

# Gacaca courts, reconciliation and the politics of apology in post-genocide Rwanda

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## ABSTRACT

In post-conflict societies, the politics of apology is increasingly and heavily relied on for justice, accountability and reconciliation to be realised. The reason for this approach is to demand a public apology from perpetrators for their mass atrocities as a sign of acceptance of responsibility. There are a number of features of this form of politics of apology applied by Gacaca courts that will be explored in light of retributive and restorative justice. Given that confession, guilty plea, repentance and apology were applied as a threshold requirement in genocide trials, this paper will critically analyse their legal consequences in light of the question whether fair trial principles should have been applied with respect to those accused who were unwilling to come forward, confess and apologise. After contextualisation and assessment of the purpose of the politics of apology in post-genocide Rwanda, the paper concludes that the politics of apology was particularly applied as a disguised attempt to allocate collective guilt to the Hutu as a group and that collective guilt has the potential to place the Hutu population in a vulnerable position within post-genocide politics. With retributive justice, the Gacaca courts served to ensure that Hutus did not escape revenge but did little to foster reconciliation.

## 1 Introduction

In a criminal justice system, a guilty plea and confession may serve as evidence necessary to constitute the crime so charged<sup>1</sup> whereas apology, repentance, and genuine remorse are typically factors that contribute to admission of guilt.<sup>2</sup> In order to avoid prejudice to an

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<sup>1</sup> A confession is a special type of admission of guilt. See PJ Schwikkard 'Confession in criminal trials' in PJ Schwikkard & SE van der Merwe (eds) *Principles of Evidence* 3ed (2009) 333.

<sup>2</sup> Apology, repentance and expression of remorse are signs that an accused accepts the blame. They are linked to criminal responsibility. See, for example, M Cunningham 'Prisoners of the Japanese and the politics of apology: A battle over history and memory' (2004) *39 J Contemp Hist* 561 at 573. They are considered as mitigating factors. See *Prosecutor v Bisengimana* (2006) Case No. ICTR 00-60-T at 132 & 145-150; *Prosecutor v Rutaganira* (2005) Case No. ICTR-95-IC-T at 149 and C Kavuro 'Penal rehabilitation in the jurisprudence of the International Criminal Tribunal of Rwanda: Pardon and commutation of sentence' (2013) *26 SACJ* 156, 168-169.

accused, the notions of guilty plea, confession, apology, repentance and genuine remorse are each considered as constituting a mitigating factor at the sentencing stage.<sup>3</sup> These notions were integral to the Gacaca genocide trials and actually served as a threshold rule of its procedure and evidence.<sup>4</sup> The post-genocide government placed the said notions at the centre of the rules of evidence in a genocide trial not only to determine merit but also for revelation of the truth in order to engender unity, reconciliation and long-lasting peace.<sup>5</sup> The notions in question are features of the politics of apology concept. This concept is understood as a situation where victims of mass atrocities request a public apology from perpetrators as a sign of accepting culpability.<sup>6</sup> In this way, confession and expression of an apology or remorse would qualify as admission of responsibility.<sup>7</sup>

Although the above notions were integral to rules of evidence, the law governing the Gacaca courts also set out the formal rules of evidence in a criminal proceeding as a guiding authority in genocide cases.<sup>8</sup> However, the provisions of the Rwandan penal code of criminal procedure were not substantively taken into account when prosecuting an accused due to the nature of the Gacaca court system. The nature of the Gacaca court system was ethically contextualised as follows: firstly, it was a participatory and reconciliatory forum.<sup>9</sup> Secondly, it combined

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<sup>3</sup> See, for instance, *Prosecutor v Bisengimana* supra (n2) at 132 & 145-150; *Prosecutor v Rutaganira* supra (n2) at 149 and Kavuro op cit (n2) 168-169.

<sup>4</sup> For the rules and procedures of accepting confessions, guilty pleas, repentance and apologies, see Chapter II of the Organic Law No 16/2004: 'Organic law establishing the organisation, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994' (hereafter the Gacaca's Organic Law No 16/2004).

<sup>5</sup> Preamble of the Gacaca's Organic Law No 16/2004.

<sup>6</sup> Normally leaders apologise. On the contrary, in Rwanda, each and every Hutu is obligated to apologise. Leaders who accepted responsibility for mass atrocities include German President Roman Herzog who, in 1994, publicly apologised to the peoples of Poland for heinous crimes committed by Germans in Poland during World War II (see V Fredericks 'The politics of apology: The Katyn Massacre and the aporia of forgiveness' at 1-2, available at <https://www.inter-disciplinary.net/wp-content/uploads/2010/06/Fredericks-paper.pdf>, accessed on 3 January 2015), and Pope John Paul II apologising for anti-Semitism (see WE Carroll 'We have sinned: When churches say we are sorry and the politics of apology and reconciliation' (2014) 2 *J Global Peace & Conflict* 1).

<sup>7</sup> See Fredericks op cit (n6) 1-2.

<sup>8</sup> Preamble, read together with arts 1 and 30 of the Gacaca's Organic Law No 16/2004 states that the Rwandan penal code of criminal proceedings should be adhered to.

<sup>9</sup> PC Bornkamm *Rwanda's Gacaca Courts: Between Retribution and Reparation* (2012) 25.

Rwandan and Western norms relating to criminal procedure.<sup>10</sup> Thirdly, it was designed to provide an expedited justice.<sup>11</sup> It is against this backdrop that the paper seeks to critically analyse the application of notions of confession and apology in Rwandan transitional justice, and in particular, to examine their consequences in a criminal trial. Taking into account the hybrid nature of the Gacaca courts and their retributive approach to sentencing, such analysis is compelling.

Aiming to contribute to an understanding of the nature and purpose of the politics of apology in Rwanda, the paper analyses the concepts of confession and apology in the light of retributive and restorative theories of justice, illuminating the extent to which the politics of apology in Rwanda are invoked. In so doing, an outline of the Rwandan Patriotic Front (RPF)'s – or the victor's – version of Rwandan genocide is provided, followed by a description of the post-genocide government's approach to criminal and transitional justice. Here, the intention is to illustrate that the post-genocide government has given priority to retribution over restoration for the sole purpose of ensuring that those accused (who are only Hutus) do not escape revenge. The paper examines the meaning of confessing and apologising within the criminal law system and the impact of the breach of standards of fair trial. The paper concludes by stating that the retributive justice system as a tool of transitional justice does not have the potential to reconcile fragmented societies. This is so because it is not concerned with addressing the needs of victims and affected communities, such as non-victimisation, restitution, unity and healing. Rather, it is concerned with punishing the perpetrators through the imposition of severe, retributive punishments.

