹ However, many participants concurrently thought that any reference to ethnicity or ethnic groups was proscribed in Rwanda.²²⁰ Understanding the past and confronting the sources of historical social divisions that informed the genocide is critical to reconciliation in Rwanda and could, “if conducted well, [. . .] further social reconstruction and cohesion.”²²¹

The NURC posits that, if the conflicting groups believe they have received justice, they will support and more meaningfully facilitate reconciliation in the nation.²²² Social cohesion would therefore be produced by the trust, nurtured by justice, with the positive development of inter-ethnic relationships crucial to the reconciliation process.²²³

While the NURC recognizes that reconciliation is both a process and an objective, it presents the following principles as reinforcing the key aim of unity and reconciliation:²²⁴

- The promotion of the Rwandan identity and placement of national interests before those related to ethnicity;
- The fundamental countering of genocide ideology;
- Nation-building governed by rule of law and human rights respect;
- The countering of any type of discrimination;
- The promotion of synergy in the nation building process;
- The healing of psychological and psychosocial wounds whilst telling the truth regarding genocide events and promoting forgiveness and repentance;
- The commitment to never allowing events similar to those which occurred in 1994 to happen again; and
- The mutual striving for self-determination and passion regarding work.

Additional responsibilities in this regard also include:²²⁵

219. *Id.* at 10, 24.

220. *Id.* at 10, 54–57.

221. Hodgkin, *supra* note 182, at 200. The term “social cohesion” is commonly defined as “the glue that bonds society together.” It necessitates that individuals in society “feel a sense of belonging and identify with a collective identity” with individuals trusting each other and working together toward mutual goals or satisfying emotional needs. *Social Cohesion in Rwanda*, *supra* note 210, at 1–2.

222. *Rwandan Reconciliation Barometer*, *supra* note 167, at 11, 60–71.

223. *Id.* at 11, 71–86.

224. *Id.* at 19.

225. *Ingando*, RWANDAPEDIA, <http://www.rwandapedia.rw/explore/ingando> (last visited Oct. 20, 2014).

- Contributing to the design and coordination of national programs for the promotion of unity and reconciliation;
- Putting in place and developing mechanisms aimed at restoring and strengthening reconciliation;
- Mobilizing and raising awareness among Rwandans on questions related to unity and reconciliation;
- Conducting research, organizing conferences and debates, sharing information and publishing documents about peace, unity, and national reconciliation;
- Consulting on activities aimed at fighting divisionism within the Rwandan society and strengthening unity and reconciliation;
- Reporting and fighting against any act, written document, or any statement aimed at spreading any form of divisionism or xenophobia;
- Drafting each year, and as often as necessary reports on unity and national reconciliation;
- Follow-up on how public and private institutions, civil society, authorities, and Rwandans in general, understand unity and national reconciliation principles and policies.

It seems ostensible that both perspectives ignore economic and political barriers to reconciliation in varying degrees. International perceptions of reconciliation are ostensibly tied to retributive justice and may have prevented the efficacy of reconciliation in Rwanda. Moreover, the economic assistance of the U.N. and Western nations may have also inadvertently diminished the autonomy of the Rwandan people in the reconciliation process.²²⁶

The NURC's report does not explicitly forge connections between the human variables (as mentioned in sections 3.0 and 3.0.1) and reconciliation, with apology particularly being absent from their report. Yet, it does point out the part that forgiveness and healing play as indicators of transitional justice efficacy.²²⁷ The notion of forgiveness, however, can be more divisive than healing, particularly if any discourse of forgiveness will require sacrificing retributive justice.²²⁸

226. See Jeffrey H. Powell, *Amnesty, Reintegration, and Reconciliation in Rwanda*, 5 MIL. REV. 84, 89 (2008).

227. *Rwandan Reconciliation Barometer*, *supra* note 167, at 70, 88.

228. See THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 40–41; see also Jean Baptiste Kayigamba, *Without Justice, No Reconciliation: A Survivor's*

Some have argued that any discourse of forgiveness will demand sacrificing punitive or deterrent justice.²²⁹ Some have also argued that forgiveness will involve survivors being coerced to overlook the crimes committed and accept a plea to let go of their suffering.²³⁰

Yet, the role that emotion has in promoting reconciliation has been taken increasingly more seriously in the international public sphere, particularly in the last decade.²³¹ Both the healing and relationship-building elements of the human aspect are required for effective reconciliation.

Equally central to the social transformation process are the constituents of truth and reparations. As regards truth, Clark identifies three components namely: truth-telling, truth-hearing and truth-shaping.²³² The aim of these components is the creation and nurturing of a safe environment within which both victims and perpetrators can discuss their experiences openly and without fear.²³³

In order for social transformation to occur long-term, reconciliation must recognize the human aspects and processes of apology, forgiveness, and healing. However, the Rwandan context has atypical socio-cultural and socio-economic factors that prevent the incorporation of apology, forgiveness, and healing within the ICTR process and, to a limited extent, *gacaca* court systems.

IV. LEGAL PLURALISM

Legal pluralism is scarcely considered in the context of transitional justice.²³⁴ The African continent is perhaps a current example of a live

Experience, in AFTER GENOCIDE: TRANSITIONAL JUSTICE, POST-CONFLICT RECONSTRUCTION AND RECONCILIATION IN RWANDA AND BEYOND 33–42 (Phil Clark & Zachary D. Kaufman eds., 2009).

229. See THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 42–43; see also Kayigamba; *supra* note 228, at 33–42.

230. *Id.*

231. In 1998, the former U.N. Secretary-General Kofi Annan and former U.S. president Bill Clinton apologized for failing to prevent the Rwandan genocide. In 2000, Argentinean President Fernando de la Rúa apologized for Argentina's indulgence of Nazi immigrants. In 2005, Japanese Prime Minister Junichiro Koizumi apologized for Japan's aggression during World War II. One only needs to refer to the collapse of the 1993 Oslo Accords—which intended to end the conflict between Israelis and Palestinians—and the outbreak of the al-Aqsa Intifada in 2000, as tragic instances of this dynamic. See Nurit Shnabel, *The Role of Acceptance and Empowerment in Promoting Reconciliation from the Perspective of the Needs-Based Model*, 2 SOC. ISSUES & POL'Y REV. 159, 160 (2008).

232. See THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 34.

233. See *Reconciliation and Conflict Transformation*, *supra* note 174.

234. Nagy, *supra* note 128, at 89.

laboratory of effectual legal pluralism.²³⁵ It can allow for a different reading of legal pluralism and provide solutions for post-conflict environments.

A distinction would have to be made between what Merry²³⁶ terms as “classic legal pluralism,” which originates from historical and anthropological studies of the relationship between colonial power and the ‘indigenous’ colonized state, and “new legal pluralism,” which relates to the “complex and interactive ordering between official and unofficial forms of ordering.”²³⁷ Regarding the latter form of legal pluralism, the notion of a normative order and the centrality of the state as the source of legitimate rule is questionable, as it is not the only ‘correct’ way of regulating and adjudicating issues.²³⁸

Legal pluralism in this sense can encompass non-government forces of social control such as religious or customary courts, multicultural polices, or codification of customary law.²³⁹ In terms of globalization, legal pluralism alludes to an array of state, intrastate, transnational, and international legal orders.²⁴⁰ In truth, legal pluralism crosses colonialism and globalization, focusing on the interactions between dominant and subordinate groups.²⁴¹ This Article concentrates on the ‘classic’ legal pluralism.

Griffiths describes legal pluralism as a situation “in which law and legal institutions are not all subsumable within one ‘system’ but have their sources in the self-regulatory activities of all the multifarious social fields present, activities which may support, complement, ignore or frustrate one another [. . .].”²⁴² The term ‘legal pluralism’ was first employed to describe the connections between formal colonial law and informal traditional/customary practices and formal colonial law,²⁴³ which could

235. Jacques Frémont, *Legal Pluralism, Customary Law and Human Rights in Francophone African Countries*, 40 VICTORIA UNIV. WELLINGTON L. REV. 149 (2009).

236. Sally Engle Merry, *Legal Pluralism*, 22 L. SOC'Y & REV. 869, 872–74 (1988) [hereinafter *Legal Pluralism*].

237. Nagy, *supra* note 128, at 89.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. Griffiths, *supra* note 19, at 39.

243. Filip Reyntjens, *The Development of the Dual Legal System in former Belgian Central Africa (Zaire-Rwanda-Burundi)*, in EUROPEAN EXPANSION AND LAW 111–27 (Wolfgang J. Mommsen & Jaap A. de Moor eds., 1992) [hereinafter *Dual Legal System*]; *Mass Justice for Mass Atrocity*, *supra* note 4, 10–11.

be viewed as a feature of the universal process of ‘modernization’ established by the colonial powers.

The colonial rulers imposed their laws on the colonized state, believing that it would replace their traditional/customary practices in due time.²⁴⁴ As such, the context of legal pluralism was assumed to be temporal in nature, although the laws were largely dispensed along racial lines, with the colonial laws for white citizens and customary laws for the indigenous residents.²⁴⁵ Moreover, traditional/customary practices were deemed to be hindrances to national development and this view persisted even after independence.²⁴⁶

After independence, the subsequent governments sought to end legal pluralism and unify national practices, but this was met with strong resistance.²⁴⁷ As a result, some aspects of pluralism and pre-colonial oral customary law remained untouched and others were codified²⁴⁸ to invariable written laws. Yet, most of these written laws did not capture all traditional/customary justice enmeshed in the practices of everyday life of individuals and groups.²⁴⁹

In truth, traditional/customary justice systems are adaptable and can change as their socio-cultural, political, and economic situations change. This highlights a distinction between the informal traditional justice systems and formal systems: the traditional/customary justice systems are able to adapt much more quickly and naturally than formal justice systems, which can change, but at a slower pace since it necessitates the modification of laws.

Additionally, traditional/customary justice systems tend to have a number of other characteristics, namely, a focus on groups rather than individuals; a goal of cooperation, compromise, and communal harmony; and an emphasis on restitution over other forms of punishment.²⁵⁰

244. *Dual Legal System*, *supra* note 243.

245. *Id.*, Nagy, *supra* note 128, at 89.

246. *Mass Justice for Mass Atrocity*, *supra* note 4, at 11; *Legal Pluralism*, *supra* note 236, at 871–72.

247. *Dual Legal System*, *supra* note 243.

248. *Id.*

249. *Mass Justice for Mass Atrocity*, *supra* note 4, at 4.

250. PENAL REFORM INT'L, ACCESS TO JUSTICE IN SUB-SAHARAN AFRICA: THE ROLE OF TRADITIONAL AND INFORMAL JUSTICE SYSTEMS 9 (2000) [hereinafter ACCESS TO JUSTICE IN SUB-SAHARAN AFRICA].

A. Historical Legal Pluralism in Rwanda

Germany was the first colonial power to occupy Rwanda, from 1896 until 1916 and did not attempt to get in the way of Rwandan society.²⁵¹ Hence, during this period *gacaca* remained unaffected.²⁵² But this came to an end when Rwanda was officially transferred to the Belgians in 1919, which is when the distinctions between Hutu, Tutsi and Twa became ensconced.²⁵³ Rwanda was already an existing well-organized kingdom and, as such, the Belgians chose a system of indirect rule. This meant that all the native arrangements were left untouched.²⁵⁴

The Belgians wielded more impact than the Germans.²⁵⁵ While they never interfered with *gacaca* directly, their approach towards the customary administrative and legal system weakened the operations of the old-style *gacaca*. The kings, who were the heads of the traditional justice system, and the chiefs of Rwanda were reduced to lower-level players with limited power.²⁵⁶

Additionally, the Belgian authorities further undermined Rwanda's traditional justice system by foisting written laws and western-style courts on the population.²⁵⁷ And while the *gacaca* courts subsisted, their adjudicating powers were removed, were placed under their control, and were organized in accordance with a strict hierarchy system that had never been known before.²⁵⁸ The western courts were the only courts authorized to judge in penal cases—with the *gacaca* courts only permitted to deal with civil cases.²⁵⁹ Yet, despite their officious and interventionist approaches, the Belgian colonial administration made no real formal attempts to harmonize the tradition/customary laws with their formal state laws.²⁶⁰

After the Hutu social revolution in 1959 and independence in 1962, the relations of domination changed.²⁶¹ Rwanda's post-colonial government,

251. ARTHUR MOLENAAR, GACACA: GRASSROOTS JUSTICE AFTER GENOCIDE: THE KEY TO RECONCILIATION IN RWANDA? 17 (2005).

252. *Id.*

253. *Id.* at 18–19.

254. *Id.* at 18.

255. *Id.* at 17.

256. *Id.*

257. *Id.* at 18.

258. *Id.*

259. *Id.*

260. *Dual Legal System*, *supra* note 243.

261. Molenaar, *supra* note 251, at 19–20.

consisting of Hutu leaders, attempted to establish legislative accord.²⁶² They linked pre-colonial traditions with the domination of the Tutsi-aristocracy; the first independent governments showed no interest in keeping and maintaining past legal values.²⁶³ They imposed strict restrictions on traditional justice and declared it as lesser and substandard to written law.²⁶⁴

Nevertheless, *gacaca* remained an important part of the legal landscape, although it lost some features that are characteristic of traditional/customary justice systems, such as its flexibility.²⁶⁵ This was partly because approximately 95% of the populace were engaged in agriculture, which was an area where traditional justice was firmly established.²⁶⁶ It was also partly because the official courts were burdened with a lot of cases.²⁶⁷ As such, the government was compelled to make use of the old-style *gacaca* to ease the burden on the domestic courts.

B. Divergent Views on Legal Pluralism

A majority of post-colonial states have shifted towards a unified system or laws or some form of dual codification with a bill of rights.²⁶⁸ In some countries, traditional/customary practices still persist in certain areas of family, marriage, inheritance, and property.²⁶⁹ Indeed, where traditional/customary practices are authorized by the government, it may signify a change from colonial rule towards an African way of doing things.²⁷⁰

It is not the intention to create the very simplistic and somewhat naïve discussion of cultural relativism and universalism. Yet, two key perspectives need to be outlined. First, given the historical background of many countries like Rwanda, we need to be cautious of, as Mamdani contends, the frequency of traditional/customary law being replicated as

262. *Id.* at 19.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. Nagy, *supra* note 128, at 91.

269. *Id.* For example, Tanzania—in addition to the following sources of law, namely: the Constitution; Statutes; Case Law; Received Laws and International laws and treaties, it also has Customary and Islamic laws. The Customary law can only take effect when it does not conflict with statutory law. Whereas Islamic law is only applicable to Muslims and the courts are empowered to apply Islamic law to matters of succession in communities that generally follow Islamic law in matters of personal status and inheritance (as per under the Judicature and Applications of Laws Act [2002]). See Bahame Tom Nyanduga & Christabel Manning, *Guide to Tanzanian Legal System and Legal Research*, <http://www.nyulawglobal.org/globalex/Tanzania.htm> (last visited Oct. 16, 2014).

270. Nagy, *supra* note 128, at 90.

authentic tradition and how tradition in a post-colonial African state becomes “a test” or an assessment of rights, justice, and entitlements.²⁷¹ Additionally, many of the traditional/customary practices are viewed as oppressive and, at times, harsh.²⁷²

Secondly, and conversely, one also needs to be circumspect about censures (particularly internationally), of traditional/customary practices, which are often grounded in human rights discourse.²⁷³ It is important to remember that, similar to arguments for colonization in the past, human rights can operate as the new standard of advancement based on Western systems with, as Merry states, culture replacing race as a subtle differentiating marker in the post-colonial era.²⁷⁴

Moreover, Mutua states that the human rights body of law is situated as “savior” to the “savagery” of non-Western culture for an archetypal “non-white, passive victim.”²⁷⁵ In reality, very few societies that can be viewed as remote because of globalization. Additionally, human rights notions are increasingly permeating the cognizance of the population.²⁷⁶

As mentioned in first section, the Rwandan post-conflict legal landscape has a type of legal pluralism that features the ICTR and the *gacaca* courts.²⁷⁷ The next section articulates how each of the two transitional justice mechanisms have facilitated reconciliation, with particular emphasis on how the legal pluralist system has cultivated or precluded outlined reconciliation goals.

V. THE ICTR, *GACACA* COURTS, LEGAL PLURALISM AND RECONCILIATION IN RWANDA

A. *The ICTR—Reconciliation Processes and Outcomes*

UNSC Resolution 955 sanctioned the establishment of the ICTR in 1994 and referred its principal aims, which are: “[to] contribute to ensuring

271. Mahmood Mamdani, *Beyond Settler and Native as Political Identities: Overcoming the Political Legacy of Colonialism*, 43 COMP. STUD. SOC'Y & HIST. 651, 657 (2001); Nagy, *supra* note 128, at 91.

272. Nagy, *supra* note 128, at 91.

273. *Id.*

274. Sally Engle Merry, *From Law and Colonialism to Law and Globalization*, 28 L. SOC'Y & INQUIRY. 569–71, 578–83 (2003); Nagy, *supra* note 128, at 91.

275. Makau W. Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L. J. 201, 207–08 (2001); Nagy, *supra* note 128, at 91.

276. Nagy, *supra* note 128, at 91.

277. *But see supra* note 25.

that such violations are halted and effectively redressed” thereby “contribut[ing] to the process of national reconciliation and to the restoration and maintenance of peace Rwanda.”²⁷⁸

The ICTR commenced its first case in 1997²⁷⁹ and since then it has been subject to several criticisms, particularly with regards to efficiency and cost.²⁸⁰ It has also been criticized²⁸¹ for not achieving its mandate promptly enough.²⁸² The ICTR has thus far completed 56 cases,²⁸³ acquitted 12 detainees, released two detainees,²⁸⁴ and has no trials currently in progress.²⁸⁵ It has released seven detainees after completion of their sentences.²⁸⁶ It also has 7 additional cases on appeal²⁸⁷ and has transferred 10 cases to national jurisdiction.²⁸⁸ There are nine accused still at large.²⁸⁹

Many also consider it an expensive entity.²⁹⁰ For example, in the 2010 and 2011 biennial budget, the ICTR had the U.N. approve a gross budget of \$245,295,800.²⁹¹ For comparison, this figure represents approximately

278. S.C. Res. 955, *supra* note 20.

279. *See generally Akayesu*, Case No. ICTR-96-4-T.