## 2 Official genocide narrative: Victor's version

Rwanda's post-genocide governance is built on the credence that the RPF (composed mainly of Tutsi refugees and expatriates) put an end to a genocide that claimed the lives of more than 800 000 Tutsis and some moderate Hutus. It is widely accepted that the genocide was planned by the former Hutu regime and that it was eventually carried out by the Hutu population. This view resulted in the projection of

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<sup>10</sup> Ibid. See also C Kavuro 'Rwandan reconciliation process: Outcome analysis of Gacaca courts' (2012) 3, available at [https://www.researchgate.net/profile/Kavuro\\_Callixte/publication/274078153\\_Rwandan\\_Reconciliation\\_Process\\_Outcome\\_Analysis\\_of\\_Gacaca\\_Courts/links/55152fd10cf2b5d6a0e93f99.pdf](https://www.researchgate.net/profile/Kavuro_Callixte/publication/274078153_Rwandan_Reconciliation_Process_Outcome_Analysis_of_Gacaca_Courts/links/55152fd10cf2b5d6a0e93f99.pdf), accessed on 10 October 2014.

<sup>11</sup> The Gacaca courts' primary mandate was to speed up adjudication of genocide-related cases and their consequences. See preamble of the Gacaca's Organic Law No 16/2004.

the RPF as a well-disciplined former rebellion which had, in 1990, invaded Rwanda to prevent the 1994 Tutsi genocide. The current RPF narrative on the genocide is widely accepted as the true version and, as a result, exonerated Tutsi perpetrators from being called to account by the International Criminal Tribunal for Rwanda (ICTR) and the Gacaca courts. However, such narrative – which is dominant in the literature – was established with the purpose of shielding the Tutsi elites from criminal prosecutions,<sup>12</sup> as will be demonstrated under 4.6 below dealing with the biased nature of Rwanda's application of transitional justice.

More important to note is that the paper does not contest that there was no genocide in Rwanda; rather it seeks to provide alternative narratives to the RPF version. Alternative narratives recognise that there were mass atrocities committed against Hutus which the current version does not take into consideration. Throughout the paper, an argument is made that viewing Tutsis as mere victims has the potential of excluding them from criminal liability and sharing moral atrocity. For example, the current narrative gives no attention to the Hutus' allegations holding that the Tutsi combatants carried out systematic mass atrocities against them in the areas controlled by it prior to, during and after the genocide.<sup>13</sup> No account is given of the fact that terror in Rwanda was caused by the RPF's own acts of aggression and armed invasion involved deliberate targets of Hutu civilians as well

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<sup>12</sup> The RPF's claim of a long-planned attack against the Tutsi population was regarded as a 'victor's myth unsupported by evidence' by the ICTR Prosecutor Carla Del Ponte. For a detailed discussion, see C Del Ponte & C Sudetic *Madame Prosecutor: Confrontation with Humanity's Worst Criminals and the Culture of Impunity* (2009); F Hartmann *Paix et Châtiment, Les Guerres Secrètes de la Politique et de la Justice Internationale* (2007); and P Erlinder 'The UN Security Council Ad Hoc Rwanda Tribunal: International justice or judicially-constructed victor's impunity' (2010) 4 *DePaul J Social Justice* 131.

<sup>13</sup> JMV Ndagijimana *How Paul Kagame Deliberately Sacrificed the Tutsi* (2009). For further documentation of mass atrocities committed by the RPF, see, for example, UN Security Council report 'Situation on human rights in Rwanda' (S/1994/1157); R Gersony 'Prospects for early repatriation of Rwandan refugees currently in Burundi, Tanzania and Zaire' (1994), paras 1-12 (hereafter Gersony Report); R Garretón (1996) 'Report on the situation of human rights in Zaire, prepared by the Special Rapporteur, Mr. Roberto Garretón, in accordance with Commission resolution 1995/69' (E/CN.4/1996/66, 29 June 1996); Erlinder *International Justice* op cit (n12) 131-214; F Reyntjens *The Great African War: Congo and Regional Geopolitics 1996-2006* (2009); G Prunier *Africa's World War: Congo, the Rwandan Genocide and the Making of a Continental Catastrophe* (2009) 120-128 and W Madsen *Genocide and Covert Operations in Africa, 1993-1999* (1999). These documents attest that the warring parties were jointly and severally responsible for breaches of (i) norms of international humanitarian law on a systematic, widespread and flagrant basis; (ii) norms prohibiting crimes against humanity; and (iii) norms prohibiting acts of genocide.

as Hutu politicians.<sup>14</sup> Kuperman posits that acts of aggression ignited inter-ethnic violence and, virtually, triggered the genocide.<sup>15</sup> The same view is shared by Davenport and Stam who, in their book entitled *What Really Happened in Rwanda?* indicated that:

‘The killings in the zone controlled by the FAR [*Forces Armées Rwandaises*] seemed to escalate as the RPF moved into the country and acquired more territory. When the RPF advanced, large-scale killings escalated. When the RPF stopped, large-scale killings largely decreased. The data revealed in our maps was consistent with FAR claims that it would have stopped much of the killing if the RPF had simply called a halt to its invasion. This conclusion runs counter to the Kagame administration’s claims that the RPF continued its invasion to bring a halt to the killings.’<sup>16</sup>

In light of this academic analysis, the issue of polemic provocation of killings was not given adequate attention by both the international community and the post-genocide government, resulting in the ICTR and the Gacaca courts overlooking the atrocities committed against Hutus. Without recognition of the role of the RPF in the mass atrocities committed in Rwanda, the RPF’s genocide narrative prevails and the road to reconciliation is unsteady. It is trite in law that such narrative has the moral consequences of inhibiting all efforts to contribute to the reconciliation of Rwandans and of bringing the legitimacy of the ICTR and the Gacaca courts into question. Should only one side to the conflict accept culpability and thus apologise, the question would be whether that approach would yield the desired reconciliatory result. The prejudiced approach was consolidated by the 2008 amendment to the Rwandan Constitution, which sought to restrict war crimes, crimes of genocide and crimes against humanity only to Rwandans from Tutsi

<sup>14</sup> An ethnic cleansing of Hutu ethnic by the RPF was deliberately carried out with the intent to establish a territory free of Hutus in which Tutsis refugees could settle upon winning the war. See J Mali ‘Testimony of Major Alphonse Furuma (Part 1),’ 13 April 2016, available at <http://www.jamiiforums.com/threads/the-testimony-of-major-alphonse-furuma-part-1.1034986/>, accessed on 15 December 2015 and J Morel *La France au Coeur du Génocide des Tutsi* (2010) 737 and F Reyntjens *Political Governance in Post-Genocide Rwanda* (2013) 102-115.

<sup>15</sup> AJ Kuperman ‘Provoking genocide: A revised history of the Rwandan Patriotic Front’ (2004) 6 *J Genocide Res* 61 at 61-62 states that the genocide against the Tutsi was a retaliation by Hutus to a violent challenge from the RPF who invaded Rwanda from Uganda in 1990.