280. *See e.g.*, Westberg, *supra* note 33, at 359–62.

281. *See* President of the Int’l Criminal Tribunal for Rwanda, Rep. of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994, transmitted by Note of the Security-General, U.N. Doc A/53/429-S/1998/857 (Sept. 23, 1998); *see also* Will Ross, *Rwanda Genocide: Did Bizimungu Trial Take Too Long?*, BBC NEWS (May 17, 2011), <http://www.bbc.co.uk/news/world-africa-13434232>.

282. One only needs to refer to the cases of *Nyiramasuhuko* and *Ndindiliyimana* as examples of lengthy trial proceedings, with both lasting in excess of 10 years. Prosecutor v. *Nyiramasuhuko*, Case No. ICTR-98-42-T, T Judgment, 1469-1519 (June 24, 2011); Prosecutor v. *Ndindiliyimana*, Case No. ICTR-00-56-T, Judgment, 517–40 (May 17, 2011).

283. *See ICTR Status of Cases*, *supra* note 39. “Completed cases” refers to the cases against individuals that have gone through the trial and appeal processes and have resulted in convictions. Contrary to the webpage, a number of cases have since been completed. The cases of Édouard Karemera and Matthieu Ndirumpatse; Ildéphonse Nizeyimana; and Callixte Nzabonimana were completed on 29 September 2014. *See ICTR Appeals Chamber Delivers Judgements in Three Cases*, ICTR, <http://www.unictr.org/tabid/155/Default.aspx?id=1423> (Oct. 14, 2014).

284. Their indictment was withdrawn. *See ICTR Status of Cases*, *supra* note 39.

285. *Id.*

286. *Id.*

287. Included in this number is the case of Augustin Ndirabatware is now being handled by the MICT (Arusha Branch), which is a residual mechanism that was established to conclude the ICTR’s remaining tasks. *See* MICT, <http://unmict.org/about.html> (last visited July 5, 2014).

288. *See ICTR Status of Cases*, *supra* note 39.

289. *Id.*

290. *See e.g.*, *The Failings of Ad Hoc International Tribunals*, *supra* note 140, at 544–45; Westberg, *supra* note 33, at 344–45, 360.

291. *General Information*, ICTR, <http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (last visited Oct. 20, 2014) [hereinafter *ICTR General Information*].

15% of Rwanda's estimated total national expenditures in 2011.²⁹² Indeed, the total estimated cost of the *gacaca* courts during its operation is over 29 billion Rwanda Francs,²⁹³ which equates to approximately \$43,224,490.²⁹⁴ In contrast, since its commencement in 1994 until 2008, the ICTR has run at a total cost of approximately \$1.1 billion.²⁹⁵

The source of the delays is, in part, because of the complications involved in prosecuting international crimes. When the ICTR took on its first cases, it was a growing criminal court. Its establishment from the ground up was a challenging assignment and until it became familiar with its work, it was unable to process cases as efficiently as well-established tribunals and domestic judicial systems. Additionally, in its early stages, it encountered a number of physical, financial, legal, and procedural impediments that led to delays.²⁹⁶ Further, the ICTR has served as an unprecedented entity that has provided groundbreaking justice and has shaped the future of international post-conflict platforms.²⁹⁷

The goal of national reconciliation in Resolution 955 is broad and somewhat daunting, particularly because in their resolution, the UNSC did not address it or offer guidance on how it was to be attained.²⁹⁸ It seems that an ordinary comprehension of reconciliation may have been presupposed, with a suggestion of a legalistic understanding of reconciliation, but this cannot be verified with any certainty. Yet, fundamentally, national

292. Rwanda's estimated expenditures in 2012 totaled approximately \$1.91 billion. See *The World Factbook: Rwanda*, Central Intelligence Agency, <https://www.cia.gov/library/publications/the-world-factbook/geos/rw.html> (last visited Oct. 1, 2014).

293. See *Interview with the Executive Secretary of National Gacaca Service Domithile Mukantaganzwa on the eve of closing of Gacaca Courts*, GOV'T OF RWANDA, <http://www.gov.rw/Interview-with-the-Executive-Secretary-of-National-Gacaca-Service-Domithile-Mukantaganzwa-at-the-eve-of-closing-of-Gacaca-Courts> (last visited Oct. 19, 2014).

294. *Id.* Gacaca's cost of operation is estimated to be 29,652,000,000 Rwandan Francs. The currency was converted using XE Universal Currency Converter, *available at* <http://www.xe.com> (last visited Oct. 20, 2014).

295. Westberg, *supra* note 33, at 345.

296. For example, the ICTR had experienced staffing problems when trying to recruit attorneys, investigators, and other professionals who were fluent in both English and French, for the Office of the Prosecutor. Louise Arbour, *The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Goals and Results*, 3 HOFSTRA L. & POL'Y SYMPOSIUM 37, 42 (1999).

297. APPRAISING THE CONTRIBUTION OF THE UN TRIBUNAL, *supra* note 50, at 270–71.

298. The Czech Republic representative, in the UNSC debate over Resolution 955, argued that the ICTR “is hardly designed as a vehicle for reconciliation. . . . but reconciliation is much more complicated process.” *SC Verbatim Record 3453*, *supra* note 2, at 7.

reconciliation is an internal domestic process. The ICTR, therefore, represents an international endeavor to forge national reconciliation “. . . as an ancillary contribution to its main judicial function of trying the cases before it.”²⁹⁹

The ICTR is governed by its own Statute, which is annexed to Resolution 955³⁰⁰ and yet there is no mention of reconciliation therein.³⁰¹ Some commentators like, Paradelle *et al.* have highlighted this discrepancy, emphasizing that the statute structures and organizes the functioning of the tribunal, especially in regard to, *inter alia*, defining the crimes, sanctions, penal responsibilities, various procedures, and the rights of the accused/convicted.³⁰² Indeed, if reconciliation was a vital and key aspect of the Tribunal’s mandate, then why was it not explicitly in the statute? This contrasts with the report of the TRC, which clearly explained, in the instructions to the commission, what the members should keep in mind while attempting to improve reconciliation in the country.³⁰³

It seems apparent that the term reconciliation connoted “the fight against impunity and the introduction of the rule of law” when the ICTR was established, which in turn “served to legitimize” its genesis.³⁰⁴

Any lasting legacy left by the Tribunal pertaining to reconciliation in Rwanda is largely limited to its judicial efforts.³⁰⁵ However, thus far it seems apparent that reconciliation has not played any significant part in judgments by the trial and appeal chambers that have been pronounced at the time of writing.³⁰⁶ Generally, the notion of reconciliation is not

299. Conference on Challenging Impunity, Kigali, Rwanda, Nov. 7–8, 2006, *The ICTR Outreach Program: Integrating Justice and Reconciliation*, 1.

300. See generally S.C. Res. 955, *supra* note 20, Annex.

301. *Id.*

302. Murielle Paradelle, Hélène Dumont & Anne-Marie Boisvert, *Quelle justice pour quelle réconciliation? Le Tribunal pénal international pour le Rwanda et le jugement du génocide*, 50 MCGILL L.J. 359, 367 (2005) [hereinafter *Quelle justice*].

303. See 1 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 110 (1998), available at <http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf>, quoted in RECONCILIATION DISCOURSE, *supra* note 201, at 60; WHEN JUSTICE MEETS POLITICS, *supra* note 143, at 322.

304. WHEN JUSTICE MEETS POLITICS, *supra* note 143, at 325–26.

305. See S.C. Res. 955, *supra* note 20, at Annex, art. 1; see also Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 32 (June 1, 2000) (“The objective in creating the Tribunal is to prosecute and punish the perpetrators of the atrocities in Rwanda, to put an end to impunity and thereby to promote national reconciliation and restoration of peace.”); Prosecutor v. Serushago, Case No. ICTR-98-39-S, Sentence, ¶ 19 (Feb. 5, 1999) (“The objective was to prosecute and punish the perpetrators of the atrocities in Rwanda in such a way as to put an end to impunity and thereby to promote national reconciliation and the restoration of peace.”).

306. WHEN JUSTICE MEETS POLITICS, *supra* note 143, at 326, 337.

referred to or mentioned.³⁰⁷ If it does appear, it makes 'direct or indirect reference' to Resolution 955.³⁰⁸

The Trial Chamber in the *Media Case* judgment recalled that its primary rationale for holding individuals accountable for their conduct was the intent to "contribute to the process of national reconciliation and to the restoration and maintenance of peace. Justice should serve as the beginning of the end of the cycle of violence that has taken so many lives, Tutsi and Hutu, in Rwanda."³⁰⁹

In *Akayesu*, the Trial Chamber pointed out the equation between ending impunity and national reconciliation:

In resolution 955 of 8 November, 1994 which was passed by the Council in this connection clearly indicates that the aim of the establishment of the Tribunal was to prosecute and punish the perpetrators of the atrocities in Rwanda in such a way as to put an end to impunity and thereby to promote national reconciliation and the restoration of peace. It is therefore clear that the penalties imposed on accused persons found guilty by the Tribunal must be directed on the one hand attri—tribution (sic) of said accused who must see their crime punished and on the other hand as deterrence, namely dissuading for good those who will be tempted in future to perpetrate such atrocities by showing them that the International community was no longer ready to tolerate serious violations of International humanitarian law and human rights.³¹⁰

Similarly in *Rutaganda*:

In determining the sentence, the Chamber shall be mindful of the fact that this Tribunal was established by the Security Council pursuant to Chapter VII of the Charter of the United Nations within the context of measures the Council was empowered to take under Article 39 of the said Charter to ensure that violations of international humanitarian law in Rwanda in 1994 were halted and effectively redressed. The objective was to prosecute and punish the perpetrators of the atrocities in Rwanda in such a way as to put an end to impunity and thereby to promote national reconciliation and the restoration of peace. That said, it is clear that the penalties imposed on accused persons found guilty by the Tribunal must be directed, on the one hand, at retribution of the said accused, who must see their crimes punished, and over and above that, on other hand, at deterrence, namely to dissuade forever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights.³¹¹

307. *Id.*

308. *Id.* at 326.

309. The *Media Case*, Case No. ICTR-99-52-T, ¶ 109; S.C. Res. 955, *supra* note 20.

310. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Sentence, ¶ 8 (Oct. 2, 1998).

311. Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, ¶¶ 454–55 (Dec. 6, 1999).

While the authors of these statements seem to presuppose the reader's familiarity with the complex hypotheses behind the varied definitions of reconciliation, it seems clear they believe reconciliation and peace can be attained through prosecution, retribution and deterrence.³¹² It is also clear that prosecution and punishment are objectives per se.³¹³ Deterrence in this context represents an end to impunity, which is very much connected to the consolidation of the rule of law, both national and international.³¹⁴ Yet, the statements are vague in that they lack specificity regarding the connection between the two concepts. As discussed further below, the deterrent effect of international trials, like the ICTR, is doubtful.³¹⁵

The guilty pleas and confessions given by some of the accused at the ICTR might be viewed as contributing to reconciliation in Rwanda—although its reconciliatory impact is difficult to measure. Moreover, it is rarely expounded how exactly the connection of reconciliation and mitigation of sentences should be comprehended.³¹⁶ The problem may stem from the conceptual vagueness of the term and is not helped by the fact that other notions often appear alongside reconciliation—and at times imply that it may mean something else. For example, in the case of *Semanza*, the Trial Chamber stated:

Having found the Accused guilty, the Chamber now turns to the question of sentencing. The appropriate sentence serves to further the goals of retribution, deterrence, stigmatisation, rehabilitation, protection of society and national reconciliation.³¹⁷

To date, eight out of 75 indictees³¹⁸ have pled guilty after entering into plea agreements with the ICTR Prosecutor.³¹⁹ Some, like Paradelle *et al.*, have argued that the ICTR treated these events as small-scale reconciliation occasions and, as such, missed numerous opportunities to publicly

312. WHEN JUSTICE MEETS POLITICS, *supra* note 143, at 327.

313. *SC Verbatim Record 3453*, *supra* note 2, at 7.

314. WHEN JUSTICE MEETS POLITICS, *supra* note 143, at 327.

315. *Infra* p. 171.

316. WHEN JUSTICE MEETS POLITICS, *supra* note 143, at 327.

317. Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, ¶ 554 (May 15, 2003).

318. This refers to the indictees whose cases have proceeded to trial.

319. Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Judgment and Sentence, ¶¶ 3–4 (Sept. 4, 1998); Prosecutor v. Serushago, Case No. ICTR 98-39-S, Sentence, ¶¶ 4–5 (Feb. 5, 1999); Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgment and Sentence, ¶¶ 110–11 (June 1, 2000); Prosecutor v. Rutaganira, Case No. ICTR-95-1C-T, Judgment and Sentence, ¶¶ 14–15, 17 (Mar. 14, 2005); Prosecutor v. Bisengimana, Case No. ICTR-00-60-T, Judgment and Sentence, ¶¶ 9–10, 12 (Apr. 13, 2006); Prosecutor v. Serugendo, Case No. ICTR-2005-84-I, Judgment and Sentence, ¶¶ 2–8, 11 (June 12, 2006); Prosecutor v. Nzabirinda, Case No. ICTR-01-77-T, Sentencing Judgment, ¶¶ 7, 9–10 (Feb. 23, 2007); Prosecutor v. Rugambarara, Case No. ICTR-00-59-T, Sentencing Judgment, ¶¶ 4–7 (Nov. 16, 2007).

use guilty pleas as a reconciliation tool.³²⁰ After the plea agreements, the accused gave statements expressing regret and seeking forgiveness from the victim's families, survivors, and citizens in Rwanda.³²¹ Some have pledged to work against genocide ideology, and all have called on Rwandans to view their guilty pleas as a step towards peace and reconciliation.³²²

It is evident from the ICTR's judgments that guilty pleas can constitute a mitigating circumstance, thereby influencing the sentence. Omar Serushago, head of an *interahamwe* militia, pled guilty to genocide and crimes against humanity.³²³ The *interahamwe* militia were purportedly notorious for murdering civilians in Gisenyi between April and July 1994.³²⁴ In light of his guilty plea, he was sentenced to a single term of 15 years' imprisonment.³²⁵ In *Ruggiu*, the accused pled guilty to direct and public incitement to commit genocide and persecution as a crime against humanity.³²⁶ After his guilty plea, the Chamber sentenced him to 12 years' imprisonment.³²⁷

Another useful example is the case of Juvénal Rugambarara, the former bourgmestre³²⁸ of Bicumbi commune. He pled guilty to extermination as a crime against humanity after, in his capacity as Mayor, he failed to take reasonable and necessary measures to investigate the crimes committed in the commune and to apprehend and punish the perpetrators.³²⁹ The crimes committed resulted in the deaths of thousands of Tutsi civilians in Mwulire, Mabare and Nawe sectors of Bicumbi commune.³³⁰

A guilty plea may have a mitigating effect on the sentence by: the showing of remorse, repentance, the contribution to reconciliation, the establishment of the truth, the encouragement of other perpetrators to come forward, the sparing of a

320. *Quelle justice*, *supra* note 302, at 378–80.

321. *See e.g.*, *Serushago*, Case No. ICTR 98-39-S, ¶ 40.

322. *Id.*

323. *Id.* § 4–5, 25(viii).

324. *Id.*; TRIAL, *Omar Serushago*, <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/203/action/show/controller/Profile.html> (last visited Oct. 14, 2014).

325. *Id.* § V.

326. *Ruggiu*, Case No. ICTR 97-32-I, § I, B.

327. *Ruggiu*, Case No. ICTR 97-32-I, § IV. Based on the statute set forth in S.C. Res. 955, *supra* note 20, articles 1 and 7, the ICTR was able to convict Ruggiu, an Italian-Belgian, for the crimes he committed in Rwanda while working as a journalist and radio presenter for the RTLM.

328. This is a French word which, when translated to English, means Mayor.

329. *Rugambarara*, Case No. ICTR-00-59-T, ¶¶ 5, 25.

330. *Id.* ¶ 24.

lengthy investigation and trial and thus time, effort and resources, and the fact that witnesses are relieved from giving evidence in court.³³¹

“Rugambarara’s . . . plea . . . may contribute to the process of national reconciliation in Rwanda. The Chamber considers these factors as mitigating.”³³² Reconciliation, contrition and truth-telling are seemingly viewed as a distinct mitigating factors. Yet, as Bachmann *et al.* point out, aren’t these aspects also logical components of reconciliation?³³³ How are they different? This highlights the abstruse nature of the term reconciliation. The tribunal implicitly acknowledges that pleading guilty as a contribution to reconciliation could be a negotiation instrument as regards to sentencing.³³⁴

The approach, insofar as it refers to reconciliation, follows the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia. Specifically, in the case of Biljana Plavšić,³³⁵ the Trial Chamber stated:

Two matters related to a plea of guilt concern expression of remorse and steps toward reconciliation. In this regard, the Prosecution notes that the accused has expressed her remorse “fully and unconditionally” and the hope that her guilty plea will assist her people to reconcile with their neighbors. The Prosecution states that this expression of remorse is noteworthy since it is offered from a person who formerly held a leadership position, and that it “merits judicial consideration.”³³⁶

In this case, the guilty plea is akin to what Long and Brecke would term a “reconciliation event,” which is a “public, symbolic meeting [...] between belligerents indicating a desire for improved relations . . .”³³⁷ It also seems that the more well-known and high profile a person is, “the better his or her chances of improving apology, forgiveness and reconciliation at the grassroots level.”³³⁸

However, the majority of the ICTR convicts refuse to recognize their role in the crimes and maintain their guiltlessness, which does not accord with national reconciliation in Rwanda.³³⁹

331. *Id.* ¶ 30.

332. *Id.* ¶ 35.

333. WHEN JUSTICE MEETS POLITICS, *supra* note 143, at 329.

334. *Id.*

335. Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, Sentencing Judgment (Feb. 27, 2003).