<sup>16</sup> C Davenport & AC Stam *What Really Happened in Rwanda?* (2009). See also *The Prosecutor v Bizimungu* (2008) Case No ICTR-99-50 T at paras 15-22 in which materials documenting killings on a large scale by the RPF were submitted and noted by the ICTR as exculpatory, even though they could not, in the view of the court, be relied on by defendants to prove their innocence.

background.<sup>17</sup> Such an approach implies the conferring of the right to seek redress on Tutsi citizens and the attribution of the power of forgiving to them. Added to this, the tool that was used to support the current RPF narrative of genocide is the politics of apology which was central to Gacaca court proceedings, as the paper turns to discuss.

## 2.1 Conceptualisation of the politics of apology under Gacaca courts

In Gacaca court proceedings, priority was given to Rwandan reconciliatory norms and values, namely, admission, repentance, apology and forgiveness, which were (and still are) important in resolving family matters at a grassroots level.<sup>18</sup> From a traditional Gacaca court system point of view, if an accused admits to have wronged, he or she is basically forgiven or, sometimes, forgiveness is accompanied by a request to restore the broken relationship through restitution. This was a norm in pre-genocide Rwanda. During that epoch, the jurisdiction of the Gacaca courts did not include crimes of a serious nature. Neither did it include imprisonment.<sup>19</sup> Its character seemed so much more reconciliatory than the Western concept of punitive justice. However, the reconciliatory nature of the Gacaca courts did not sit well with the RPF whereby its nature was reviewed to become retributive.

Such a radical shift was seen as necessary in order to extend the Gacaca courts' jurisdiction to include retributive penalties like imprisonment and correctional services (known, in French, as *Travail d'Intérêt Général* or TIG), which could be imposed on the basis of general criminal norms and principles. In this way, the Gacaca courts were modernised, designed and adapted to apply criminal procedures that uphold substantive criminal goals.<sup>20</sup> Adaptation of the Gacaca courts placed accusatorial procedure and, intrinsically, the politics of apology at the centre of its participatory and reconciliatory approach.<sup>21</sup>

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<sup>17</sup> The Constitution of the Republic of Rwanda (O G No Special of June 04, 2003), as revised by the third amendment, incorporated the phrase 'genocide against the Tutsi' in the Preamble and other certain provisions.

<sup>18</sup> Prior to modernising the Gacaca courts through extension of its jurisdiction, the courts dealt with private matters involving land, cattle, marriage, loans and property. See Kavuro op cit (n10) 3.

<sup>19</sup> O Lin 'Demythologising restorative justice: South Africa's Truth and Reconciliation Commission and Rwanda's Gacaca courts in context' (2006) 12 *ILSA J Int'l & Comp L* 41 at 76.

<sup>20</sup> Bornkamm op cit (n9) 25. See too B Mutamba 'Localising justice' in E Stover & HM Weinstein (eds) *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (2004) 71.

<sup>21</sup> Bornkamm op cit (n20) 27.

The reliance on the politics of apology was all about relaxation of the rules of evidence for acceleration of genocide cases through demanding that Hutu perpetrators accept their roles in the genocide in exchange for reduced sentences. In fact, the politics of apology was a part 'of recognising the past injustices [and] ... establishing a shared morality within the international community'.<sup>22</sup> From this point of view, Cunningham conceptualises the term apology as

'either a low cost way for governments to curry favour with marginalized groups, or a manifestation of a trend in society and politics in which confessional and emotional displays are considered laudable'.<sup>23</sup>

The politics of apology entered the Rwandan polity through various forums. It was initially introduced by the *Ingando*<sup>24</sup> and then featured heavily in Gacaca criminal procedure and the *Ndi Umunyarwanda* forum.<sup>25</sup> In these forums, emotional, confessional and apologetic displays were not only considered laudable but were also utilised as a mechanism for establishing a shared moral atrocity of members of the Hutu community. The manner in which an apology and a confession were obtained from Hutu suspects is of central concern to this paper.

In modernising the Gacaca courts as a criminal alternative to dispute resolution, the post-genocide government adopted the Organic Law No 40 of 2001, as modified by the Organic Law No 16 of 2004, which combines both restorative and retributive theories of justice. Of concern is its law of evidence which, according to Bolocan, disregarded the standard of proof requiring that guilt be proved beyond a reasonable doubt based on the standards of fair trial, including the right to be

<sup>22</sup> Cunningham op cit (n2) 561.

<sup>23</sup> Ibid.

<sup>24</sup> *Ingando* is described as pro-RPF political ideology and indoctrination. It is feared as a 'dangerous undertaking in a country in which political indoctrination and government-controlled information were essential in sparking and sustaining the genocide'. See C Mgbako 'Ingando solidarity camps: Reconciliation and political indoctrination in post-genocide Rwanda' (2005) 18 *Harv HRJ* 201 at 202.

<sup>25</sup> The *Ndi umunyarwanda* campaign was launched by the National Unity and Reconciliation Commission (NURC) in 2013 as a way to uphold Rwanda's moral values and Rwandan spirit, thereby strengthening national reconciliation and unity. Under the *Ndi umunyarwanda* programme, President Kagame called for young adults of Hutu descent to apologise for acts of genocide committed 'in their name' by their parents and relatives. For full details, see Rwandan Platform for Dialogue, Truth and Justice (RDTJ) 'Rwanda : President Kagame's medieval ideology of visiting the iniquity of the Hutu fathers upon children divides Rwandan society', 18 July 2013, available at <http://www.france-rwanda.info/article-rwanda-president-kagame-s-medieval-ideology-of-visiting-the-iniquity-of-the-butu-fathers-upon-chil-119135254.html>, accessed on 10 October 2014 and RDTJ 'Ndi Umunyarwanda' (I Am Rwandan) and other similar campaign initiatives: 'Reconciliation or social division?', 14 December 2013, available at <http://ikazeiwacu.k.i.f.unblog.fr/files/2013/12/rdtj-view-on-ndi-umunyarwanda.pdf>, accessed on 10 October 2014.

presumed innocent, to remain silent and not to be compelled to give self-incriminating evidence.<sup>26</sup> These rights are traditionally essential components of criminal procedure, but they did not feature in Gacaca criminal proceedings since it was intrinsically claimed to be a reconciliatory forum, created to provide justice within a short time. Speeding up genocide trials – one of its five goals<sup>27</sup> – was prioritised.

In light of reconciliatory conditions, the nature of the rules of procedure and evidence of the Gacaca courts was simplified in line with the politics of apology, which resulted in the standards of fair trial being inhibited. Contextually analysed, standards of fair trial are negated by art 54, read together with art 62,<sup>28</sup> of the Gacaca's Organic Law, which made confessions, guilty plea, repentance and apologies essential in the Gacaca's proceedings. Article 54 stated:

'Any person who has committed [crimes of genocide and crimes against humanity] has the right to have recourse to the procedure of confessions, guilty plea, repentance and apologies. Apologies *shall* be made publicly to the victims in cases where they are still alive and to Rwandan society. To be accepted as confessions, guilty plea, repentance and apologies, the defendant *must* (1) give a detailed description of the offence, how he or she carried it out and where, when he or she committed it, provide witnesses to the facts, persons victimized, where he or she threw their dead bodies and damaged caused; (2) reveal the co-authors, accomplices and any other information useful to the exercise of the public action; and (3) apologise for the offences that he or she has committed.' [Emphasis added].