336. *Id.* ¶ 70.

337. WILLIAM J. LONG & PETER BRECKE, WAR AND RECONCILIATION: REASON AND EMOTION IN CONFLICT RESOLUTION ix (2003).

338. WHEN JUSTICE MEETS POLITICS, *supra* note 143, at 329.

339. Timothy Gallimore, *The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and its Contributions to Reconciliation in Rwanda*, 14 NEW ENG. J. INT’L & COMP. L. 239, 253 (2008) [hereinafter *The Legacy of the ICTR*].

This also highlights a problem with international criminal justice, which arguably focuses, in varying degrees, more on the rights of the criminal and not those of the victim.³⁴⁰ The same is applicable in the ICTR, as the victims are the missing party in the legal proceedings.³⁴¹ The ICTR Statute does not provide a right to compensation for victims, primarily because they are not party to the proceedings—although in limited circumstances, the “Tribunal also endeavors, within the budgetary constraints of the section for witness protection, to assist ailing witnesses who testify before the Judges in Arusha.”³⁴²

Nevertheless, the lack of reparations to victims in the ICTR perhaps adversely impacts national reconciliation because it does not create the necessary link between the perpetrator and the victim; the victims are not afforded the chance to value the remorse and sympathy of the perpetrator. The apology is made in the ICTR courtroom in Arusha rather than at the relevant location in Rwanda where most of the survivors reside.³⁴³

Additionally, it is possible for an interested party or victim to commence civil action for compensation based on the decision of a Trial Chamber at the ICTR. However, they would be required to wait until the case finishes before instituting proceedings. Hence, they would be at a disadvantage as the ICTR cases can take years to conclude.³⁴⁴ It is also exacerbated by the fact that Rwanda is a developing country and poverty generates survival concerns on a daily basis.³⁴⁵ With this in mind, it is improbable that the victims will forfeit their limited resources and time on another trial.³⁴⁶

340. Jean Marie Kamatali, *The Challenge of Linking International Criminal Justice and National Reconciliation: The Case of the ICTR*, 16 LEIDEN J. INT'L L. 115, 131 (2003).

341. Concerning victims in the ICTR Statute, the key provisions are contained in article 21, which provides that the ICTR “shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and protection of the victim’s identity.” Article 23 provides that “[i]n addition to imprisonment, the Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.” S.C. Res. 955, *supra* note 20, at Annex, arts. 21, 23.

342. U.N. S.C. Rep. of the Int’l Criminal Tribunal for Rwanda, 55th Sess., U.N. Doc. A/55/435-S/2000/927, ¶ 79–81 (Oct. 2, 2000); *see also* Nsanzuwera, *supra* note 80, at 946.

343. *See* Westberg, *supra* note 32, at 360–61.

344. Kamatali, *supra* note 340, at 131–32.

345. *Id.*

346. *Id.*

Notwithstanding the limitations of the ICTR's adversarial legal process, the creation of historical records would promote, to some extent, healing and reconciliation because it acknowledges the persecution and suffering that the survivors/victims experienced.³⁴⁷

Some scholars regard clemency as a key component of reconciliation.³⁴⁸ However, in the ICTR context, some question who is permitted to forgive and give clemency.³⁴⁹ Should it be for the court to decide without any participation by the victim? Article 27 of the ICTR Statute stipulates that "[t]here shall only be pardon or commutation of sentence if the President of the [ICTR], in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law."³⁵⁰

There has only been one application of a commutation of sentence, albeit not in the context of Article 27. As mentioned above, the Tribunal convicted Georges Ruggiu for his involvement in the genocide and sentenced him to 12 years' imprisonment.³⁵¹ He was to serve the remainder of his sentence in Italy,³⁵² but, on April 21, 2009, the Italian authorities granted him early release, in contravention of the ICTR Statute.³⁵³ This raises questions as to what deliberations and justifications a country where those sentenced by the ICTR are serving their punishment, like Italy, would consider when deciding whether or not to grant a pardon. Is the decision based on its domestic legislation? Will they consult the ICTR or Rwanda? Such applications of clemency by States hamper the ICTR's proclaimed reconciliation mandate.

A dominant censure of the ICTR has been that it is geographically too far, remote, and removed from Rwandan society.³⁵⁴ At times this tends to work against the culture and the people of Rwanda, who do not feel

347. *The Legacy of the ICTR*, *supra* note 339, at 255.

348. Kamatali, *supra* note 340, at 129.

349. *Id.*

350. S.C. Res. 955, *supra* note 20, at Annex, art. 27; *see also* INT'L CRIMINAL TRIBUNAL FOR RWANDA RULES OF PROCEDURE AND EVIDENCE, r. 124–26 (Jan. 31, 2010) [hereinafter RPE], *available at* http://www.unictt.org/Portals/0/English/Legal/Evidence/English/130410amended%206_26.pdf. The judges adopted the initial Rules of Procedure and Evidence on June 29, 1995. The Rules have undergone several amendments, the most recent being January 31, 2010.

351. *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence, § 4 (June 1, 2000).

352. *Georges Omar Ruggiu Transferred to Italy*, INT'L CRIMINAL TRIBUNAL FOR RWANDA, ICTR/INFO-9-2-555.EN (Feb. 28, 2008), <http://www.unictt.org/tabid/155/Default.aspx?ID=37>.

353. *Convicted Journalist Released Early in Violation of ICTR Statute*, THE HAGUE JUSTICE PORTAL (May 29, 2009), <http://www.haguejusticeportal.net/index.php?id=10688>.

354. *See e.g.*, Westberg, *supra* note 33, at 360–61.

justice is served.³⁵⁵ Moreover, some have criticized the Tribunal because those who are convicted do not serve their sentences in Rwanda.³⁵⁶ So far, the bulk of those convicted are serving their sentences in Mali and Benin.³⁵⁷ Although, as mentioned above, that is no longer the case given the recent judicial reforms implemented in Rwanda.³⁵⁸ Indeed, the ICTR can transfer cases to the Rwandan national courts and other jurisdictions on the proviso that, *inter alia*, the accused will receive a fair trial.³⁵⁹

Traditionally, Rwanda is a country where the family and community structure play key roles in society.³⁶⁰ Within the Rwandan culture, an individual's role as a part of a community is important and is reflected in the origins of *gacaca*.³⁶¹ As such, a person is obliged to make amends to those he has harmed.³⁶² It seems the ICTR is devoid of this feature.³⁶³

However, this perception is unwarranted. The decision to hold these trials hundreds of miles away from Rwanda could be viewed as a necessary compromise, particularly because during that period time, Rwanda was in the midst of political disarray and seemingly unable to facilitate the establishment of the ICTR. Further, even if it were located in Rwanda, the trials would still “suffer a crisis of legitimacy . . . fueled by conflicting conceptions of justice, by Rwandan anger at Tribunal mismanagement

355. Westberg, *supra* note 33, at 359; *Hybridity, Holism and Traditional Justice*, *supra* note 167, at 816.

356. See e.g., Westberg, *supra* note 33, at 361–62.

357. These are two of the seven countries that have signed agreements with the U.N. for the purpose of enforcing ICTR sentences. The U.N. has secured enforcement agreements with the following countries: Mali, Italy, France, Rwanda, Benin, Swaziland and Sweden. See *Detention of Suspects and Imprisonment of Convicted Persons The Detention Facility*, INT'L CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unictr.org/tabid/114/default.aspx> (last visited Apr. 12, 2013).

358. *Supra* pp. 175–76.

359. RPE, *supra* note 350, r. 11 *bis*; see also S.C. Res. 1503, 1–2, U.N. Doc. S/RES/1503 (Aug. 28, 2003). On June 28, 2011, a specially designated Referral Chamber referred the Uwinkindi case to the Rwandan domestic court system under rule 11 *bis*, marking an important landmark in the ICTR's history. Prosecutor v. Jean-Bosco Uwinkindi, Case No. ICTR-01-75-AR11bis, Decision on Uwinkindi's Appeal against the Referral of his Case to Rwanda and Related Motions (Dec. 16, 2011) [hereinafter *Uwinkindi Appeal Decision*]; Prosecutor v. Jean-Bosco Uwinkindi, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶¶ 222–25 (June 28, 2011) [hereinafter *Uwinkindi Decision*]. Adama Dieng, *Capacity-Building Efforts of the ICTR: A Different Legacy*, 9 NW. U. J. INT'L HUM. RTS. 403, 420–21 (2011).

360. Ingelaere, *supra* note 128, at 33–34.

361. *Id.*

362. *Id.*

363. Westberg, *supra* note 33, at 360.

and the slow pace of trials and by the Tutsi-led Rwandan government's efforts to control the Tribunal's prosecutorial agenda for its political ends."³⁶⁴

1. *The Challenges of Linking Justice with Reconciliation*

The ICTR's reconciliation mandate has been used as an instrument for arguments in a number of cases. On appeal in the *Media Case*, Jean-Bosco Barayagwiza, who was originally sentenced to 35 years imprisonment,³⁶⁵ contended that the Trial Chamber placed too much weight on the notions of retribution and deterrence, and not enough weight on national reconciliation.³⁶⁶ The Appeals Chamber, unmoved by this contention, held that Barayagwiza, did not explain how the sentence imposed would damage national reconciliation.³⁶⁷ Furthermore, the purpose of rehabilitation should not be given undue weight in view of the gravity of the crimes committed.³⁶⁸ It seems that Barayagwiza focused on retribution and deterrence as opposed to reconciliation. Yet according to Bachmann *et al.*, the notions of deterrence and retribution may actually be hidden in the meaning of reconciliation, particularly in regard to combatting impunity.³⁶⁹

The Appeals Chamber offered further clarification (and rationalization) in the *Kamuhanda* case, by stating:

[W]hile national reconciliation and the restoration and maintenance of peace are important goals of sentencing, they are not the only goals. Indeed, the Trial Chamber correctly referred to "deterrence, justice, reconciliation, and the restoration and maintenance of peace" as being among the goals consistent with Security Council Resolution 955 of 8 November 1994 which set up the Tribunal. These goals cannot be separated but are intertwined, and, in any case, nothing in Resolution 955 indicates that the Security Council intended that one should prevail over another. The Appellant contends that sentencing him to life imprisonment would deprive "both his fellow Rwandans and their country of what they could learn from him upon his release" and therefore not serve the goal of national reconciliation. The Appeals Chamber is not persuaded by this argument. The Trial Chamber was free to conclude that any advantage in terms of national reconciliation gained by the Appellant's eventual release was either minimal or was outweighed by the

364. Victor Peskin, *Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme*, 3 J. INT'L CRIM. JUST. 950, 951 (2005).

365. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor (*Media Appeal Case*), Case No. ICTR-99-52-A, Appeal Judgment, ¶ 1039 (Nov. 28, 2007).

366. *Id.* ¶ 1056, which states: "Appellant Barayagwiza argues that, in determining his sentence, the Trial Chamber placed too much emphasis on the objectives of retribution and deterrence, and not enough on those of national reconciliation and rehabilitation."

367. *Id.* ¶ 1057; WHEN JUSTICE MEETS POLITICS, *supra* note 143, at 332–33.

368. *Id.* ¶ 1057.

369. WHEN JUSTICE MEETS POLITICS, *supra* note 143, at 333.

harms to both general deterrence and national reconciliation that would be created by a lenient sentence that was not perceived to reflect the gravity of the crimes committed. Moreover, too lenient a sentence might also undermine other fundamental principles of sentencing, in particular proportionality, by giving the impression that the punishment does not reflect the gravity of the crimes committed. In any case, it is not a matter—as the Appellant contends—of “the triumph of the law over the barbarous acts that were committed” or of whether or not “sentencing [him] to life imprisonment [would] contribute, even momentarily, to the restoration of peace or national reconciliation, which is one of the Tribunal’s goals.” It is settled case law before both the ICTR and the ICTY that the underlying principle is that Trial Chambers must tailor the penalty to fit the individual circumstances of the accused and the gravity of the crime. The Appellant has neither demonstrated that the Trial Chamber committed any error in its assessment of the goals behind the creation of the Tribunal, nor that the Trial Chamber improperly exercised its discretion in determining the appropriate sentence.³⁷⁰

This paragraph from the judgment reveals how the different interpretations of reconciliation challenge each other.³⁷¹ The Tribunal, as an executor of the law, adopted a retributivist approach and deemed that perceptions of justice would better serve reconciliation.³⁷² In truth, releasing the accused based on his contentions would be viewed as negative and detrimental to national reconciliation in Rwanda.³⁷³ The aforementioned Appeal Chamber’s judgment on the *Kamuhanda* case implies that, while reconciliation is an identified steering and mitigating gauge on which an accused could be sentenced, it is not a guiding principle or an envisioned goal.

2. “Mimetic Structures of Violence” and Reconciliation

Confronting the “mimetic structures of violence” that are entrenched in the “minds of individuals who live in an environment of recurring and deep-rooted conflict” is a key component in encouraging national reconciliation in Rwanda.³⁷⁴

370. Jean de Dieu Kamuhanda v. The Prosecutor, Case No. ICTR-99-54A-A, Appeal Judgment, ¶ 351 (Sept. 19, 2005).

371. WHEN JUSTICE MEETS POLITICS, *supra* note 143, at 336.

372. *Id.*

373. *Id.*

374. Timothy Gallimore, *Unresolved Trauma: Fuel for the Cycle of Violence and Terrorism*, in 2 THE PSYCHOLOGY OF TERRORISM: CLINICAL ASPECTS AND RESPONSES 143, 146–47 (Chris E. Stout ed., 2002); *The Legacy of the ICTR*, *supra* note 339, at 258. Both documents cite René Girard, “who hypothesized that violence is engendered through scapegoating and mimetic desire. The premise of mimetic desire is that people imitate the actions of others who they admire.” Victims of violence would detest, rather

The existence of negative role models may propagate conflict in Rwanda. As the genocide's key perpetrators, particularly the leaders who are among the ICTR convicts, become icons or gain infamy, the public will view them as heroes to be revered and imitated.³⁷⁵ For example, on November 26, 1991, the front cover of *Kangura* magazine had an image of Grégoire Kayibanda, First Republic's second president, who made Hutus the governing ethnic group after the massacres in 1959.³⁷⁶ Cynically, it had for its title: "Tutsi: Race of God," with an image of a machete on the left. To the right of the machete, it states "[w]hich weapons are we going to use to beat the cockroaches for good?"³⁷⁷ Such images and words were used by extremists in the media to incite the Rwandan population to commit genocide.³⁷⁸

Another threat is from mimeses, a critical psychological factor that causes victims to continue violence and to persecute others as a way to compensate for their guilt and shame they feel because of their own victimization.³⁷⁹ By emulating the violence of the persecutor, the victim discards his oppression and sates his urge for vengeance.³⁸⁰

The ICTR's key contribution to reconciliation and justice in Rwanda is holding the principal perpetrators accountable for the genocide.³⁸¹ By arresting and taking away these politically influential figures from public life and stigmatizing them, the ICTR divested the perpetrators of their major leaders, thereby abating their military and political disruption of peace in Rwanda.³⁸² This also ruptured the "mimetic cycle of violence and revenge" that characterizes the history of impunity in Rwanda.³⁸³ Moreover, the ICTR's arrest of these figures outside Rwanda extended

than admire, their assailants. "However, the basic human need for power causes victims to desire the position of power that their victimizers occupy. Power and control become the objects of desire and victims identify in a positive way with that aspect of their aggressors. Victims become perpetrators in order to regain power. They model the behaviour of their victimizers." *The Legacy of the ICTR*, *supra* note 339, at 258 n.47.

375. Mimetic structures of violence may possibly endure for several hundred years. "They are passed on through the generations . . . people within an identity group mimetically join in the violence initiated by certain members of their group . . ." *Implication of Religious Leaders*, *supra* note 124, at ¶ 6.

376. *See supra* p. 134.

377. *Batutsi Bwoko Bw'imana*, KANGURA, Nov. 1991; The Media Case, Case No. ICTR 99-52-T, ¶ 160; DES FORGES, *supra* note 1, at 72–73.

378. *See generally* The Media Case, Case No. ICTR 99-52-T, ¶¶ 136–73.

379. *See generally* FRANTZ FANON, BLACK SKIN WHITE MASKS (Charles Lam Markmann trans., Pluto Press 2008) and at 174; *The Legacy of the ICTR*, *supra* note 339, at 259, n.51.

380. *Id.*

381. Nsanzuwera, *supra* note 80, at 948.

382. *Id.*

383. *The Legacy of the ICTR*, *supra* note 339, at 259.

the hand of justice beyond the Rwandan justice system's limited reach, because Rwanda did not have extradition treaties with countries harboring suspects at that time.³⁸⁴

While there is limited evidence that justice contributes to reconciliation in societies that have experienced mass violence, the convictions handed down by the ICTR symbolize the international community's reconfirmation that the crimes committed in Rwanda in 1994 were among the most atrocious of human acts, which deserve condemnation and punishment under international law.³⁸⁵

At times, the sentences handed down do not appear to reflect the gravity of the crimes and are viewed negatively in Rwanda, thereby affecting the ICTR's limited reconciliation efforts. Furthermore, the sentences imposed do not contain clearly formulated information as to how justice will contribute to national reconciliation in Rwanda.³⁸⁶ If leaders are "seen to be away receiving 'international justice,'" which is generally perceived as lenient, then they are not fully and severely punished relative to (at the very least) national values and standards for the horrors that were committed.³⁸⁷

For example, the Trial Chamber found Grégoire Ndahimana, the bourgmestre of Kivumu Commune, guilty of genocide and extermination as crimes against humanity, based on the mass killings committed at Nyange Church, Kivumu Commune, Kibuye Prefecture, on April 15 and 16, 1994.³⁸⁸ Ndahimana was given a single sentence of 15 years' imprisonment.³⁸⁹ While his convictions were affirmed on appeal, the Appeals Chamber concluded that Ndahimana's responsibility, in relation

384. *The Legacy of the ICTR*, *supra* note 339, at 242.