As it stands, the right to have recourse to the procedure of confession, guilty plea, repentance and apology did not at first glance appear to be mandatory or directive, but art 57 seemed to make the procedure mandatory. It did so by prescribing the legal consequences that would be meted out to those who wanted to exercise their rights to silence or non-self-incrimination in the following striking terms:

'If it is found out subsequently offences that a person has not confessed, he or she is prosecuted, at any time, for these offences and shall be classified

<sup>26</sup> GM Bolocan 'Rwanda Gacaca: An experiment in transitional justice' (2004) 2 *J Dispute Resol'n* 255, 346 states that the Gacaca blends retributive and restorative justice in an innovative and unique way.

<sup>27</sup> They include: (i) revelations of the truth on the genocide events; (ii) trying the overwhelming number genocide crimes more quickly; (iii) eradication of the culture of impunity; (iv) helping to reconcile Rwandans and strengthening the unity of communities and (v) demonstrating that Rwanda is capable of solving its own problems without outside intervention or direction. See Organic Law No 40/2000 of 26/01/2001: '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'.

<sup>28</sup> Its first paragraph states that '[t]he person who committed crimes of genocide can have recourse to the confessions; guilty plea, repentance and apologies for the committed offenses before the Seat of the Gacaca Court.'

in the category in which the committed offences place him or her, and is punishable by the maximum penalty provided for this category.’

This provision entails that an individual who was convicted of committing crimes of genocide and/or crimes against humanity, but who did not have recourse to a plea of guilty, confession and apology or whose plea of guilty, confession or apology was rejected, had to incur a maximum sentence that appropriately fitted the gravity of the crime or crimes committed. Here it appears that the statutory request of confession is no longer optional, given that the legislation criminalises a conduct of refusing to confess or apologise by creating penalties that will be meted out to those Hutu accused whose confessions and apologies do not meet conditions laid down under art 54 or who completely refuse to confess and apologise or plead guilty.<sup>29</sup> What can be inferred from this is that the notion of accelerating genocide cases had been equated with mandatory confession and apology as well as untested public testimonies. This approach placed an innocent individual at risk of being found guilty; hence the due process of criminal law was not applied for the sake of expediting trials, but for the sake of supporting the current version of genocide. In fact, the concepts of confession and apology were impliedly mandated so as to find Hutus guilty on a balance of probability and to allocate collective guilt to the Hutu as a group. The more they could be found guilty, the more the collective guilt could be proved and the more the narrative of Tutsi genocide could be justified.

It needs to be noted that the material aspects of genocide are not the major focus for the analysis of such relaxation of the standard of proof, but rather the institutional and procedural aspects of post-genocide efforts to achieve justice, accountability and reconciliation through prosecution. Noted with approval is that the Gacaca courts played a major role in restoring public order. However, the Gacaca courts’ refusal to apply the standard of proof, in addition to their reluctance to prosecute and try mass atrocities committed against Hutus by the RPF’s forces,<sup>30</sup> works to discredit the alternative narratives of what happened. Such refusal and reluctance created an impression that all

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<sup>29</sup> Articles 72 and 73 prescribe penalties that must be meted out to those whose confessions and apologies are accepted, not accepted, or who completely refuse to confess and apologise or plead guilty.

<sup>30</sup> The Gacaca considered the Hutus’ violence against Tutsis as genocide whereas the Tutsis’ violence against Hutus was not. See T Longman ‘An assessment of Rwanda’s Gacaca courts’ (2009) 21 *Peace Rev: J Social Just* 304 at 309.

Hutus, particularly men, were guilty of genocide crimes.<sup>31</sup> Accordingly, Hutu accused could face harsh consequences solely on the ground of their act of defiance to adhere to unfair and unjust rules of evidence.

Articles 55 and 56 offered reduced sentences to those who pleaded guilty, confessed, repented or apologised in deference to the Gacaca's rules of evidence. This incentive encouraged some Hutu accused to come forward, but sentences could only be reduced provided that confessions implicated others as required by art 54. The inference that can be drawn from that condition is that initial suspects or accused were summoned by the Gacaca courts and, eventually, implicated others. Those implicated could implicate others through their confessions whereby a circle of implications was created. The danger of criminal implication was that those who were implicated were found guilty on the basis of confessions provided by the confessed. Accused, who had been implicated by another, could do nothing to prove innocence, given that they could neither vindicate their fair trial rights, including the right to legal representation. Apparently, most of them were found guilty on the basis of untested testimonies.<sup>32</sup>

Generally speaking, criminal justice in the Gacaca proceedings was driven by the desire to prove the collective guilt that could be used as a nuanced tool to justify common purpose of committing genocide against Tutsis. Initially, all Hutus were obligated to undertake *Ingando's* Re-education Programme,<sup>33</sup> in which innocent Hutus – including children – were encouraged to apologise for crimes committed 'in the name of Hutu'.<sup>34</sup> Likewise, those who appeared in Gacaca courts were required to confess and seek forgiveness, resulting in their convictions without a trial. By definition, the *Ingando* programme is a pro-RPF political ideology and indoctrination programme under which Hutus are taught to accept and support the current genocide narrative which promotes the notion that genocide was long planned

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<sup>31</sup> Longman op cit (n30) at 310. See also Human Rights Watch (HRW) *Law and Reality: Progress in Judicial Reform in Rwanda* (2008) at 70 which states that the absence of the presumption of innocence in cases of genocide 'has led many public officials to speak as if all Hutus are guilty of [the crime of genocide ideology]'.

<sup>32</sup> A great deal has been written about the fact that the Gacaca courts were characterised by prejudices, including admission of manifestly false, fabricated or coerced testimonies. Longman, op cit (n30) 306, asserts that thousands of accused were convicted on the basis of hearsay or unsubstantiated accusations or some of them were detained without files or formal charges. Public participation was coerced and Gacaca public hearings were conducted under heavy security; see Lin op cit (n19) 84.

<sup>33</sup> For the definition of *Ingando*, see note 24 above.

<sup>34</sup> See RDTJ *Ndi Umunyarwanda* op cit (n25) and RDTJ *Medieval Ideology* op cit (n25).

by Hutus since 1960s.<sup>35</sup> Those who resist or defy the RPF's political ideology and indoctrination constructed on the lines of collective blame and who object to providing false testimonies are seen as threats to the current genocide narrative and are called derogatory names that seek to stigmatise them in their social life.<sup>36</sup> In addition, the criminal consequences of refusal to cooperate with the post-genocide government by providing made-up testimonies are grave.<sup>37</sup>

The post-genocide government theory that regards war crimes, crimes against humanity and crimes of genocide as well as other serious violations of international humanitarian law as merely crimes against Tutsis negatively impacts on post-conflict justice goals of putting an end to impunity and contributing to reconciliation. This dimension takes away the right of Hutu and Twa victims to seek justice in a court of law or to seek forgiveness in reconciliatory fora, thereby complicating Rwandan transitional justice. In order to justify this dimension, the politics of apology is used as a nuanced mechanism to substantiate the collective *actus reus* and *mens rea* possessed by Hutus as a group to destroy the Tutsis as a group. Alternative narratives of what happened, which are excluded from the current,

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<sup>35</sup> The version of history taught by the RPF at the *Ingando* camps is offensive to many ordinary Rwandans who know the Rwandan history well, especially events that led to the 1959 Hutu social revolution, on the one hand and Tutsi's acts of aggression, on the other. See SM Thomson *Resisting Reconciliation: State Power and Everyday Life in Post-Genocide Rwanda* (Doctoral thesis, Dalhousie University, 2009) 178. The version of history does not recognise the role of each ethnic group in fuelling social division and hatred. Based on its invented narrative, the RPF paints the Tutsi 'as innocent victims who passively waited for the ethnic enmity of Hutu to be enacted, which in turn allows it to capitalise on its ability to liberate Rwanda from an oppressive and genocidal political leadership' (ibid at 123-124). By contrast, the true version of history holds that Hutus are the most oppressed and marginalised people in the history of Rwanda as is well explained by Kintu. R Kintu 'The truth behind the Rwanda tragedy' (2005) at 2, available at <https://repositories.lib.utexas.edu/bitstream/handle/2152/4486/3588.pdf?sequence=1>, accessed on 25 February 2015, eloquently defines the Hutu-Tutsi ethnic conflict as follows: 'The Tutsi vs. Hutu relationship in Rwanda has been marred with gruesome human rights violations committed and perpetuated by Tutsis for centuries. Belgian colonialism did very little to alleviate the brutality, enslavement, dehumanization and all sorts of suffering which Hutus endured for centuries at the hands of Tutsi minority who controlled that country with an iron hand.' Prior to and during colonial era, 'Hutus were nothing but slaves of Tutsis' (ibid).

<sup>36</sup> Thomson op cit (n35) 212. Thomson identified three categories of individuals who openly defy or resist the post-genocide regime policies related to the national reconciliation and unity programme. These are classified into *abasazi*, *ibyihebe*, and *ibipinga* groups. Literally, *abasizi* means 'madness' or 'foolish'; *ibyihebe* means 'fearless' and *ibipinga* means those who oppose or are diametrically opposed. These terms are used to imply that no person in his or her sober sense could stand up against a repressive government, knowing very well that the consequences could be grave (see 212 n36).

<sup>37</sup> Ibid.

dominant and monolithic account, hold that both Hutus and Tutsis committed crimes of genocide. For example, whereas currently Hutus were prosecuted for crimes of genocide against Tutsis, several calls are made by Hutus and human rights organisations to prosecute those RPF combatants who committed mass killings of Hutu populations as a part of a campaign of cleansing intended to clear areas for Tutsi habitation<sup>38</sup> and to prosecute RPF soldiers for assassination of Hutu politicians.<sup>39</sup> These calls or allegations cannot simply be overlooked on the basis that these systematic killings and assassinations are *not* recognised by the international community. Rwanda has jurisdiction to investigate all crimes committed on its territory in an impartial manner and without favour or prejudice and thus bring perpetrator(s) to justice in accordance with its penal code of criminal procedure, and the failure to do so may give rise to the principle of complementarity.<sup>40</sup> Atrocities need not be recognised by the United Nations Security Council for the state having jurisdiction to investigate and prosecute. For reconciliation purposes, the truth about all crimes as well as the motive behind their commission must be told.

## 2.2 Collective guilt and the ICTR findings

The RPF genocide narrative is not supported by the ICTR findings, despite the collective guilt that Gacaca sought to justify through untested testimonies. The requirement of ‘intention to destroy’ contained in art II of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948<sup>41</sup> could not be established by prosecutors in the key ICTR cases – *inter alia*, *Bagosora*,<sup>42</sup> *Karemera*<sup>43</sup> and *Ndindiliyimana*<sup>44</sup> in which alleged ringleaders or architects of Tutsi

<sup>38</sup> Erlinder op cit (n12) 193-195; Morel op cit (n14) 737; and Gersony Report op cit (n13) paras 1-12.

<sup>39</sup> It is alleged that President Habyarimana of Rwanda and President Ntaryamira of Burundi were assassinated by the RPF in collaboration with UN Belgian troops and that assassinations ignited a fire in Rwanda and its neighbouring countries which is yet to be extinguished, see Kintu op cit (n35) 25 and Erlinder (2010) op cit (n12) 182-186.

<sup>40</sup> In terms of this principle, the international criminal courts can act where the domestic criminal system fails to investigate and prosecute international crimes; see J Burchell *Principles of Criminal Law* 3ed (2005) 2.

<sup>41</sup> Article II states that: ‘In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical or religious group ...’.

<sup>42</sup> *The Prosecutor v Bagosora* (2008) Case No ICTR-98-41-T and *Bagosora v The Prosecutor* (2011) Case No ICTR-98-41-A.

<sup>43</sup> *Karemera v The Prosecutor* (2014) Case No ICTR-98-44-A.

<sup>44</sup> *Ndindiliyimana v The Prosecutor* (2014) Case No ICTR-00-56-A.

genocide were tried.<sup>45</sup> Beyond the world of politics of collective guilt, the ICTR findings were that there was no evidence in these particular cases of the perpetrators' involvement in any plan or conspiracy to destroy Tutsi civilians, given that the prosecutor failed to discharge the onus to prove their guilt beyond reasonable doubt. In the case of *Bagosora and others*<sup>46</sup>, the ICTR ruled that there was insufficient evidence showing that the said genocide was carried out in a Nazi-like fashion; rather the civilians were caught up in war-time violence.<sup>47</sup> The finding caused Erlinder to ask the academic question whether the 1994 Rwandan tragedy could be called 'a genocide at all'.<sup>48</sup> He eventually called that tragedy 'accidental genocide'.<sup>49</sup> The same question caused Cruvellier to refer to Tutsi genocide as 'brainless' since there was no master plan.<sup>50</sup>

Acknowledged, however, is the fact that the genocide was – whether planned or not – committed because there were some ICTR cases where perpetrators were convicted of committing acts of genocide

<sup>45</sup> On 18 December 2008, the Trial Chamber acquitted Brig Gen Gratién Kabiligi, of the Rwandan Army General Staff, on all counts (see *The Prosecutor v Bagosora* supra (n42) at para 2258). On 14 December 2011, the Appeal Chamber ruled that there was insufficient evidence to convince it that the accused had intention to commit crimes of genocide (see *Bagosora v The Prosecutor* supra (n42) at paras 730, 740). On 11 February 2014, the Appeal Chamber acquitted Maj Gen Ndindiliyimana and Maj Nzuwonemeye on all accounts. With regard to Sagahutu, the Appeals Chamber upheld Sagahutu's criminal responsibility for aiding and abetting, and as a superior in relation to the killing of at least two Belgian UNAMIR peacekeepers on 7 April 1994, but reversed the Trial Chamber's finding that he had ordered their killings (see *Ndindiliyimana v The Prosecutor* supra (n44) at paras 253, 278, 322, 388). And very recently, the Appeal Chamber held that Karemera and Ndirumpatse did not conspire to commit genocide prior to the April 1994 assassination of President Habyarimana; rather they encouraged the commission of it a few days after such assassination (*Karemera v The Prosecutor* supra (n43) para 643).