385. *See e.g.*, Prosecutor v. Serushago, Case No. ICTR-98-39-S, Sentence, ¶ 20 (Feb. 5, 1999).

[I]t is clear that the penalties imposed on accused persons found guilty by the Tribunal must be directed, on the one hand, at retribution of the said accused, who must see their crimes punished, and over and above that, on other hand, at deterrence, namely to dissuade for good others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights.

386. WHEN JUSTICE MEETS POLITICS, *supra* note 143, at 326.

387. *See The Trials of Concurrent Jurisdiction*, *supra* note 104, at 358–59 (explaining that lenient sentencing incentivizes perpetrators to admit to their crimes).

388. Prosecutor v. Ndahimana, Case No. ICTR-01-68-T, Judgment, ¶¶ 27–29, 840–43 (Dec. 30, 2011).

389. *Id.* ¶ 872.

to the crimes, was “more appropriately described as that of a participant in a joint criminal enterprise rather than as that of an aider and abettor.”³⁹⁰ As such, his sentence was increased to 25 years’ imprisonment.³⁹¹

These sentences typically raise a number of questions from a lay perspective: Does it serve as adequate retribution or deterrence of a government-sponsored mass murder, enthused by racial ideology? Does 15-25 years (as opposed to life imprisonment) for genocide and extermination as a crime against humanity dissuade others, who may be tempted in future to perpetrate such crimes, by demonstrating that the international community will no longer tolerate grave human rights abuses?

The deterrent effect of international trials is questionable. Since the establishment of a permanent international court, *ad hoc* tribunals and even hybrid courts, there have been many conflicts where mass human rights abuses were committed and continue to be perpetrated. This is true in Kenya,³⁹² South Sudan,³⁹³ Iraq³⁹⁴ and Syria,³⁹⁵ to name a few. It is doubtful that such sentences would have a positive impact on reconciliation in Rwanda.

More research is necessary regarding the long-term impacts on international courts on the ground level. However, in reality, the precise deterrent effects of international courts may take significant time to determine and understand. It is possible the effects may never be known. It is more difficult to empirically measure the absence of an action rather than its occurrence.

Furthermore, even if a quantifiable decrease in human rights violations is determined, it would be virtually impossible to determine the exact contribution resulting from deterrence; especially with the existence of other variables, such as shifts in international norms, differing cultural

390. Prosecutor v. Ndahimana, Case No. ICTR-01-68-A, Judgment, ¶ 251.

391. *Id.* at ¶ 254.

392. Commission of Inquiry into the Post-Election Violence [CIPEV], *Final Report*, at 272, 305, 308 (Oct. 15, 2008).

393. *Thousands dead in South Sudan violence, UN says*, BBC NEWS (Dec. 24, 2013), <http://www.bbc.com/news/world-africa-25511595> (last visited Oct. 16 2014).

394.

395. U.N. Human Rights Council, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, 1, U.N. Doc A/HRC/27/60 (Aug. 13, 2014); *Syria conflict: UN report accuses Assad regime of massacres and crimes against humanity*, THE INDEPENDENT (Aug. 27, 2014), <http://www.independent.co.uk/news/world/middle-east/syria-conflict-un-report-accuses-assad-regime-of-massacres-and-crimes-against-humanity-9694116.html> (last visited Oct. 16 2014).

settings, and changing domestic and international political and economic pressures.³⁹⁶

3. *ICTR's Contribution to Reconciliation in Rwanda*

Gallimore contends that the work of the ICTR contributed to reconciliation in five key ways:³⁹⁷

*a. By Facilitating Re-Education and Communication to Encourage Respect for Human Rights and the Rule of Law in Rwanda*³⁹⁸

Gallimore asserts that

[r]econciliation comes about when the victim is joined by the bystanders (in this case the Tribunal) to condemn the actions of the perpetrator. Victim and bystander start down the road of reconciliation by agreeing on the wrongness of the victimization. The three basic steps in the reconciliation process are: 1) a complete and detailed public acknowledgment of the wrong/injury, 2) expression of contrition and acceptance of responsibility by the perpetrator who requests forgiveness and 3) voluntary forgiveness of the perpetrator by the victim for the injuries suffered.³⁹⁹

Hence, in terms of who is supposed to be reconciling with whom through the ICTR, it seems to be the perpetrator (i.e. Hutu) reconciling with the victim (i.e., Tutsi), thereby reinforcing perceptions of “victor’s justice.”⁴⁰⁰ Indeed, many Hutus have questioned the legitimacy of the ICTR, which has not prosecuted RPF military officers suspected of committing atrocities against Hutu civilians in 1994.⁴⁰¹ Additionally, one scholar claimed that the Rwandan government’s agenda is to safeguard the Tutsi political and

396. See generally Mirko Bagaric & John Morss, *International Sentencing Law: In Search of a Justification and Coherent Framework*, 6 INT’L CRIM. L. REV. 191 (2006).

397. See *The Legacy of the ICTR*, *supra* note 339, at 251.

398. See *infra* pp. 181–82.

399. *The Legacy of the ICTR*, *supra* note 339, at 253.

400. KINGSLEY CHIEDU MOGHALU, *RWANDA’S GENOCIDE: THE POLITICS OF GLOBAL JUSTICE* 3 (2005).

401. Author Timothy Longman referred to a survey conducted where 74.1% of Hutu participants agreed or strongly agreed that the ICTR should try members of the RPF who committed war crimes. See Timothy Longman, *The Domestic Impact of the International Criminal Tribunal for Rwanda*, in *INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE?* 33, 38 (Steven R. Ratner & James L. Bischoff eds., 2004); see also MOGHALU, *supra* note 402, at 3.

military elite from investigation and prosecution, while simultaneously pursuing Hutu genocide perpetrators by military and judicial means.⁴⁰²

Essentially, national reconciliation can only occur in an environment in which both sides feel that justice is being achieved, and international judicial institutions are not perceived as systematically biased towards one group. In order to promote authentic national reconciliation, there cannot be victor's justice.⁴⁰³

Yet the perceptions of victor's justice appear to be misinformed. This may be attributed to the fact that information, in this regard, is "sparse and has not been put into the public arena for consumption."⁴⁰⁴ The ICTR's derivation, mandate and constitution preclude it from being a 'victor's court,' particularly as the Prosecutor can investigate and prosecute serious abuses of international humanitarian law on all sides of the conflict.⁴⁰⁵ The ICTR Prosecutor investigated serious abuses of international humanitarian law on all sides of the conflict and deferred prosecution of crimes by the RPF soldiers to the military courts in Rwanda.⁴⁰⁶

402. *Id.*; see also Victor Peskin, *Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 4 J. HUM. RTS. 213, at 222–27 (2005).

403. See *Impunity Gap*, *supra* note 31, at 77–78.

404. JONES, *supra* note 21, at 181.

405. The ICTR Prosecutor Hassan Jallow has publicly acknowledged on various occasions, including at the United Nations Security Council, the responsibility of the Office of the Prosecutor to investigate the allegations against the RPF. Letter from Hassan B. Jallow, ICTR Chief Prosecutor, to Kenneth Roth, Human Rights Watch Exec. Dir., OTP/2009/P/084 (June 22, 2009), available at http://www.hrw.org/sites/default/files/related_material/2009_06_Rwanda_Jallow_Response.pdf.

406. In 2008, the ICTR Prosecutor Hassan Jallow transferred one of its investigations—the massacre of several clergy in *Kabgayi* by RPF soldiers—to the Rwandan government for national prosecution. Prior to this, the Prosecutor had already handed over thirty-five files relating to the genocide for Rwanda to investigate and prosecute at its discretion. The indictment in the *Kabgayi* case was drafted by the Military Prosecutor in Rwanda and cleared with the OTP—with allegations of violations not only of Rwandan law, but also as war crimes under the Geneva conventions. The prosecution of the officers proceeded on that basis. After the proceedings in Rwanda, the Prosecutor since stated that fair trial standards were observed in the case and that his office did not have any further indictments for other RPF cases. Moreover, the *Kabgayi* matter was not the only instance of RPF soldiers being prosecuted by Rwanda in relation to the events of 1994. Several military officers had been prosecuted before Rwandan military courts for offences committed against civilians in connection with the genocide. Investigations were conducted on 42 RPF soldiers, 19 of which were prosecuted for offences committed within the jurisdiction of the ICTR and the remaining 23 for offenses committed post 1994 against civilians suspected of genocide perpetration. Of the 19 soldiers prosecuted, 12 were convicted and sentenced to various terms of imprisonment, 5 were acquitted, and the remaining two cases did not proceed due to the absence of the accused persons. U.N. SCOR, 64th Sess., 6134th mtg. at 33, U.N. Doc. S/PV.6134 (June 4, 2009); see Letter from Hassan B. Jallow to Kenneth Roth, *supra* note 407.

Ostensibly, the Prosecutor's decision on whether to indict was based on, *inter alia*, the availability of credible evidence and on the law (as is the position with all ICTR cases).⁴⁰⁷ Therefore, "balancing acts," indicting all sides to the Rwandan armed conflict, become irrelevant.⁴⁰⁸ However, this approach is plausible with military prosecutions because a military court is typically an appropriate forum in which to hear cases involving members of the armed forces. Moreover, the perpetrators were relatively low ranking soldiers and proceeding with their cases would have been contrary to U.N. Resolution 1534 from 2004.⁴⁰⁹

The ICTR has provided a solid base for international criminal prosecution of genocide and war crimes in terms of creating legal precedents, setting primary post-conflict international agenda, and obtaining cooperation from the international community with respect to arrest or detention of fugitives.⁴¹⁰ It has pioneered victim-oriented justice within the context of international criminal law⁴¹¹ and serves as a model to the African continent and beyond in its endorsement of witness protection, the rights of detainees and prisoners, and the use of new technologies in judicial proceedings.⁴¹²

With regard to institutional reform, it is widely acknowledged that recent legal developments in Rwanda may ascribe to the influence of the ICTR.⁴¹³ In 1996, Rwanda adopted Genocide legislation that expressly espoused the definitions of the 1948 International Convention on Genocide.⁴¹⁴ Moreover, other Rwandan legislation acknowledges the

407. Every prosecutor at international tribunals has the discretion in deciding which cases should proceed—taking into account their office's mandate and practical considerations like resources and time. No prosecutor indicts in every possible case. Using the ICTR as an example, in November of 2004, Prosecutor Jallow clarified the specific criteria that the OTP uses to select cases for investigation and prosecution, including "the status of the person in Rwanda at the time of the genocide, the extent of involvement of the person, the nature and the seriousness of the offences alleged . . . as well as the need for geographical spread of the targets in Rwanda to ensure nationwide coverage." Hassan B. Jallow, Chief Prosecutor of the Int'l Criminal Tribunal for Rwanda, Guest Lecture at the Asser Institute: The Hague, *The ICTR and the Challenge of Completion* (Oct. 4, 2006), available at http://www.unictr.org/Portals/0/English%5CNews%5Cevents%5COct2006%5Cictr_completion.pdf.

408. *Id.*

409. S.C. Res. 1534, ¶ 5, U.N. Doc. S/RES/1534 (Mar. 26, 2004).

410. Dieng, *supra* note 359, at 405.

411. See *ICTR General Information*, *supra* note 291.

412. Dieng, *supra* note 359, at 411–13.

413. *Id.* at 416.

414. See The Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1

principle of superior responsibility that is enshrined in the ICTR Statute.⁴¹⁵ The Rwandan Constitution of 2003⁴¹⁶ reaffirms its adherence to international instruments, such as the Universal Declaration of Human Rights⁴¹⁷ and the International Covenant on Civil and Political Rights.⁴¹⁸

In 2007, Rwanda adopted Organic Law N° 11/2007,⁴¹⁹ also known as the “Transfer Law.”⁴²⁰ The Transfer Law assigns the Rwandan High Court and Supreme Court “to deal with cases transferred to Rwanda from the ICTR or third-party states, and to exercise jurisdiction over crimes identical to those” in the ICTR Statute.⁴²¹ Its development was based on various due process and fair trial standards of the ICTR, especially regarding the rights of the defendants.⁴²² The Transfer Law was also built on the ICTR’s rules of evidence and can be applied to indictees transferred to Rwanda from the ICTR or other states.⁴²³ The law was then revised to allow Rwandan judges to hear evidence from witnesses abroad with a video-link for the Rwandan viewers.⁴²⁴

The Rwandan government officially abolished the death penalty in 2007,⁴²⁵ replacing it with life imprisonment.⁴²⁶ Further, Rwanda upgraded its prison facilities to meet the international standards for the

October 1990, Organic Law No. 08/1996 of 1996 (Rwanda) [hereinafter Organic Law No. 08/1996].

415. *Organic Law instituting the penal code*, N° 01/2012/OL of May 2, 2012, § 5, art. 135.

416. CONSTITUTION OF THE REPUBLIC OF RWANDA May 26, 2003, pmb. ¶ 9, amend. II, available at www.parliament.gov.rw/fileadmin/Images2013/Rwandan_Constitution.pdf.

417. Universal Declaration of Human Rights, G.A. Res 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

418. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

419. Organic Law Concerning Transfer of Cases to the Republic of Rwanda From the International Criminal Tribunal for Rwanda and From Other States, Organic Law No. 11/2007 of 2007 (Rwanda).

420. See e.g., *Uwinkindi Appeal Decision*, *supra* note 359, at ¶ 37 and note 95.

421. *Uwinkindi Decision*, *supra* note 359, at ¶ 21; Dieng, *supra* note 359, at 417.

422. Dieng, *supra* note 359, at 417.

423. *Id.*

424. *Id.* at 420.

425. Organic Law Relating to the Abolition of the Death Penalty, Organic Law No. 31/2007 of 2007 (Rwanda) [hereinafter Organic Law No. 31/2007]; Sulah Nuwamanya, *Gacaca Courts to Get More Powers*, THE OBSERVER (Mar. 26, 2008), <http://allafrica.com/stories/200803060759.html> (last visited Oct. 20 2014); *Rwanda scraps the death penalty*, BBC NEWS (June 8, 2007), <http://news.bbc.co.uk/2/hi/africa/6735435.stm> (last visited Oct. 20 2014).

426. Organic Law No. 31/2007, *supra* note 425, art. 4 (defines life imprisonment with special provisions and they are as follows: (i) a convicted person is not entitled to any kind of mercy, conditional release or rehabilitation, unless he/she has served at least 20 years of imprisonment; and (ii) a convicted person is kept in isolation).

possible relocation of the ICTR convicts to serve their sentences.⁴²⁷ Other recent reforms include the establishment of a separate Witness Protection Unit within the Judiciary and granting immunity to witnesses from abroad, thereby easing witnesses' fears of indictment.⁴²⁸ However, this raises concerns as to how victims and survivors of the crimes would perceive this protection.

*b. By Constructing a Factual Account of the Genocide Judicial History, Which is Unavailable to Historians*⁴²⁹

The testimony of witnesses and survivors is a significant element in the construction of the history of Rwanda and can provide a basis upon which to construct a new collective identity in the post-conflict era. The judicial records and ICTR archives are perhaps the best historical narrative of the genocide and should serve as an authentic public historical record against revisionism.

However, it is important to keep in mind that the *raison d'être* of the ICTR is not to provide an official history. The degree that a historical record is vital to individual trials is only incidental to the ICTR's work, not its prime purpose. There is no real process in the ICTR for establishment of the truth, which would, ideally, lead to a shared acceptance of the history of the conflict.

Nonetheless, through the recording of witness and defendant testimony in the trial process, the ICTR to some extent serves as a documenter of 'truth,' even though this may be 'legal truth' and differ from case to case. It therefore operates at a limited level as a guardian of history, giving a verified factual account of what happened.

*c. By Issuing Judicial Notice Confirming That There Was Genocide Against the Tutsi Ethnic Group in Rwanda*⁴³⁰

Judicial notice of the genocide means that the occurrence of the 1994 genocide in Rwanda is taken as an established fact that is beyond dispute,

427. Dieng, *supra* note 359, at 420.

428. *Id.*

429. *The Legacy of the ICTR*, *supra* note 339, at 251, 255.

430. RPE, *supra* note 350, at r. 94; *see, e.g.*, Prosecutor v. Ngirabatware, Case No. ICTR-99-54-T, Judgment and Sentence, ¶¶ 10, 1374 (Dec. 20, 2012) (citations omitted); *The Legacy of the ICTR*, *supra* note 339, at 255.

not requiring any further proof.⁴³¹ This was particularly symbolic and crucial as it served to collectively validate genocide victims and survivors by its public acknowledgment of their dignity, humanity, victimization, discriminatory ill-treatment, moral injury, and the fact that they were targeted for extermination based on their ethnicity.

d. By Fostering the Concept of Individual Criminal Responsibility, Thereby Not Allowing Group Stigmatization or Criminalization

This is a vital and foundational, yet controversial component in ICTR's jurisprudence, because the focus is on individual guilt rather than collective or group responsibility.⁴³² Hence, this approach implies that neither the military, the state, armed militia groups, the media (who were actively involved inciting perpetration of the genocide⁴³³), nor any other group can collectively be held accountable.⁴³⁴

An accused is treated as an individual, never as an ethnic group, and this approach generally obviates the “criminalizat[ion] and stigmatizat[ion]” of an entire ethnic group for the deeds of its members, who bear individual responsibility for their criminal acts.⁴³⁵

However, the ICTR is unable to avoid discourse on the basis of ethnicity because establishing individual criminal responsibility for genocide requires showing that victims were targeted for extermination and persecution just because they belonged to an ethnic group (i.e. Tutsi).⁴³⁶ The genocide perpetrators largely come from the same ethnic group (Hutu)⁴³⁷ and the fact that they targeted the Tutsi ethnic group for extermination on the basis of their ethnicity cannot be removed from the reconciliation equation, if the problem is to be solved.

431. Starting June 16, 2006, Trial Chambers took judicial notice that between April 6, 1994 and July 17, 1994, genocide occurred in Rwanda against the Tutsi ethnic group. For the ICTR Prosecutor, this meant he no longer had to prove the occurrence of the genocide in each case still pending before the ICTR, and could now focus on presenting specific evidence about the personal involvement each accused person still on trial had in the genocide. *Id.*; see Prosecutor v. Karemera, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, ¶¶ 26, 32 (June 16, 2006). The Appeals Chamber upheld this decision regarding judicial notice. Prosecutor v. Karemera, Case No. ICTR-98-44-AR73(C), Decision on Motion for Reconsideration (Dec. 1, 2006).

432. *The Legacy of the ICTR*, *supra* note 339, at 255.

433. See generally *The Media Case*, Case No. ICTR 99-52-T, ¶¶ 106–08.

434. See Kamatali, *supra* note 340, at 124.

435. *The Legacy of the ICT*, *supra* note 339, at 239.

436. See S.C. Res. 955, *supra* note 20, at Annex, art. 2.2. The Tribunal's identification of ethnicity is a necessity given both the language of the ICTR statute and the legal definition of genocide as the “targeting of a group for extermination.”

437. *But see infra* p. 180 and note 455.

The Tribunal is therefore in the unsteady position of simultaneously having to acknowledge the significance of ethnic group identity for legal purposes (determining *mens rea* for genocide) and attempting to avoid ethnicity when establishing individual guilt to facilitate and endorse reconciliation. This quandary is especially crucial because the “ICTR and the Rwandan government have different approaches to national reconciliation, the former having the starting point of seeing Tutsi, Hutu and Twa as ethnic groups, and the latter basing its national reconciliation policy on deconstructing any such approach.”⁴³⁸

Indeed, these approaches raise the question as to whether a crime that is collective in its nature, like genocide, can be redressed by punishing individuals. Common law presumes non-compliance or non-conformity from what is viewed as normalcy, as the basis for a criminal act.⁴³⁹ Yet, social psychology has revealed that the freedom of individual action is intensely habituated “by the perceived authoritative hierarchy in which the individual feels himself/herself to be situated.”⁴⁴⁰ Individual ethics and principles can be compromised in the face of authority.⁴⁴¹

In the Rwandan genocide, numerous people were murdered because there were numerous murderers.⁴⁴² What persuaded several individuals to participate in the bloodshed was not just intimidation, submission, and compliance,⁴⁴³ but also the legitimate support of the idea that the entire Tutsi population had to be exterminated once and for all.⁴⁴⁴ People acted in concert with others in accomplishing this goal,⁴⁴⁵ thereby eliminating “questions of accountability which might arise. If everybody is implicated, then implication becomes meaningless.”⁴⁴⁶

Many also believed that exterminating the Tutsi ethnic group was a civic duty and “nothing less than the right thing to do.”⁴⁴⁷ This explained why the killings were so violent and committed in public, in view of an even larger number of people who simply acquiesced to the genocide.⁴⁴⁸

438. Kamatali, *supra* note 340, at 121–22.

439. WHEN JUSTICE MEETS POLITICS, *supra* note 143, at 316.

440. *Id.* at 315.

441. *Id.*

442. See Maogoto, *supra* note 4, at 192.

443. See *supra* notes 111–13 and accompanying text.

444. Maogoto, *supra* note 4, at 192.

445. *Id.*

446. TOMORROW WE WILL BE KILLED, *supra* note 3, at 96.

447. Maogoto, *supra* note 4, at 192.

448. DES FORGES, *supra* note 1, at 770.

Further, while many people may have not physically perpetrated the crimes, they may have been involved in other ways, such as directing attackers to where the victims were hiding, uttering hatred, or looting the properties of the victims after they were murdered.⁴⁴⁹ Of course, there were also many who were coerced to perpetrate or witness crimes.⁴⁵⁰ Hence, “the direct and indirect participation” of the populace in the crimes “blur[. . .] the line between guilt and innocence” and hinders reconciliation to a degree.⁴⁵¹

Hence, the question to consider here is whether individual and collective responsibilities are mutually incompatible notions when seeking national reconciliation. In truth, advancing the concept of individual guilt and responsibility as the basis of criminal punishment, for all perpetrators who participated in the Rwandan genocide, is a near-impossible feat. Alan Norrie argues, “blameworthiness and responsibility are issues that must integrate falsely dichotomizing tendencies such as seeing *either* the individual *or* society as being to blame. We need to replace ‘either/or’ with ‘both/and’ thinking.”⁴⁵²

But then again, the Rwandan ethnic categorizations are only appropriate to an extent. These groupings cannot be sustained because many Hutu, Twa and individuals of mixed heritage, who were deemed ‘Tutsi sympathizers’ were victims of the genocide and many Tutsi and Twa committed crimes.⁴⁵³

Additionally there are also many complexities involved in attributing collective responsibility. For example, armed militia groups tend not to possess strict command structures and may not be entities per se. As such, prosecuting a group is difficult, especially many years after the crimes were perpetrated. The ICTR’s prosecutorial approach with regard to individual guilt seems to be a fair compromise. By prosecuting key individuals linked to certain groups, especially when the form of criminal liability charged is joint criminal enterprise,⁴⁵⁴ the ICTR effectively, albeit indirectly, has denounced and reviled these groups.

449. DVD: GACACA, LIVING TOGETHER AGAIN IN RWANDA? (Anne Aghion Films 2002) [hereinafter LIVING TOGETHER AGAIN].

450. *Id.*

451. Maogoto, *supra* note 4, at 192.

452. ALAN NORRIE, PUNISHMENT, RESPONSIBILITY AND JUSTICE: A RELATIONAL CRITIQUE 36, 115 (2000).

453. NIGEL ELTRINGHAM, ACCOUNTING FOR HORROR: POST-GENOCIDE DEBATES IN RWANDA 69–99 (2004); THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 1, 333; *Hybridity, Holism and Traditional Justice*, *supra* note 167, at 766 and note 6.

454. This form of liability amounts to “committing” under Article 6(1) of the ICTR Statute. S.C. Res 955, *supra* note 20, at Annex, art. 6(1); *see, e.g.*, Gacumbitsi v. Prosecutor, Case No. ICTR-2001-64-A, Appeal Judgment, ¶ 158 (July 7, 2006); Prosecutor v. Munyakazi, Case No. ICTR-97-36A-A, Appeal Judgment, ¶ 163 (Sept. 28, 2011);

*e. By Giving a Collective Voice to the Victims and Having Their Experience of Suffering Validated*⁴⁵⁵

To a degree, the testimonies given by witnesses and survivors during the trial at the ICTR have assisted with reconciliation, because it allowed victims and survivors to tell their stories, have their experiences of suffering acknowledged, and put them in a position to forgive and reconcile with the perpetrators. It implicitly recognizes victims and helps them rebuild a sense of political self-confidence and an awareness of their own capacity to act. Conversely, when witnesses testify, old wounds are reopened. They are called upon to recall events like rape and the murder of their babies. As such, they are often distressed and re-traumatized by the extensive and tough cross-examination of, at times, tactless defense counsels whose interest is in defending their client.⁴⁵⁶

According to Nadler and Shnabel, this mechanism is called “socio-emotional intergroup reconciliation,” which seeks to reconfigure in the self-identification of two formerly hostile parties by “removing conflict-related emotional barriers that block the way to ending intergroup conflict,” thus respectively transforming their own collective perception and representation.⁴⁵⁷ While victims are generally keen on recovering credibility in “political agency, of which they had been violently deprived,

Prosecutor v. Ndahimana, Case No. ICTR-01-68-T, Judgment and Sentence, ¶¶ 1–5 (Dec. 30, 2011). A common trait of international crimes is that they “do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act . . . the participation and contribution of other members of the group is often vital in facilitating commission of the offence in question. It follows that the moral gravity of such participation is often no less—or indeed no different—from that of those actually carrying out the acts in question.” Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Appeal Judgment, ¶ 80 (Feb. 28, 2005) (*citing* Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Appeal Judgment, ¶¶ 188, 191, 195–226 (Int’l Crim. Trib. for the Former Yugoslavia July, 15 1999)).

455. *The Legacy of the ICTR*, *supra* note 339, at 254–55; THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 34.

456. *The Legacy of the ICTR*, *supra* note 339 at 250–52.

457. Arie Nadler & Nurit Shnabel, *Instrumental and Socio-Emotional Paths to Intergroup Reconciliation and the Need-Based Model of Socio-Emotional Reconciliation*, in SOCIAL PSYCHOLOGY OF INTERGROUP RECONCILIATION 37–39 (Arie Nadler, Thomas E. Malloy & Jeffrey D. Fisher eds., 2008) (emphasis omitted).

perpetrators are mostly interested in a moral rehabilitation of their collective self.”⁴⁵⁸

The public acknowledgement of victims’ suffering may influence the process of identity rehabilitation far more deeply than the tacit and indirect attempts of enhancing the rule of law by displaying authoritative justice. As such, publicity and contact with the population is of critical importance, and the media can play an important role in the process.

The ICTR established its Outreach Program in 1999, which was designed to keep Rwandan citizens informed of the ICTR’s objectives, relevance, and achievements.⁴⁵⁹ In 2000, it opened an Information and Documentation Centre in Kigali, commonly known as “*umusanzu mu bwiyunge*,” or “contribution to reconciliation”, and the Centre’s main objective is to “bridge the information gap between the Tribunal and the Rwandan population.”⁴⁶⁰

Additionally, there are a number of ways in which victims and their grief can be recognized and acknowledged. One of them is reconciliation events. A relevant example is in 1998, when the former U.N. Secretary-General Kofi Annan and former U.S. president Bill Clinton apologized for failing to prevent the Rwandan genocide,⁴⁶¹ so as to improve the apology and forgiveness cycle in Rwanda. Another example is anniversaries and sites of commemoration, like the annual commemoration of the 1994 Genocide against the Tutsi by the ICTR⁴⁶² and the Rwandan government.⁴⁶³

458. WHEN JUSTICE MEETS POLITICS, *supra* note 143, at 312.

459. See Peskin, *supra* note 364, at 951–52; but see Westberg, *supra* note 33, at 361.

460. “The ICTR has opened ten “mini” information and documentation centres scattered across all provinces of Rwanda.” The ICTR planned that following the completion of the ICTR’s mandate, the UN will hand the centres over to the Rwandan government with the goal of ensuring that an accurate record of the ICTR’s historical judicial output is preserved and communicated beyond the closure of the Tribunal. Dieng, *supra* note 384, at 408–09; *ICTR Information Centre Opens in Kigali*, INT’L CRIM. TRIBUNAL FOR RWANDA, ICTR/INFO-9-2-241 (Sept. 25, 2000), <http://www.unict.org/tabid/155/Default.aspx?ID=374> (last visited Oct. 20, 2014); *The ICTR Remembers*, U.N. MECHANISM FOR INT’L CRIM. TRIBUNAL, <http://unmict.org/ictr-remembers/> (last visited Oct. 20, 2014).

461. U.N., *Secretary-General, in ‘Mission of Healing’ to Rwanda, Pledges Support of United Nations for Country’s Search for Peace And Progress*, Press Release SG/SM/6552 AFR/56 (May 6, 1998), <http://www.un.org/press/en/1998/19980506.SGSM6552.html> (last visited Oct. 17, 2014); CBS News, *Text of Clinton’s Rwanda Speech*, (Mar. 25, 1998) <http://www.cbsnews.com/news/text-of-clintons-rwanda-speech/> (last visited Oct. 17, 2014); History, *The “Clinton Apology”* <http://www.history.com/speeches/the-clinton-apology#the-clinton-apology> (last visited Oct. 17, 2014).

462. *ICTR to Host Ceremony in Commemoration of 20th Anniversary of the 1994 Genocide in Rwanda*, INT’L CRIM. TRIBUNAL FOR RWANDA (Apr. 4, 2014), <http://www.unict.org/tabid/155/Default.aspx?id=1387> (last visited Oct. 20, 2014).

463. *What is Kwibuka20?*, KWIBUKA, <http://www.kwibuka.rw/whatiskwibuka20> (last visited Oct. 20, 2014).

B. The Gacaca System—Reconciliation Processes and Outcomes

The *Gacaca* courts emerged as a result of the domestic system's inability to deal with the huge number of back-logged genocide cases promptly.⁴⁶⁴ They were intended to be a temporary measure to relieve Rwanda's weak and burdened legal system.⁴⁶⁵ After the genocide, the legal system was in tatters and not in a position to discharge the task of bringing the perpetrators to justice,⁴⁶⁶ particularly as many of the legal personnel were killed or fled the country.⁴⁶⁷ Moreover, Rwanda's early post-genocide judiciary suffered from inadequate resources, inefficiency, corruption, and executive influence.⁴⁶⁸

In its traditional form, *gacaca* is an informal, community-centered system of dispute resolution with pre-colonial Rwandan roots.⁴⁶⁹ *Gacaca* epitomizes "restorative justice principles because it does not seek to achieve justice by punishing the perpetrator, but to restore social order by finding communal, compromised solutions and by reintegrating the offender within the community."⁴⁷⁰

Akin to the traditional *gacaca* system, the 'new' *gacaca* process focuses on justice, truth and reconciliation among Rwandans through communal participation.⁴⁷¹ The system also aims to prevent a recurrence of genocide and encourage truthfulness, in the form of confessions, by allowing sentence reductions for those who confess.⁴⁷² Additionally, it makes justice accessible to the people. For example, anyone can make an allegation

464. Westberg, *supra* note 33, at 347; THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 237, 239.

465. See *Genocide Courts Finish Work*, *supra* note 41; *Curtains fall on Gacaca*, *supra* note 41.

466. See JONES, *supra* note 21, at 84; see also Kingsley Chiedu Moghalu, Legal Adviser and Special Assistant to the Registrar, ICTR, Paper Presentation at the African Dialogue II Conference, Arusha, Tanzania (May 24–26, 2002).

467. See *supra* note 27.

468. LIVING TOGETHER AGAIN, *supra* note 449.

469. Goldstein-Bolocan, *supra* note 31, at 376; see Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT'L L. & POL. 355, 370–71 (2002). In many African countries, colonial powers introduced their own system of courts while allowing indigenous systems of dispute resolution to continue operating—resulting in a dual, parallel system of laws and courts (i.e., legal pluralism). See also *Access to Justice in Sub-Saharan Africa*, *supra* note 250, at 51; *supra* section IV.A.

470. Goldstein-Bolocan, *supra* note 31, at 376.

471. Nagy, *supra* note 128, at 93.

472. *Id.* at 94.

and the accuser gets the opportunity to face the offender in a judicial process held in the community,⁴⁷³ often where it took place in the accused's home village.⁴⁷⁴ The judges then typically read-out the case file, comprised of depositions from the accusers.⁴⁷⁵ The judges and community members then hear from the accused, from any accusers, or any other person who wishes to speak.⁴⁷⁶ The panel of judges then "deliberate among themselves and pronounce the verdict in public."⁴⁷⁷

The process differs from traditional *gacaca* in that the new process is formally recognized and organized by the government,⁴⁷⁸ It represents "a *re-birth* of a traditional Rwandan solution . . ."⁴⁷⁹ The rules are not customary, but rather codified in the Rwandan Transitional National Assembly Organic Law 40/2000 of January 26, 2001.⁴⁸⁰

As of April 2012, the *gacaca* courts had tried approximately 1,951,388 cases⁴⁸¹ in fewer than eight years, and the conviction rate was about 65%.⁴⁸² This differs with the national justice system, which dealt with only 10,026 cases between 1997 and 2004.⁴⁸³ The *gacaca* courts are generally independent from the national courts and there is no institutional

473. *Id.* at 93–94. The *Gacaca* trials are held at various administrative levels depending on the category of offense of the accused. The lowest and smallest administrative level is the cellule, which is equivalent to a neighbourhood or small community. The next level is a secteur, which akin to a small village or groups of several cellules. The *Gacaca* courts deals with Category 2 and 3 offences—trials for Category 2 offences held at the secteur level and Category 3 offences tried at the cellule level (there is also an alternative type of dispute resolution under this category). Since 2008, the *gacaca* courts jurisdiction had been extended to include some Category 1 offenses. Confessions are considered during sentencing, and if done before appearing on a list of suspects, there is a further reduction in the sentence. *See* Ingelaere, *supra* note 128, at 41–43; *see also* Nuwamanya, *supra* note 427, at 60.

474. Ingelaere, *supra* note 128, at 42.

475. *See id.* at 41–42; Westberg, *supra* note 33, at 339.

476. Ingelaere, *supra* note 128, at 42.

477. *Id.*; Westberg, *supra* note 33, at 340.

478. JONES, *supra* note 21, at 8.

479. *Id.* Every *gacaca* jurisdiction has threelimbs: (1) the General Assembly, which is made up of the whole populace of the jurisdiction (i.e. cell, sector, district, or province); (2) a seat of elected judges; and (3) a Coordinating Committee chosen by the panel of judges. *Western and Local Approaches*, *supra* note 8, at 226.

480. Organic Law Setting Up "Gacaca Jurisdictions" and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994, Organic Law No. 40/2000 of 2001 (Rwanda) [hereinafter Organic Law No. 40/2000].

481. This figure likely includes all instances of trials and appeals. It also includes non-genocide cases such as offences against property (for example, looting, criminal damage etc.). Additionally, there is no joinder of parties in *gacaca* cases—even though multiple perpetrators may be involved in the same incident.

482. *See Genocide Courts Finish Work*, *supra* note 41; *Curtains fall on Gacaca*, *supra* note 41.

483. Ingelaere, *supra* note 128, at 45.

link between them.⁴⁸⁴ However, cases of Category 1 genocide crimes may be transferred from the *gacaca* courts to the national courts.⁴⁸⁵

NURC encourages group-to-group reconciliation, which concentrates on repairing damaged relationships between groups of genocide survivors and perpetrators, presuming that the groups lived in a previous state of harmony and that the unity is salvageable.⁴⁸⁶ It also implies that social harmony is a dynamic inherent in Rwandan society and that it could be revived in the current context by establishing customs, such as those personified in *gacaca*.