<sup>46</sup> *The Prosecutor v Bagosora* supra (n42) paras 2110, 2113.

<sup>47</sup> P Erlinder *The Accidental ... Genocide* (2013) 23, 24. See too *The Prosecutor v Bagosora* supra (n42) para 1996: the Trial Chamber noted with approval that the RPF triggered the killings that followed the assassination of President Habyarimana. As it appears, killings against the Tutsi were somehow spontaneous with the RPF's killings. The Trial Chamber upheld that 'there were a certain amount of spontaneous reprisal killings by members of the population in Rwanda ... and that it was 'also perfectly possible that some killings reflected the settling of old scores between certain individuals' (para 1996). Based on this observation, the Trial Chamber found that the prosecution could not show credible evidence from which an inference could be drawn that the four accused shared the same intention to destroy the Tutsi population (para 2111).

<sup>48</sup> There was no evidence to support the claim that the genocide was planned. Such claim was a victor's myth. See Erlinder op cit (n12) above.

<sup>49</sup> See Erlinder op cit (n47).

<sup>50</sup> T Cruvellier 'A brainless genocide' *International Justice Tribune*, 21 December 2011, available at <https://www.justicetribune.com/articles/brainless-genocide>, accessed on 16 October 2014.

with *dolus specialis*. Some perpetrators pleaded guilty for committing crimes of genocide and then were convicted. Notwithstanding these convictions, the Hutu population cannot be stigmatised as criminals – without distinction between guilty and innocent – as this has personal and social implications of imposing hardships and social degradation on the Hutu community. Every individual must be held to account for his or her own behaviour as required by the principle of autonomy underpinning values of criminal liability.<sup>51</sup> Upholding the principle of autonomy will have the potential for precluding Hutus from being made to feel the burden of the guilt collectively.

In light of the above, Hutus as a whole cannot be blamed for genocide. Those upper level Hutu perpetrators who were convicted of acts of Tutsi genocide should be the ones to blame for moral atrocity. They had power over their subjects. They were duty-bound to prevent genocide from happening as well as to guard against the state of anarchy through maintenance of public order. If account should however be given to the fact that the top decision makers in the Hutu regime were acquitted of intent to and of conspiracy to commit genocide against the Tutsi, one may not hesitate to state that the genocide debate becomes more complex, obscure, and controversial with regard to understanding who planned and initiated it. For one thing, the absence of a master plan does not take away the fact that the ICTR was convinced by prosecutors that there were in fact plans prior to the assassinations of two presidents, on 6 April 1994, to commit genocide in Rwanda<sup>52</sup> and had also took judicial notice that, between 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group.<sup>53</sup> On the other hand, in *Bagosora* the ICTR acknowledged that the genocide against the Tutsi was a result of a retaliatory violence that immediately followed assassinations of Hutu presidents in Rwanda and Burundi, in addition to atrocities committed by the RPF in its advance to power.<sup>54</sup> In other words, the genocide

<sup>51</sup> A Ashworth *Principles of Criminal Law* 4ed (2003) 28.

<sup>52</sup> The prosecutor, based on historical reprisal killings, contended that ‘there are certain indications in the evidence of a prior plan or conspiracy to perpetrate a genocide as well as other politically motivated killings in Rwanda, which could have been triggered upon the resumption of hostilities between the government and the RPF or following some other significant event’. See *The Prosecutor v Bagosora* supra (n42) para 2107.

<sup>53</sup> *The Prosecutor v Ngirabatware* (2009) Case No ICTR-99-54-T, paras 1, 9; *The Prosecutor v Karemera* (2006) Case No ICTR-98-48-AR73, para 35; and *The Prosecutor v Semanza* (2005) Case No ICTR-97-20-A, para 192.

<sup>54</sup> *The Prosecutor v Bagosora* supra (n42) paras 1990-1991; the Appeal Chamber noted the insurgencies and atrocities committed by the RPF, but remarked that although these facts appeared to be true, the accused was not being tried for spontaneous crimes, but crimes perpetrated by his subordinates (para 1996).

against the Tutsi was triggered by the RPF; a fact that makes the intention of the Hutu regime to destroy the Tutsi debatable.

In criminal law, where intention is lacking, an accused person can still be found guilty on the basis of negligence. For example, if, in the case of murder, intention is lacking, the crime becomes culpable homicide. In the cases involving genocide crimes, special intention or *dolus specialis* is the necessary condition to qualify an ordinary killing as genocide. In this regard, murder must be distinguished from extermination for the purpose of genocide. Bassiouni posits that whereas murder requires intention, extermination 'implies both intentional and unintentional killings'.<sup>55</sup> However, Bassiouni strongly argues that the 'intent to destroy' requirement of the Genocide Convention 'excludes situations where the required intent does not exist'.<sup>56</sup> Murder and extermination do not form part of acts of genocide but of crimes against humanity in the sense of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. In this way, they are contained in art 3 of the ICTR. However, the ICTR Statute did not define what constitutes murder or extermination. In terms of the definitional ambit of genocide, it is clear that if intent to destroy is lacking, it can be concluded that mass violence against a population should rather qualify as crimes against humanity. In this respect, for example, when considering the requirement of intent to destroy, the ICTR found that Col. Bagosora (the supposed ringleader of the genocide planning) had no intention to destroy the Tutsi as a group but convicted him on the basis of negligence, that is, he failed to discharge his duties of maintaining public order for a period of two days.<sup>57</sup>

Unlike the ICTR Statute, the Gacaca Organic Law did not explicitly make reference to murder or extermination; rather it described different types of murderers and killers who are placed in first and second categories.<sup>58</sup> More important to note is that the Gacaca Organic Law did not restrict perpetration of genocide to Hutus. Neither did it limit the victims to Tutsis. In principle, the criminalisation of mass atrocities in the context of genocide and crimes against humanity should hold both sides accountable. Justice and accountability should be individualised on the basis of general principles of criminal law, that is, *dolus* to destroy, in whole or in part, members of the Tutsi as a group or members of the Hutu as a group. Killing with *dolus*

<sup>55</sup> MC Bassiouni *Crimes Against Humanity in International Criminal Law* (1999) 302.