It is argued that the *gacaca*'s processes are cooperative, with the population being the focal agent and communal discourse being the principal form of deliberation.⁴⁸⁷ This is crucial if the divergent groups wish to rediscover how to coexist.⁴⁸⁸ The Rwandan government proscribed the use of ethnic labels on national identity cards in 2003⁴⁸⁹ and made it illegal to promote "divisionism" or "sectarianism."⁴⁹⁰ As such, this inhibits public discourse on ethnicity. By extension, the groups involved in this process are no longer depicted as Hutus or Tutsis, but instead as "victims . . . and suspects" or "survivors and perpetrators."⁴⁹¹ This is appropriate to an extent, considering that the Rwandan conflict resulted predominantly from antagonisms between the two ethnic groups.⁴⁹² It is imperative, nevertheless, to acknowledge the role ethnicity played in encouraging the commission of genocide.

Public participation in *gacaca* was thus essential for the reinforcement of unity. This communal participation generates a greater sense of togetherness during the process of *gacaca*, which, in turn, engenders greater accord or reconciliation in the sense of group-to-group outside of

484. JONES, *supra* note 21, at 94.

485. *Id.*

486. THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 310; *see* Marc Lacey, *A Decade After Massacres, Rwanda Outlaws Ethnicity*, N.Y. TIMES (Apr. 9, 2004), <http://www.nytimes.com/2004/04/09/international/africa/09RWAN.html>.

487. THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 310–11.

488. *Id.*

489. *Id.* at 310.

490. Organic Law N° 47/2001 of Dec. 18, 2001, ch. 2, art. 3; *See Organic Law instituting the penal code*, *supra* note 415, at ch. 2, art. 135. *See also Mass Justice for Mass Atrocity*, *supra* note 4, at n.188; THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 310.

491. THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 310 (citations omitted).

492. *Id.*

gacaca. The barring of legal representation in hearings is aimed at amplifying the community's sense of ownership over the process.⁴⁹³ As such, the atmosphere in the *gacaca* proceedings is informal, less adversarial, and more participatory, thereby speeding up the process whilst putting the population at ease.⁴⁹⁴

Some commentators have contended that *gacaca* has not succeeded in facilitating reconciliation.⁴⁹⁵ Ingelaere avers that *gacaca* permitted a negligible level of discourse among the participants.⁴⁹⁶ Equally, Waldorf argues that *gacaca* failed because the Rwandan government has 'politiciz[ed] *gacaca*' so as to 'collectivize the guilt' of the Hutu-majority population for the mass atrocities perpetrated.⁴⁹⁷ Harrell, conversely, states that reconciliation through *gacaca* is akin to an individual-to-individual process, with reconciliation involving the restoration of relationships between individual perpetrators and survivors, and that confession and contrition are important instruments in this outcome.⁴⁹⁸

He argues that the reintegration of detainees into their home communities and the utilization of these detainees in activities can afford relatable benefits to survivors.⁴⁹⁹ He further states that community service as a punishment has "the potential to reconcile a wrongdoer with the larger community" by changing the way the community views his/her motives and actions,⁵⁰⁰ unlike one-dimensional, simple reintegration, which entails the detainee merely avoiding revenge attacks.⁵⁰¹

Similarly, Penal Reform International ("PRI"), an international NGO,⁵⁰² avers that use of community service as a mode of sentence is, in part, aimed "to repair the social tissue and promote reconciliation" while

493. See Aneta Wierzynska, *Consolidating Democracy Through Transitional Justice: Rwanda's Gacaca Courts*, 79 N.Y.U. L. Rev. 1934, 1957 (2004); *Hybridity, Holism and Traditional Justice*, *supra* note 167, at 796; Phil Clark, *The Rules (and Politics) of Engagement: The Gacaca Courts and Post-Genocide Justice, Healing and Reconciliation in Rwanda* in AFTER GENOCIDE: TRANSITIONAL JUSTICE, POST-CONFLICT RECONSTRUCTION AND RECONCILIATION IN RWANDA AND BEYOND 304 (Phil Clark & Zachary D. Kaufman eds., 2009).

494. *Hybridity, Holism and Traditional Justice*, *supra* note 167, at 795–96; Wierzynska, *supra* note 495, at 1958; *but see* Westberg, *supra* note 32, at 356 (citations omitted).

495. THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 327 (citations omitted).

496. Ingelaere, *supra* note 128, at 46–49.

497. *Mass Justice for Mass Atrocity*, *supra* note 4, at 79; THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 246, 327 (citations omitted).

498. HARRELL, *supra* note 18, at 87.

499. *Id.*

500. *Id.*; THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 328 (citations omitted).

501. THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 328 (citations omitted).

502. NGO is Non-Governmental Organization.

contributing to “the social rehabilitation of detainees.”⁵⁰³ Indeed, while the view is plausible, the extent to which reconciliation occurs in *gacaca* in this regard is questionable. Reconciliation necessitates a thorough process and is not something that can be easily recaptured. The switch from reintegration to reconciliation can take a long time and will require more dialogue between detainees and their communities beyond when detainees first return home and during *gacaca*.

The Rwandan population, whether as individuals or groups, experienced the conflict in dissimilar ways—some more deeply and intensely than others. As such, a proportion of the populace found it less problematic than others to reconcile. Indeed, some have expressed skepticism about the level of reconciliation possible during the aftermath of the genocide.⁵⁰⁴ De Jonge commented, “given the survivors’ traumatic experiences . . . it is unjust to expect them to engage with perpetrators in any deep and taxing way.”⁵⁰⁵

This feeling was exacerbated by a dilemma that existed within the *gacaca* system: that the detainees and local populations were afraid to confess to their own crimes or denounce others, fearing that they would be condemned for crimes that had not been brought to the *gacaca* court.⁵⁰⁶ Moreover, it is unsurprising that a number of detainees would lie, avoiding complete confessions, minimize their involvement, and blame others for crimes they committed in order to take advantage of the reduced sentences.⁵⁰⁷

The *gacaca* system also seem to contribute to increased tensions and rekindled hatred between cultural groups in some communities,⁵⁰⁸ particularly when large numbers of convicted perpetrators returned after serving their sentences to live side-by-side with genocide survivors.⁵⁰⁹

503. PENAL REFORM INT’L, PRI RESEARCH ON GACACA REPORT: GACACA JURISDICTIONS AND ITS PREPARATIONS 13 (2002).

504. See THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 329, for Phil Clark’s interview with Klass de Jonge, the Research Coordinator at PRI, in Kigali, Rwanda on January 29, 2003.

505. *Id.*

506. See LIVING TOGETHER AGAIN, *supra* note 449, for an interview with genocide survivor Annociata Muanyonga.

507. See *id.*, for the confession gathering at Rilima Prison; see also THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 209 (citations omitted).

508. See *Western and Local Approaches*, *supra* note 8, at 227; but see THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 231–32.

509. See THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 224–27.

There are examples of cases where *gacaca* judges or the participants were bribed, intimidated, or implicated in the genocide.⁵¹⁰

These issues, while appropriately raised, did not fully undercut the *gacaca* courts' ability to represent "civic virtues of communal engagement, discourse and debate that are important for building trust and long-term peace."⁵¹¹ It is important for a population to be able to fully express themselves within the limits of their laws in order to accurately observe the extent to which reconciliation has taken place. Gasibirege contended that the dialogue that *gacaca* encourages is required for the population to learn to resolve difficult issues communally and is vital to the wellbeing of the entire community.⁵¹²

Other criticisms of the *gacaca* courts centered on fair trial violations and victor's justice.⁵¹³ For example, Amnesty International stated that it "has a number of human rights concerns regarding the constitution of the Gacaca Jurisdictions and the fairness of their proceedings."⁵¹⁴ Concerns include the constitutionality of the *gacaca* legislation, particularly relating to the concepts of fair trial,⁵¹⁵ legal representation,⁵¹⁶ the placing of the burden of proof,⁵¹⁷ the double jeopardy principle,⁵¹⁸ and competence of the lay *gacaca* judges.⁵¹⁹ Moreover, the *gacaca* system was perceived to deal only with crimes perpetrated by the Hutu population and not the RPF.⁵²⁰ This may have contributed to a "culture of impunity," and the Hutus' long term feelings or resentment and victimization.⁵²¹

510. *Western and Local Approaches*, *supra* note 8, at 227; Christopher J. Le Mon, 14 (2) HUM. RTS. BRIEF 16, 17 (2007) <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1208&context=hrbrief> (last visited Oct. 16, 2014).

511. THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 234.

512. Simon Gasibirege, *L'Élection des juges inyangamugayo: rupture ou continuité*, in 6 CAHIERS DE CENTRE DE GESTION DES CONFLITS: DE LA PAIX À LA JUSTICE: LES ENJEUX DE LA RÉCONCILIATION NATIONALE 93–127 (Eugene Ntaganda ed., 2002); *see also* THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 201, 363, 296.

513. Westberg, *supra* note 33, at 353–56; THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 28.

514. *A Question of Justice*, *supra* note 30, at 12, 34–40.

515. *Id.* at 30.

516. The lack of legal representation was contrary to Article 18 of the Constitution of Rwanda (adopted by referendum on May 26, 2003) which provides: "The right to be informed of the nature and cause of charges and the right to defence are absolute at all levels and degrees of proceedings before administrative, judicial and all other decision making organs." CONSTITUTION OF THE REPUBLIC OF RWANDA May 26, 2003, *available at* www.parliament.gov.rw/fileadmin/Images2013/Rwandan_Constitution.pdf.

517. *A Question of Justice*, *supra* note 30, at 23.

518. *Id.* at 33, 39.

519. *Id.* at 37–39; Westberg, *supra* note 33, at 353–55.

520. THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 211; *Hybridity, Holism and Traditional Justice*, *supra* note 167, at 806; *Retributive Justice*, *supra* note 116, at 86.

521. ELTRINGHAM, *supra* note 453, at 145; Ingelaere, *supra* note 128, at 56.

However, many of these criticisms stem from some Western views that focused on *gacaca* courts' failure to punish.⁵²² The criticisms are largely unsubstantiated for two key reasons. Principally, the *gacaca* court system cannot be framed as an exclusively legal institution, nor can it be framed in the absence of its aims relative to reconciliation.⁵²³ As Clark argues "[t]he dominant discourse fails to account for the hybrid nature of *gacaca* and the hybrid methods and objectives it embodies. We therefore require a more nuanced interpretation of *gacaca* and its objectives if we are to offer more appropriate suggestions as to how it may be reformed to aid its effectiveness as a tool of post-genocide reconstruction."⁵²⁴

The most significant weakness of the *gacaca* system is the inability to materially create social cohesion. Some academics have suggested that this fault results largely from the system's dual focus on competing goals of reconciliation and retribution, whereby the court is not fully operational as "either a court or a customary dispute resolution mechanism."⁵²⁵ The *gacaca* court system was re-constructed with aspirations that the telling and discovery of truths would then facilitate reconciliation and encourage both apology and forgiveness.⁵²⁶ These are weighted goals and, while integral to the processes of reconciliation, they may not achieve the necessary psychological shift required for reconciliation to occur.

Sosnov cites, "sadly, reconciliation remains a distant hope. In pilot studies, *gacaca* created more divisiveness than communal bonds. Many survivors perceive confessions by genocide suspects as insincere, promoting resentment between Hutus and Tutsis rather than reconciliation."⁵²⁷ Rettig offers a similar criticism of *gacaca*, pointing out that "attempting to strike a middle-ground between punitive and restorative justice," ultimately produced inconsistent results, simultaneously encouraging confessions, lies, and more silence.⁵²⁸

Nonetheless, the ambitiousness of the *gacaca* court system is admirable, bearing in mind that a seamless, efficient delivery of transitional justice was improbable through any legal system, given the deeply rooted

522. *Hybridity, Holism and Traditional Justice*, *supra* note 167, at 806–07.

523. *Id.*

524. *Id.*

525. Maya Sosnov, *The Adjudication of Genocide: Gacaca and the Road to Reconciliation in Rwanda*, 36 DENV. J. INT'L L. & POL'Y 125, 126 (2008).

526. JONES, *supra* note 21, at 61–62; THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, *see generally* ch. 7.

527. *Id.* at 143.

528. *See* Rettig, *supra* note 26, at 44–45.

psychological origins of the genocide and the number of individuals involved.

The *gacaca* system offered a re-orientation of Rwandan justice by focusing on confession, healing, and forgiveness without rejecting the importance of retribution.⁵²⁹ According to the NURC study, 89% of Rwandan citizens believed that “the punishments handed down to perpetrators were fair.”⁵³⁰ A key criticism regarding *gacaca* is the notion that retributive justice and reconciliation are incompatible legal philosophies.⁵³¹ But, as the literature examining transitional justice suggests, retribution is integral and undeniably present.⁵³² In turn, retribution serves as a component of the reconciliation process. Thus, to frame *gacaca* as the sole entity through which reconciliation may be achieved would be an overly narrow, insufficient framework.

The *gacaca* system exists within the broader, social milieu of Rwanda’s post-genocide environment. It filled a valid need with respect to transitional justice directly and reconciliation processes indirectly. No legal system for transitional justice could have coped with the hundreds of thousands of individuals involved in the genocide. Criticisms of *gacaca*, in short, neglect the war-torn background in which the system existed. *Gacaca* was not solely a legal entity pursuing justice, but rather, a unique socio-legal entity that was influenced by the psychology of the Rwandan collective, informed significantly through fear, anger, remorse, sadness, and varying levels of necessary human emotions that cannot be extricated from Rwandan society.

C. Rwandan Government Initiatives

As part of the broader social scheme in the reconciliation process, the Rwandan government re-instituted a number of initiatives drawn from Rwandan culture and traditional practices.⁵³³ They were re-invented and adapted for modern development.⁵³⁴ These programs are designed to foster progress in all areas of Rwandan growth, including the economy,

529. *Id.* at 31.

530. *Rwandan Reconciliation Barometer*, *supra* note 167, at 65–66.

531. *See generally* Mark J. Osiel, *Why Prosecute? Critics of Punishment for Mass Atrocity*, 22 HUM. RTS. Q. 118 (2002).

532. Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 744–45 (1998).

533. Rwanda Governance Board, Presentation at Annual Interpol Expert Meeting, *Reconciliation Process after genocide, War crimes, and Crimes against Humanity: “The role of Reconciliations commissions in Africa.”* Kigali, Rwanda (Apr. 15, 2014) (on file with author).

534. *Id.*

healthcare, social issues and governance.⁵³⁵ With the exception of NURC and the *gacaca* courts, these initiatives, while not directly linked to reconciliation, relate to governance, general welfare and communal interaction, which, in turn, can contribute to reconciliation.

Moreover, these initiatives have gone some way to fill some of the gaps inherent the legal pluralist system. In addition to NURC and the *gacaca* courts, these schemes include:

- Performance Contract (*Imihigo*);⁵³⁶
- Local Mediation Committees (*Abunzi*);⁵³⁷
- Community Works (*Umuganda*);⁵³⁸
- National Dialogue Council (*Umushyikirano*);⁵³⁹
- One Cow per Poor Family (*Girinka*);⁵⁴⁰
- Social Health Insurance (*Mutuelle de Sante*);⁵⁴¹
- Communal Action and Reciprocated Support (*Ubudehe*);⁵⁴²
- National Leadership Retreat (*Umwiherero*);⁵⁴³
- Solidarity Camps (*Ingando*);⁵⁴⁴
- Saving and Credit Cooperatives (*Umurenge SACCOs*);⁵⁴⁵

535. *Id.*

536. *Imihigo*, RWANDAPEDIA, <http://www.rwandapedia.rw/explore/imihigo> (last visited Oct. 20, 2014).

537. *Abunzi*, RWANDAPEDIA, <http://www.rwandapedia.rw/explore/abunzi> (last visited Oct. 20, 2014).

538. *Umuganda* is a day, usually the last Saturday of each month, when communities come together to do a variety of communal labour. *Umuganda*, RWANDAPEDIA, <http://www.rwandapedia.rw/explore/umuganda> (last visited Oct. 20, 2014).

539. *Umushyikirano*, RWANDAPEDIA, <http://www.rwandapedia.rw/explore/girinka> (last visited Oct. 20, 2014).

540. *Girinka*, RWANDAPEDIA, <http://www.rwandapedia.rw/explore/girinka> (last visited Oct. 20, 2014).

541. *Health System*, GOV'T OF RWANDA, <http://www.gov.rw/Health-System> (last visited Oct. 20, 2014).

542. *Ubudehe*, RWANDAPEDIA, <http://www.rwandapedia.rw/explore/ubudehe> (last visited Oct. 20, 2014).

543. *Umwiherero*, RWANDAPEDIA, <http://www.rwandapedia.rw/explore/unwiherero> (last visited Oct. 20, 2014).

544. *See Ingando*, *supra* note 225.

545. Alex Rutareka, *Saving Can Help to Lift Rwandans From Poverty*, THE RWANDA FOCUS (Nov. 7, 2011), <http://focus.rw/wp/2011/11/saving-can-help-to-lift-rwandans-from-poverty> (last visited Oct. 20, 2014); Alphonse Nahayo *et al.*, *Assessing the Contribution of Umurenge Saving and Credit Cooperative (SACCO) Loans to the Household Income: A Case Study of Nyabihu District, Western Rwanda, from 2010 to 2011*, 2 GLOBAL J. CURRENT RES. 6 (2013); *Umurenge SACCO records high increase in deposits*, TWIZIGAMIRE

- Civic education programs that promote values of unity, citizenship and the culture of hard work (*Itorero*);⁵⁴⁶
- Citizen Report Card;⁵⁴⁷
- Rwanda Governance Scorecard.⁵⁴⁸

Currently, these programs have appeared to produce positive, constructive results. For example, since 2007, *Umuganda*, the community works project, is estimated to have contributed to Rwanda's development at a value of \$60 million U.S. dollars.⁵⁴⁹ Since its reintroduction in 2006, *Girinka* has enabled more than 180,000 poor families to receive cows, contributed to an increase in agricultural production in Rwanda, particularly in milk products, which has reduced malnutrition and increased incomes.⁵⁵⁰ More recently, the Rwandan government initiated a program called *Ndi Umunyarwanda*, which aims to “build national identity based on trust and truth.”⁵⁵¹ Yet, there may still be difficulties in objectively assessing and measuring their real impacts and influence on reconciliation, for instance in terms of:

1. **Time:** considering *Imihigo* was reintroduced in 2006, *Itorero* was re-launched in 2009, while both *Umurenge SACCOs* and *Ndi Umunyarwanda* were established recently, it may be too early to get a clear picture given the fact that reconciliation can be a long-term process;
2. **Scope:** it is uncertain how comprehensive the study needs to be in order to reflect the impact the various initiatives;

(Aug. 15, 2013), <http://www.twizigamire.com/2013/08/umurenge-sacco-records-high-increase-in-deposits/> (last visited Oct. 20, 2014).