<sup>56</sup> Bassiouni op cit (n55) at 203.

<sup>57</sup> Col. Bagosora was convicted of crimes committed by subordinates, occurring on 7-9 April 1994. See, *Bagosora v The Prosecutor* supra (n42) paras 631-633, 691, 695-696, 720, 730, 737, 740.

<sup>58</sup> Article 55 of the Gacaca Organic Law No 16/2004.

and *culpa* must be taken into consideration. In situations where retributive justice is applied, convictions should not be based entirely on confessions and apologies but on the provisions of the penal code of criminal procedure. In doing so, regard must also be given to legal justifications, excuses and defences. From this point of view, the paper emphasises that the doctrines of obedience to superior orders and military necessity could, for example, have been used to exonerate, for example, lower level perpetrators from collective guilt. Rights of an accused person cannot be compromised by reasons of speeding up trials, because if the due process of criminal law is actually not observed, innocent people will be convicted. On this point, Buckley-Zistel states that trial by confession and apologies led to a dramatic increase in new allegations and accusations and, as a result, this fuelled tension, resentment and division because more people were implicated than anticipated, thereby consolidating an impression of collective guilt.<sup>59</sup>

In post-conflict societies such as Rwanda where the criminal justice system had collapsed or where there was a higher number of perpetrators, application of theories of restorative justice (as discussed below under 4.4) is necessary as an alternative justice mechanism to deal with all perpetrators, given that it focuses on the need for healing the nation, rather than focusing on retribution as the Gacaca courts did. Within retributive justice, it seems that it would be difficult to convince a reasonable person that the governed, and the powerless had planned to exterminate Tutsis or had intended to destroy the Tutsi population if the powerful rulers were acquitted of acts of genocide and conspiracy to commit genocide or if there were no architects of genocide. By 1994, the armed conflict had transformed from latent conflict to manifest conflict whereby, according to the ICTR, the prevailing ethnic conflict, political tension and mistrust generated spontaneous killings ‘with the primary responsibility lying with the RPF’.<sup>60</sup>

### **3 Rwanda’s approach to transitional justice**

With regard to transitional justice, the approach adopted by the post-genocide government was the prosecution of the Hutu population, claimed to be responsible for acts of genocide, primarily by applying the politics of apology. According to Gacaca law, in circumstances where the accused persons could not admit the charges levelled against them and thus refused to confess, the trial could be put on hold,

<sup>59</sup> S Buckley-Zistel ‘“The truth heals”? Gacaca jurisdictions and the consolidation of peace in Rwanda’ (2005) 80 *Die Friedens-Warte* 110 at 117.

<sup>60</sup> *The Prosecutor v Bagosora supra* (n42) para 1996.

subject to forensic investigation.<sup>61</sup> But the Gacaca judges proceeded and convicted the accused persons simply on the basis of public testimonies and/or confessions made by other accused. Justifications of this approach are grounded in the notion that transitional justice does not usually follow the general principles of criminal law in its pure form. Hence its duty is to balance the need for justice with the restoration of peace, security, harmony, and rule of law.<sup>62</sup> In this respect, the criminal standard of proof was disregarded.

The pertinent question is whether the standards of fair trial should not be adhered to in situations where a person risks being deprived of his or her liberties for life or by means of a long imprisonment. Standards of fair trial are part and parcel of human rights and freedoms. These standards cannot simply be overlooked for the sake of moral, political, or transitional justice. The paper takes cognisance of about 1.2 million cases that were mediated in the Gacaca courts and thus notes that it could have been impossible to deal with these cases in a conventional way. However, it is concerned with the stages where sufficient evidence was needed to determine guilt beyond a reasonable doubt but such evidence could not be submitted on the grounds of relying on public testimonies and other accused persons' confessions. Although this might be sufficient evidence in some cases, those Hutu who were implicated by others could have been given opportunity to state their cases (ie *audi alteram partem* principle). It is especially important to note that the vast majority of accused were unhappy with the requirement of confession and pleading guilty without stating their cases.<sup>63</sup> Should an accused have wished to plead not guilty or had refused to confess, the penal code of criminal procedure could have been applied, coupled with the standards of fair trial. An accused, who has been compelled to apologise on the sole ground that he was implicated by others, could, as noted, have been given an opportunity to challenge certain facts in issue and to adduce some evidence. In defending themselves, accused persons were faced with the challenge of finding witnesses, as members of the public were unwilling to testify on behalf of an accused for fear of being

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<sup>61</sup> See arts 46, 47 and 48 of the Gacaca's Organic Law No 16/2004.

<sup>62</sup> The transitional justice system is a hybrid of 'a range of disciplines including law, economics, psychology, history, public policy, forensics and the arts'. See K Chitsike *Transitional Justice Options for Zimbabwe: A Guide to Key Concepts* (2012) 1 at 4. See too R Uprimny & MP Saffon 'Transitional justice, restorative justice and reconciliation: Some insights from the Colombia Case' (2005) at 1, 2-3, available at [http://global.wisc.edu/reconciliation/library/papers\\_open/saffon.pdf](http://global.wisc.edu/reconciliation/library/papers_open/saffon.pdf), accessed on 12 October 2014.

<sup>63</sup> Bornkamm op cit (n9) 27.

incriminating themselves or being charged with the crime of genocide denial.<sup>64</sup>

### 3.1 The Rwandan meaning of transitional justice

The normative foundation of justice is to ensure accountability and impartiality in the protection and vindication of human rights and freedoms, including to prevent, combat and investigate crimes and ultimately to punish perpetrators for the sake of deterring others.<sup>65</sup> In criminal justice, regard must be given to the rights of both those accused and victims in the interest and well-being of the community at large. In dispensing justice in post-conflict societies, two conceptual notions are given consideration: post-conflict justice and transitional justice. A clear conceptual distinction between these terms is of paramount importance because the two notions are applied to help a society come to terms with a legacy of past generalised violence and/or mass atrocities.<sup>66</sup> The concepts are both invoked with the aim and purpose of ensuring accountability and fairness in the pursuit of justice.

The notion of post-conflict justice refers to practices that attempt to promote peace processes and the rule of law through reformation of criminal laws, coupled with sanctioning perpetrators with a view to preventing the recurrence of gross human rights abuses.<sup>67</sup> On the other hand, the term transitional justice is defined as ‘a response to systematic or widespread violations of human rights [that] seeks recognition for the victims and to promote possibilities for peace, reconciliation and democracy’.<sup>68</sup> Teitel describes the term transitional justice in the sense of

‘the view of justice associated with periods of political change, as reflected in the phenomenology of primarily legal responses that deal with the wrongdoing of repressive predecessor regimes’.<sup>69</sup>

<sup>64</sup> This was acknowledged by the ICTR in *The Prosecutor v Kanyarukiga* (2008) Case No ICTR-2002-78-R11bis, para 26 and *The Prosecutor v Munyakazi* (2008) Case No ICTR-97-36-R11bis, para 37. See too Buckley-Zistel op cit (n59) 120; HRW op cit (n31) 70; see also Amnesty International *Safer to Stay Silent: The Chilling Effect of Rwanda's Laws on 'Genocide Ideology' and 'Sectarianism'* (2010).