546. *Itorero*, RWANDAPEDIA, <http://www.rwandapedia.rw/explore/itorero> (last visited Oct. 20, 2014).

547. The Citizen Report Card is a citizen perception survey that assesses the “quality, adequacy and efficiency of public services and improves public accountability to citizens. It has the objective of using the feedback obtained from citizens as a tool for recommending remedial actions.” See Jean Paul Munyandamutsa, *2010 Citizen Report Card Survey: Major Findings*, RWANDA GOVERNANCE ADVISORY COUNCIL (IPAR Research Conference Dec. 8, 2011), available at http://www.ipar-rwanda.org/index.php?option=com_docman&task=Doc_download&gid=49Itemid=151.

548. “The Rwanda Governance Scorecard (“RGC”) is an annual publication of the Rwanda Governance Board that seeks to accurately gauge the state of governance in Rwanda.” *Rwandan Governance Scorecard 2012*, RWANDA GOVERNANCE BOARD (Dec. 2012), available at http://www.rw.undp.org/content/dam/rwanda/docs/demgov/RW_RGS%202012%20Final%20Report%2006_05.pdf.

549. *Umuganda*, *supra* note 538.

550. *Girinka*, *supra* note 540.

551. *Goal*, NDI UMUNYARWANDA, <http://www.ndiumunyarwanda.rw/> (last visited Oct. 20, 2014).

3. **Participants:** determining the proper parties to consult and question may prove difficulty in terms of identification and objectivity.

D. Interim Summation: Reconciliation in Rwanda

Conflict between social groups, at all levels, are an inevitable aspect of human society.⁵⁵² Fundamentally, it occurs when the objectives of one group vary from those of another group in terms of causes, actions, intensity, and duration.⁵⁵³ While some conflicts are relatively short and easily resolved through negotiations, others endure for decades, penetrating the social fabric of society.⁵⁵⁴

Within this spectrum, there are differing echelons of reconciliation requirements, whereby relatively short-term conflicts do not necessarily require any reconciliation effort at all. The Rwandan genocide, however, came about mainly as a result of deeply-entrenched ethnic enmity.⁵⁵⁵ Ultimately, this foundation posed a difficult challenge to achieving post-genocide reconciliation in Rwanda, necessitating the focus on all levels of infrastructure and society.⁵⁵⁶

Divergent reconciliation objectives are connected to the nature of the conflict rather than the mechanisms supporting the reconciliation process. The role of individual emotion is critical, because it could encourage collective resistance to, or support for, reconciliation. Furthermore, anger, hatred, and fear could become deeply embedded in the national psyche over time and cause continual conflict. In turn, it could then be sustained by collective and national memory, which thus catalyzes continual conflict. What emerges from this concept of reconciliation is the fundamental view integral to this study—*reconciliation does not naturally occur following conflicts such as the Rwandan example*. It requires proactive, fervent, and multidimensional efforts on every societal level.⁵⁵⁷

Karekezi confirms this perspective by arguing that reconciliation is not “the manufacture of a cheap and easy bonhomie,” but rather requires “facing unwelcome truth in order to harmonize incommensurable world

552. *The Nature of Reconciliation*, *supra* note 155, at 12–13.

553. *Id.*

554. *Id.*

555. *Supra* sections II., II.A., and II.B.

556. *The Nature of Reconciliation*, *supra* note 155, at 12–13.

557. *Id.*

views.”⁵⁵⁸ She further states that reconciliation will be tricky to attain and will require prolonged, often painful discourse between rival groups and individuals in order to rebuild damaged relationships.⁵⁵⁹

Rival groups in society require specialized mechanisms that will foster both reconciliation and integration. The process of reconciliation can thus be framed in terms of the provisional transitional justice mechanisms, such as the ICTR and *gacaca* courts. Reconciliation outcomes are reflected in the psychological shift that results from these processes. While the reconciliation process is distinguishable from peacemaking, the role of sustainable peace is closely bound to reconciliation outcomes.

The shift occurring in the behaviors, beliefs, and attitudes of one group toward another is the outcome of reconciliation. It is closely bound to individual and collective psychological processes and penetrates deeply into the social fabric of a post-conflict nation.

In the Rwandan context, the psychological dimension of reconciliation is significant because of the ingrained historical nature of the conflict.⁵⁶⁰ As an international mechanism of transitional justice, some have criticized the ICTR for not facilitating the psychological dimension of reconciliation in Rwandan society.⁵⁶¹

The *gacaca* courts, in contrast, are more optimally positioned to facilitate reconciliation on both the individual and collective levels, because of their scope and size. However, the degree to which *gacaca* encourages reconciliation goals is linked to the psychological change of the Rwandan population. This is integral to reconciliation as an outcome.

While both the ICTR and *gacaca* endorsed reconciliation as a process and as a legal pluralist system that is central to Rwanda transitional justice, it was the *gacaca* courts that generated the most critical support of reconciliation as an outcome. Nevertheless, the role of the ICTR must not be understated. The ICTR afforded international involvement and garnered attention to transitional justice in post-genocide Rwanda. Furthermore, it added another dimension to reconciliation as a broader collective outcome important to the global community.

As highlighted in section two above, the divergent collective memories of Rwandan history by both Hutus and Tutsis may obstruct reconciliation.⁵⁶²

558. Alice Karekezi, *Juridictions gacaca: lutte contre l'impunité et promotion de la réconciliation nationale*, in 3 CAHIERS DU CENTRE DE GESTION DES CONFLITS: LES JURIDICTIONS GACACA ET LES PROCESSUS DE RÉCONCILIATION NATIONALE 9, 85 (Eugène Ntaganda ed., 2001); see also THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 330.

559. Karekezi, *supra* note 558, at 83–90.

560. THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 40 (citations omitted).

561. Ingelaere, *supra* note 128, at 51; Westberg, *supra* note 33, at 360–61.

562. *Supra* § II.B.1.

Arguably, recollection of the past may require immoderate revision in order to fashion a synchronized, mutually acceptable history. Moreover, the longstanding nature of the ethnic conflict that impelled the genocide has facilitated the accrual of considerable intergroup grievances requiring recognition and resolution through healing and forgiveness.

Where the Rwandan government emphasizes individual healing and forgiveness as fundamental to its reconciliation definitions,⁵⁶³ the international community does not embody these goals, perhaps due to its existence on a more individual, internal and domestic level. Yet, there is divergence as to how and whether healing and forgiveness should be envisaged as important to reconciliation outcomes at all. Healing and forgiveness may not be possible in some severely divided societies that are affected by extreme violence.⁵⁶⁴

Due to its external position, the ICTR is incapable of facilitating reconciliation goals beyond the justice-based processes that are integral to its proposed outcomes. *Gacaca*, on the other hand, was optimally positioned as a transitional justice mechanism that could, in theory, prompt reconciliation as both a process and outcome.

According to the NURC, the monitoring of the reconciliation process serves to forewarn decision-makers in Rwandan government about areas of failed reconciliation efforts, potential unrest and the degree to which various transitional justice mechanisms, such as the ICTR and *gacaca*, have promoted reconciliation goals more broadly.⁵⁶⁵

In evaluating reconciliation progress, the NURC asks whether citizens: (1) view political institutions as legitimate; (2) feel material, physical and cultural security; and (3) possess a tolerance for diversity in combination with a shared sense of identity and citizenship, citizens will be more willing to commit themselves to the reconciliation process and reconciliation is more likely to occur.⁵⁶⁶ Additional hypotheses include that if Rwandan citizens are given a space within which to confront sources of historical, socio-cultural divisions, then there is a greater likelihood for reconciliation.⁵⁶⁷

The NURC's study posited that over 87% of Rwandan citizens believe that there has been open and frank discourse about the historical roots of the genocide between the rival sides; although, nearly 40% of the 3,000

563. *Rwandan Reconciliation Barometer*, *supra* note 167, at 32, 61–63, 70, 88.

564. *The Nature of Reconciliation*, *supra* note 155, at 19.

565. *Rwandan Reconciliation Barometer*, *supra* note 167, at 9.

566. *Id.* at 9–10.

567. *Id.* at 10–11.

citizens surveyed said that there are people living in the nation who would commit another genocide if the opportunity arose.⁵⁶⁸ This suggests that, while the Rwandan population has a potentially safe space within which to tell the truth, the psychological healing resulting from reconciliation has yet to occur.

The NURC posits further that the belief that justice has been served was integral to the process of reconciliation. Moreover, the NURC highlighted both the ICTR and *gacaca* systems as potentially integral to the role of transitional justice in promoting reconciliation.⁵⁶⁹ While both the ICTR and *gacaca* system have advanced the transitional justice component of reconciliation, neither have been successful in encouraging the psychological healing aspect.

Apart from what was directly experienced, *gacaca* educated nearly 94% of Rwandan citizens about the genocide.⁵⁷⁰ Despite ostensible flaws in the progress, the truth-telling at the *gacaca* trials and meetings aided the reconciliation across all class lines and in all geographic areas assessed by the NURC. However, a considerable fissure in the *gacaca* system was the level of social cohesion it facilitated, which is still a subject of debate.⁵⁷¹

Structural components alone cannot channel the process of reconciliation. Transitional justice mechanisms can provide a space within which various justice outcomes can be achieved. But instead, the psychological outcomes of reconciliation would be linked to the human, rather than structural, element.

Political, social, and economic processes that encourage the conflict, must irrefutably be restructured in order to foster greater intergroup relations and eliminate discrimination and inequalities.⁵⁷² The criticisms of *gacaca* highlight the system's inefficiencies in addressing discrimination toward the Hutus after the genocide, specifically by not addressing revenge killings and Tutsi perpetrators of violence.⁵⁷³

The restoration of the justice system in Rwanda was not conducted solely through *gacaca*. Rather, *gacaca* emerged from a need to address the widespread perpetration of crimes in a timely manner and in a way that would promote the reconciliation process. The ICTR's key achievement is the promotion of an international post-conflict agenda, which was not

568. *Id.* at 58–60.

569. *Id.* at 7071.

570. *Id.* at 66.

571. See e.g., *Genocide Courts Finish Work*, *supra* note 41; *Curtains fall on Gacaca*, *supra* note 41.

572. *The Nature of Reconciliation*, *supra* note 155, at 16, 25.

573. See Rettig, *supra* note 26, at 40; see also *Hybridity, Holism and Traditional Justice*, *supra* note 167, at 806; see also Sosnov, *supra* note 527, at 139.

linked to traditional notions of reconciliation outcomes. These outcomes usually exist on both individual and collective levels within the confines of a geographic area. Instead, this agenda views reconciliation as an ongoing process where the international community becomes more cohesive, participatory, and aware of the interconnectivity of human society.

The combination of the ICTR and *gacaca* systems is therefore illustrative of how steps to reconciliation can be meaningfully sourced from both the macro (collective) and micro (individual) levels (i.e., above and below), thereby facilitating reconciliation outcomes that are sustainable on all levels of society.

E. The Legal Pluralist System and Reconciliation From Above and Below

Reconciliation processes that are sourced from above include political institutions and leadership or transitional justice mechanisms like the ICTR. Those from below include community engagement and intergroup interactions on the micro levels. These processes produce the most sustainable outcomes.⁵⁷⁴ Grassroots efforts, such as those indicated by *gacaca*, are more meaningful and relevant when they are grounded in policy and take on the perspectives of leaders reflected in the *gacaca* system. The reconciliation process requires policies that create a psychological shift (the critical outcome of reconciliation) for all citizens. These policies should not only be conveyed in formal statements, articles, and speeches, but also through acts of symbolic collaboration and communication. Communications shifts the relationship shift towards social cohesion.⁵⁷⁵

The Rwandan situation demonstrates that transitional justice mechanisms, on both the macro and micro levels, or above and below respectively, cannot alone channel reconciliation outcomes. NURC's study implicitly concluded that social cohesion was not directly linked to transitional justice, but was instead connected to "economic cleavages" in society. It also found that social cohesion somewhat lagged behind the other indicators of reconciliation, despite relatively high levels of confidence in the ICTR and *gacaca* systems.⁵⁷⁶

The Rwandan government, through NURC, has defined reconciliation as the practice of consensus among the nation's citizens who share

574. *The Nature of Reconciliation*, *supra* note 155, at 27.

575. *Id.* at 27–28.

576. *Rwandan Reconciliation Barometer*, *supra* note 167, at 70–71, 86, 88.

common nationality, culture and have equal rights.⁵⁷⁷ Additionally, it asserts that truth and the healing of one another's wounds in the post-genocide environment is critical to achieving reconciliation. Further, it claims that "radical change" is necessary for the nation to meaningfully and sustainably transform into a "reconciled" society."⁵⁷⁸ While the *gacaca* system confronted reconciliation more directly and from a grassroots level, the ICTR served in an arguably equal capacity in contextualizing both conflict and reconciliation within the global community.

The NURC categorizes the reconciliation process as occurring solely on a domestic level.⁵⁷⁹ These processes are defined as: the promotion of the Rwandan identity, the creation of a nation that respects the rule of law and human rights, the promotion of synergy in nation-building, and truth-telling that heals psychological wounds.⁵⁸⁰

The *gacaca* system has largely served these processes, making it a unique model for future post-conflict reconciliation, when channeled through socially-minded transitional justice. The ICTR has served these processes on a broader collective, and global level by: combating genocide ideology in the worldwide community, indicating that gross human rights violations will not be internationally tolerated, and, more saliently, reflecting synergy and trust on an international level. While the *gacaca* system was more optimally positioned to facilitate internal reconciliation outcomes, the ICTR represents an international-level transitional justice mechanism that is relevant to the post-conflict reconciliation process.

Typical criticisms of the ICTR refer to its structural and logistical weaknesses⁵⁸¹ that resulted in the conclusion of only a relatively limited number of cases.⁵⁸² Censures of the *gacaca* system focus more narrowly on the inability of its system to promote social cohesion.⁵⁸³ It is worth noting that national reconciliation was never the core objective of the ICTR, especially due to its external positioning.⁵⁸⁴

The extent of the ICTR's intervention may not appear to be significant, with only 68 cases completed⁵⁸⁵ since its establishment. Contrast that

577. *Id.* at 18.

578. *Id.* at 18–19.

579. *Id.* at 19–20.

580. *Id.* at 19.

581. See Lana Ljuboja, *Justice in an Uncooperative World: ICTY and ICTR Foreshadow ICC Ineffectiveness*, 32 HOUS. J. INT'L L. 767, 768 (2010).

582. Westberg, *supra* note 33, at 360.

583. *Id.* at 356.

584. See *supra* note 298.

585. See *supra* note 35 and text accompanying notes 283–85. This figure represents cases against individuals that have gone through the trial and appeal processes and have resulted in either convictions or acquittals.

with the *gacaca* courts' 1,951,388 cases.⁵⁸⁶ However, it would not have been possible or practical for the ICTR to handle thousands of cases, as this would require more resources than were available.⁵⁸⁷ Furthermore, given the large number of perpetrators of serious crimes and the ephemeral make-up of the ICTR, the UNSC intended⁵⁸⁸ and called on the ICTR to focus on those most responsible, leaving the rest to national courts.⁵⁸⁹ The Prosecutor could not take on more cases because of the prearranged time limits set by the UNSC.⁵⁹⁰ The Prosecutor was also encouraged to decide which cases to proceed with and which cases were to be transferred to competent national jurisdictions (the latter set of cases were considered to involve intermediate and lower ranking individuals) to allow the ICTR to meet its deadlines.⁵⁹¹

In any event, while the ICTR was created to fight against impunity, it would have been limited in this regard if it had acted alone and focused on a small number of high-level perpetrators. This would leave "an accountability gap which could undermine the effort to end impunity."⁵⁹² Moreover, it was important for Rwanda's domestic legal system to close this gap by prosecuting most of the offenders.⁵⁹³ International third party prosecutions could have assisted, but, as with the ICTR, they were also limited in the number of perpetrators they could arraign.⁵⁹⁴

As a legal pluralist system, the ICTR and the *gacaca* courts represent a constructive avenue for multidimensional transitional justice outcomes, from collective and individual levels, respectively. The ICTR was integral to reconciliation, primarily in terms of taking a stance globally and symbolically against atrocities committed in future conflicts and reflecting reconciliation, in terms of its role in the broader, human society. Within the Rwandan context, the ICTR alone has not directly influenced domestic reconciliation. Nevertheless, it has fostered acknowledgement among

586. *See supra* note 480.

587. *See supra* p. 159 (particularly note 296).

588. *SC Verbatim Record 3453, supra* note 2, at 3 (submissions of the representative of France). Reaffirmed in S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003) 1-2 and S.C. Res. 1534, ¶ 5, U.N. Doc. S/RES/1534 (Mar. 26, 2004).

589. S.C. Res 1534, *supra* note 409, ¶ 4.

590. S.C. Res. 1503, *supra* note 359, ¶ 7; S.C. Res 1534, *supra* note 409, ¶ 6.

591. S.C. Res 1534, *supra* note 409, ¶ 6.

592. Sigall Horovitz, Presentation at Annual Interpol Expert Meeting, *Can International Criminal Tribunals Close the Impunity Gap?*, Kigali, Rwanda, 1 (Apr. 14–15, 2014) (on file with author).

593. *Id.*

594. *Id.*

political leaders that the international community is connected to the nation through their mutually embodied goals.

F. *The ICTR, Gacaca and Reconciliation Symmetry*

The *gacaca* system has provided an initial and necessary step toward promoting reconciliation outcomes, in terms of psychological healing. While reconciliation is an enduring process in any context, Rwanda, in particular, may demand decades of social and psychological reconstruction in order to generate the social cohesion indicative of reconciliation goals. The NURC's study suggests that, while progress is being made, social cohesion has not been achieved nearly two decades following the genocide.⁵⁹⁵ Additionally, there are notable censures of the *gacaca* system, indicating that it channeled conflict more than it reduced animosities.⁵⁹⁶

However, social transformation in Rwanda has undoubtedly occurred, with possible symmetries in Hutu and Tutsi perspectives beginning to be visible.⁵⁹⁷ Kriesberg posits that symmetry begins with truth-telling and justice and that neither of these two processes is indicative of eventual reconciliation outcomes, but rather, they are major processes that could foster longstanding psychological change.⁵⁹⁸

At the crux of the ICTR's contribution to reconciliation is the fact that Rwanda does not exist in isolation to the global community. The unique nature of the legal pluralist system that embodies both grassroots, community participatory efforts through the medium of *gacaca* and international, largely objective efforts through the ICTR is indicative of the evolving nature of the global community. This embryonic nature is also suggestive of reconciliation itself. The reconciliation goals, as stated by the Rwandan government for instance, are limited to subsist within the nation's borders. However, those of the international community acknowledge the importance of the collective, supranational level in achieving reconciliation goals.

G. *The Global Community and Reconciliation*

In determining both the individual impact of the ICTR as well as that of the legal pluralist system (comprised of both the ICTR and the *gacaca* courts), it is useful to reframe reconciliation for its role within twenty-first century society. Reconciliation has changed due to the forces of

595. *Rwandan Reconciliation Barometer*, *supra* note 167, at 86.

596. *See supra* text accompanying notes 495–97, 508–09, 527.

597. *See Rwandan Reconciliation Barometer*, *supra* note 167, at 86–88.

598. Louis Kriesberg, *Reconciliation: Aspects, Growth and Sequences*, 12 INT'L J. PEACE STUD. 1, 3–9 (2007) [hereinafter *Aspects, Growth and Sequences*].

globalization.⁵⁹⁹ This includes the increasingly fluid movement of people, goods, information, services, and ideas that bring about unprecedented interconnectivity and is bound to create trends within the legal, social, economic and political discourse.⁶⁰⁰

Kriesberg highlights that there are three particular trends in human thought which are particularly pertinent to the reframing of reconciliation for the twenty-first century environment: (1) developments in religious beliefs; (2) thinking about human relations; and (3) a focus on democracy and human rights.⁶⁰¹

In the Rwandan context, all three trends are essential to the reconciliation process. In particular, religious beliefs played a substantial role in the *gacaca* processes.⁶⁰² According to Clark, people's religious beliefs enhanced the likelihood of their meaningful participation at *gacaca*.⁶⁰³ He argues that this widely ignored factor facilitates reconciliation, particularly when mercy, forgiveness, and grace represent crucial rudiments of the faith in question.⁶⁰⁴ While interviewing survivors, he observed that many alluded to their religious convictions and thus were willing to forgive and to reconcile with genocide perpetrators.⁶⁰⁵ This standpoint has been vital for *gacaca*'s ability to facilitate reconciliation.

Human relations in the global community are largely influenced by secular thinking, which focuses on equality and cooperation. However, there are counter developments in human relations in the form of racism, belligerence, and avarice.⁶⁰⁶ Kriesberg contends that "[o]n the whole, nevertheless secular ways of thinking have developed that provide increasing recognition of the importance, use and contributions of reconciliation to human life. First, intellectual support for racism has gradually declined. Recent academic work has demonstrated how ethnicity is socially constructed and that races too are social constructs, their nature varying from one culture to another."⁶⁰⁷ Moreover, the global community reproaches unilateral, socio-economic exploitation of one group over another as "counterproductive," and negatively views any form of

599. *Id.* 12–13.

600. *Id.*

601. *Id.* at 10.

602. THE GACACA COURTS, POST-GENOCIDE JUSTICE, *supra* note 12, at 337–38, 341.

603. *Id.*

604. *Id.*

605. *Id.* at 337–38.

606. *Aspects, Growth and Sequences*, *supra* note 598, at 11.

607. *Id.*

democracy that endorses ethno-nationalism (thereby excluding entire groups of people).⁶⁰⁸

Global developments and trends relating to the material and social worlds are also changing. This is evident from the emergent socio-economic interdependence, expanding communication and burgeoning productivity.⁶⁰⁹ International organizations such as the U.N. and the ICTR, are a consequence of these trends, with the growing interdependence of the global community inducing a more participatory role in the reconciliation process by international bodies.⁶¹⁰ Intervention by entities such as the ICTR both reflect and shape the ways in which human relations are changing, with external intervention by these bodies brought about by recognition that reconciliation is beneficial to the global order rather than just a domestic, human rights issue.⁶¹¹

External, international entities' role in sourcing reconciliation is therefore a crucial, but enigmatic one, since reconciliation is not brought in from even the most participatory, global organizations.⁶¹² Huyse points out that any international agency seeking to foster the reconciliation process after a violent conflict must view its role solely in terms of supporting, rather than counteracting, domestic policies for reconciliation.⁶¹³ He further states that the international community must exert caution. It must be conscious of the nature of a transitional society and recognize that the process is locally owned, especially since "[o]nly the victims and the perpetrators can reconcile themselves with one another."⁶¹⁴ The unique nature of every violent conflict precludes a universal approach to international involvement in post-conflict reconciliation.

If reconciliation is reframed for the international context, then the participation of an objective, global community is critical to the reconciliation process, provided it does not interfere with domestic delivery of both justice and reconciliation.⁶¹⁵ International entities, such as the ICTR, can function to give priority to programs that indirectly, but not authentically, facilitate reconciliation. From this viewpoint, the ICTR served an ideal purpose by seeking to create favorable conditions within which reconciliation could take place without interfering with the domestic justice system.

608. *Id.*

609. *Id.* at 12–13.

610. *Id.*

611. *Id.*

612. Luc Huyse, *The International Community, in RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK* 163 (David Bloomfield, Teresa Barnes & Luc Huyse eds., 2003).

613. *Id.* at 163–64.

614. *Id.*

615. *Id.* at 164.

Because of the legal pluralist system, transitional justice in Rwanda resulted in very favorable and successful outcomes. As a significant weakness in the system, social cohesion may be more appropriate during the healing process rather than in the delivery of justice. In conclusion, the nature of the post-genocide environment in Rwanda precludes total psychological healing and, by extension, total reconciliation in a short period of time.

Entire social thought patterns must be reconstructed and vicious atrocities forgiven for reconciliation to occur. It is not, therefore, the counterproductive nature of the *gacaca* system's reconciliation and retribution goals that preclude social cohesion, but rather the socio-cultural context in which the system exists.

H. Moving from Legal Pluralism Towards "Interlegality"

At this point, a conceptual distinction needs to be made between legal pluralism and "interlegality."⁶¹⁶ Legal pluralism assumes plural normative arrangements, such as parallel legal systems. Conversely, interlegality refers to a continuous interactive mix between different legal beliefs and viewpoints.⁶¹⁷ This thereby influences and shapes new normative orders that are customized to take into account cultural factors and thus reach a middle ground regarding adaptations, negotiations, and antipathies between the plural legal and normative orders.⁶¹⁸ Interlegality represents a give and-take approach between international values and local customs and will always be changing in the context of transitional justice.⁶¹⁹

Generally, non-governmental or intergovernmental forces that create their own mandatory standards both internally and externally influence national laws, rules, and regulations.⁶²⁰ Therefore, implementation of national laws relies on government social arenas.⁶²¹ Exchanges between domestic and traditional/customary laws can be varied, dynamic, and serve as a vehicle for continuing negotiation and clarification between different legal spheres.⁶²² There will always be uncertainty, which prevents universalization and the imposition of a one-size-fits-all solution based

616. Nagy, *supra* note 128, at 101.

617. *Id.*

618. *Id.* at 102.

619. *Id.*

620. Nagy, *supra* note 128, at 101.

621. *Id.*

622. *Id.*

on a naïve supposition that indignity is unsound and irrelevant in the modern world. The goal is to reach a common ground between the two spheres.⁶²³

The existence of interlegality is already evident in the continuing interactions between the Rwandan government and the international community. For example, while the U.N. and the international community were moving away from one-size-fits-all type solutions, the Rwandan government adapted the *gacaca* courts with key support from non-governmental organizations such as Avocats Sans Frontières,⁶²⁴ Réseau de Citoyens,⁶²⁵ and Penal Reform International.⁶²⁶

Rwanda, as a country is neither liberal nor non-liberal.⁶²⁷ Regardless, the international community and international law should provide continuous legal and normative resources in this and similar situations. Yet, international standards and law should only be viewed as part of a transitional framework and not an absolute, ‘gospel’ truth. It is clearly possible to have more than one suitable approach in a transitional justice framework. In post-genocide Rwanda, there was no other substitute (particularly one that is culturally sympathetic to the Rwandan population and the genocide milieu) to the national courts, other than *gacaca*. The challenge for any transitional justice approach is whether it has the spirit of interlegality ingrained in it (i.e. a system that constantly acclimates and adopts local standards, protects human rights, and engages social, political, legal and economic issues on various levels).

623. *Id.*

624. Anuradha Chakravarty, *Gacaca Courts in Rwanda: Explaining Divisions within the Human Rights Community*, 1 YALE J. INT’L AFF. 132, 136–37 (2006). Avocats sans Frontières use their legal skills to support the rule of law in fragile political systems, train and support local lawyers, and advocate respect for human rights. They have been in Rwanda since 1996 and have become increasingly engaged in matters such as representing defendants accused of genocide in national courts and petitioning to the government to consider, *inter alia*, the prisoners who were minors at the time they allegedly participated in the genocide.

625. *Id.* at 137. Established in 1994, the Réseau de Citoyens have supported the development of legal infrastructure needed for genocide trials. Their volunteers train court clerks and magistrates, assist to produce code books and facilitate access to legal manuals, organize seminars on law and human rights and develop syllabi for legal training at local institutions.

626. *Id.* at 136. Penal Reform International monitor, document and research the system of prison reform. They also do the same for restorative justice and alternative dispute resolution mechanisms, and make recommendations to the government for systematic improvements.

627. Nagy, *supra* note 128, at 102.

VI. CONCLUDING REMARKS

While the connection between national reconciliation and transitional justice may seem idyllic, its field execution still requires extensive development. After all, the aim of transitional justice is to re-create an environment where members of a society can live in harmony and peace after periods of conflict or repressive rule.

The 1990s marked one of the most violent decades in recorded history, defined by a sharp increase in violent conflicts fuelled by ethnic unrest, and concluded with a considerable civilian death toll.⁶²⁸ During 1996 alone, all major conflicts in the world were civil or intra-state and tens of millions of human beings were estimated to be at risk as a result of these civil conflicts. Parallel with the drastic rise in these volatile intra-state conflicts was mounting attention to human rights and individual security, emerging prominently within the international community's agenda.⁶²⁹

In conjunction with multiple, multilateral declarations, charters and other channels for communicating relevant goals globally, the quality and quantity of conflict intervention measures increased considerably during the late 1990s.⁶³⁰ By recognizing that divided societies were providing fertile ground for violent unrest, ethnic cleansing, and genocide to occur, the international community began creating institutions and tools through which conflicts could be countered. At the same time, they were conversely endorsing transitional justice and reconciliation.⁶³¹

However, the complex nature of these conflicts (with Rwanda serving as a prime example) have meant resistance to the development of a universal, international agenda for conflict intervention. While human rights concerns and the evident urgency to protect those living in divided societies represent common and positive forces in shaping the post-conflict agenda, the variety of stakeholders on multiple levels with multiple perspectives has partially counteracted the development of a successful, international agenda for both transitional justice, specifically and reconciliation, more broadly. More saliently, these complexities coexist with visible animosity among domestic communities instead of international intervention.⁶³²

628. Francis K. Abiew & Tom Keating, *Outside Agents and the Politics of Peacebuilding and Reconciliation*, 55 INT'L J. 80, 80 (2000).

629. *Id.* at 80–81.

630. *Id.* at 81.

631. *Id.*

632. *Id.* at 105.

While the Rwandan context did not exhibit any considerable animosity against the ICTR or the U.N., it did point out the limited and external role of the international entity in the reconciliation process. Therefore, when evaluating the extent to which the ICTR and *gacaca* courts' legal plurality should inform the post-conflict agenda, it is important to highlight the motivations for pursuing interventions in post-conflict societies from both above and below, respectively.

The term "reconciliation" has appeared in about 10% of the ICTR's judgments⁶³³ and is often quoted alongside Resolution 955,⁶³⁴ but without any formulation as to how it impacts national reconciliation in Rwanda, the term seems to have only been deployed rhetorically.

The ICTR represents an outsider intervention in a divided society. Moreover, it must be borne in mind that if the ICTR was viewed as contributing indirectly to national reconciliation and thereby firmly connecting justice (i.e. international justice) and reconciliation, there is a risk that its main objective and achievement, i.e. justice, would be frustrated. Yet, this is a brand of justice that looks at the past and whose outcome depends, to some degree, on the competencies of the investigators, lawyers and judges. Conversely, reconciliation, as Rigby puts it, "refers to the future and requires the active participation of those who were divided by enmity"⁶³⁵ and it is difficult to see how the ICTR can guarantee such involvement. From this perspective, it is even more challenging to see how international criminal tribunals, like the ICTR, can contribute to reconciliation.

Outsider interventions can engender considerable skepticism in regard to the international community's motivation. Specifically, the literature shows that, post genocide, the international community's moral obligation derived largely from the U.N.'s guilt for failing to intervene in the genocide sooner.⁶³⁶ However, this moral obligation did not alone influence the construction of the ICTR, nor did it define the reconciliation or transitional justice agenda the international community had for Rwanda.

Keating and Abiew posit that the international institutions, such as the ICTR, have emerged under very specific conditions. Such mechanisms are unlikely to be reestablished in another context unless the following elements are recreated: an urgent call for action and international involvement in post-conflict societies; the international community's mounting interest in global, human rights; and an increased attention to

633. See *supra* notes 318–19 and accompanying text. Eight out of seventy-five convicts have pleaded guilty after entering into plea agreements with the ICTR Prosecutor.

634. S.C. Res 955, *supra* note 20.

635. RIGBY, *supra* note 200, at 12.

636. See *supra* Part II.C.; *The Failings of Ad Hoc International Tribunals*, *supra* note 140, at 542.

peace-building and cross-national “Western hegemony” in terms of post-conflict goals.⁶³⁷

While their postulation is plausible, it is unlikely that the U.N. will create another ad hoc tribunal, given its high costs and limited efficiency.⁶³⁸ Nonetheless, the Rwandan setting for transitional justice and reconciliation, by extension, is one in which these realities converged to inform a post-conflict agenda including measures from both micro and macro levels.

One of the most salient points emerging from this Article is the role of reconciliation as being both a process and an outcome. Furthermore, it is based on both the individual and collective level. In using the Rwandan context to inform a post-conflict agenda, it is essential to base this agenda within these points, as well to assert the significance of legal pluralism in addressing reconciliation in divided societies.

From a legal pluralist perspective, most criticisms of the ICTR and *gacaca* become largely inconsequential. This is because the dual system encourages international awareness of the post-genocide environment, promotes transitional justice within the broader context of reconciliation from both above and below, and facilitates reconciliation, specifically, on both the individual and collective levels.

In essence, the ICTR symbolizes an unprecedented measure that promotes justice and reconciliation objectively and through international, external actors. It did not seek to focus on individual healing, forgiveness, and apology, which is more akin to the grassroots efforts promoted through the *gacaca* system.

The reconstruction of a social fabric shredded by genocide and, in particular, one that was fuelled by longstanding ethnic tension represents a far more difficult and arduous task than the comparatively simple rebuilding of infrastructures following a natural disaster. It necessitates total redefining and reorienting relationships across societal lines, which subsists in the social, economic, and political dimensions. It also requires the concurrent endorsement of psychological healing.

Arguably, reconciliation in Rwanda has a largely top-down dynamic. As such, it would be imprudent to suppose that completion of *gacaca* indicates that reconciliation has been attained.

A furtherance of all-inclusive transitional justice projects is required, which should carry on the spirit of interlegality. The test will be to bring

637. Abiew & Keating, *supra* note 628, at 83–84.

638. *See supra* text accompanying notes 290–96.

out the strengths of an indeterminate, pluralistic approach to transitional justice. One that is continuously adapting, embraces local values, protects human rights, and engages social, political, legal and economic issues on multiple levels.

The post-conflict agenda must therefore be sourced, both internally and externally, in order to facilitate multilateral resource contributions while remaining socio-culturally relevant and competent. The international community has historically intervened to end violence. Peace-building and reconciliation have represented divergent processes that follow this primarily military, political action. Contextualized within the broader framework of reconciliation, transitional justice is a complex way of rebuilding the socio-legal systems and delivering justice in the post-conflict environment. Reconciliation, however, is a far more burdensome, longstanding, and intricate process that goes beyond the delivery of justice. This process is continuing in Rwanda even now that the ICTR and *gacaca* courts have largely concluded their roles within the transitional justice system.

The legal pluralist system contextualized in Rwanda by the ICTR and the *gacaca* courts does not denote a perfect mechanism for reaching all reconciliation and transitional justice goals. They did, however, function as partners to facilitate reconciliation as a process that demands transitional justice from both the collective and individual levels, as well as highlight gaps in the system that can and should be filled during future instances of reconstruction. In spite of the positive steps taken, it is difficult to measure reconciliation.

In any event, national reconciliation does not need to rely a great deal on justice, especially international justice. Instead, it must depend on political actions and other methods to resolve and manage conflict. These political actions must also be supported by economic progress and development, just as the Rwandan government reconciliation initiatives have begun to demonstrate.