<sup>65</sup> UN Security Council ‘The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies; Report of the Secretary General’ (2004) (S/2004/616), para 7.

<sup>66</sup> UN Security Council op cit (n65) para 2. See TG Lie, HM Binningsbø & S Gates ‘Post-conflict justice and sustainable peace’ (2007) 1-2.

<sup>67</sup> UN Security Council op cit (n65) para 20. See too Lie, Binningsbø & Gates op cit (n66) 7.

<sup>68</sup> International Centre for Transitional Justice (ICTJ) ‘What is transitional justice’ (2009), available at <https://ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>, accessed on 23 October 2014 and JN Clark ‘Judging the ICTY: Has it achieved its objectives’ (2008) 9 *J SE Eur Black Sea Stud* 123, 124.

<sup>69</sup> RG Teitel ‘Transitional justice in a new era’ (2002) 26 *Fordham Internal LJ* 893.

More fundamentally, transitional justice refers to a way by which rendering justice helps post-conflict societies to transcend their social divisions and political conflicts.<sup>70</sup> More often than not, it is invoked on the basis of understanding that a radical transformation is necessary for moral, social, economic and political order.

With the aim of ending impunity, Rwanda's transitional justice system was designed in a criminal justice framework and conceived primarily in terms of notions of just deserts and deterrence. The post-genocide government believed that just deserts and deterrence would do justice to the Tutsi victims and put an end to a culture of impunity thereby contributing to the restoration and maintenance of peace, reconciliation and reconstruction.<sup>71</sup> The granting of amnesty was strongly rejected by the post-genocide government because there was a need to send a strong message to Tutsi genocide perpetrators and would-be perpetrators that it was not ready to tolerate the serious crimes committed.

Whereas other fragmented societies like South Africa, Guatemala, Peru, Timor-Leste, and Morocco largely focused on establishing truths through the Truth Commissions and eventually paid compensation or reparations to victims or their families and, to some extent, prosecuted upper level perpetrators based on findings and reports of the Truth Commissions,<sup>72</sup> Rwanda investigated all members of the Hutu communities regardless of their social strata. This approach was based on understanding that masses of the Hutu population were enjoined in the gruesome exercise against their Tutsi compatriots and that genocide was not only committed by political leaders or military leaders, but by ordinary Hutu citizens who carried out killings in reprisal of assassination of the presidents. For that reason, Hutus should be punished for what they had done. Post-genocide Rwanda holds the view that justice had been compromised by the former Hutu regime which granted blanket amnesty to Hutu perpetrators of the previous ethnic violence,<sup>73</sup> and that this should end. Even so, ending impunity should be approached holistically and impartially.

This aspiration was, in the post-genocide society, ethnically oriented, resulting in subjecting one ethnic group to justice. The prejudice was reflected in the reluctance to prosecute perpetrators

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<sup>70</sup> ICTJ op cit (n68).

<sup>71</sup> Kavuro op cit (n2) 156-7.

<sup>72</sup> PB Hayner *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* 2ed (2011) 1-7: Other illustrative Truth Commissions include Argentina, Chile, El Salvador, Germany, Haiti, South Korea, Ghana, Sierra Leone, South Korea, Liberia, Togo, Canada, and Kenya.

<sup>73</sup> FK Rusagara 'Gacaca as a reconciliation and nation building strategy in post-genocide Rwanda' (2005) 2 *Conflict Trends* 20 at 25.

from Tutsi backgrounds. One-sided justice was dispensed for and in the defence of the current version of genocide. This compromised and undermined efforts to dispense justice to all victims. Thus, members of the Hutu community were treated like objects, without inherent rights or feelings of their own but simply as a means to an end. Without having regard to what might have happened to them, Hutus were obliged to apologise to Tutsi compatriots, including their assailants. Although an apology was indeed appropriate for individuals who felt some sense of guilt, it was inappropriate for the vast majority who were compelled to apologise for the crimes of genocide based on an understanding that the genocide was committed by their relatives and in the name of the Hutu.

#### **4 Confession and apology in criminal justice**

As has been demonstrated, Hutus were compelled to confess and apologise in Gacaca proceedings. The fundamental question that needs to be explored is what a confession or an apology entails in social and religious life in general and criminal justice in particular. It is especially important to state that people apologise for what they did or failed to do, which resulted in psychological, emotional or physical harm to others. In a similar way, people can confess to having done something wrong or to knowing something about a wrongdoing. More often, people will tell about bad things they have done or said so that they can say that they are sorry and be forgiven. In social and religious life, acts of confession and apology aim to restore relationships and to strengthen harmony between parties. They create conditions for peace. Stamato observes that

[a]n apology can acknowledge that an injury or damage has occurred. It may include acceptance of responsibility for the mistake; recognize regret, humility or remorse in the language one chooses; explain the role one has played; ask for forgiveness; include a credible commitment to change or a promise that the act will not occur again; and, often, tender some form of restitution or compensation.<sup>74</sup>

In the transitional justice system, confession and apology can yield a similar result but in criminal matters would yield a different result. In a criminal justice system, confession and apology are viewed as an admission of the commission of the crime and as a consequence, an individual may be found guilty of that crime and ultimately be punished. Punishment is always and necessarily imposed – taking into account the main purpose of punishment – after being found guilty or convicted.

<sup>74</sup> L. Stamato 'Peace and the culture and politics of apology' (2008) 20 *J Social Jus* 389.

## 4.1 Apology

An apology is necessarily linked to criminal responsibility because it implies admission of guilt which is often accompanied by restitution.<sup>75</sup> An apology can amount to admissible evidence in criminal proceedings.<sup>76</sup> From a restorative justice point of view, the restitution is a sign of sincerity of intent to reconcile. In this sense, the punishment of compensation, fine, correctional supervision or community service is more appropriate for restitution.<sup>77</sup>

Since the Gacaca court system was politically used as tool to support the current genocide narrative, emphasis was placed on an apology. Notwithstanding the expression of an apology, such expression was viewed as an admission of the commission of crimes. As admissions, apologies were dealt with in terms of retributive justice and not restorative justice. This is apparent in the refusal to accept compensation as a form of restoration of the *status quo ante* with respect to any crime against an individual. A fine or compensation as a form of punishment could be imposed only for crimes against property. In all cases, punitive measures were taken with a view to achieving retribution and deterrence objectives. Integral to sentencing, therefore, was ensuring that a perpetrator should suffer the pain of remorse. It follows that an apology which is viewed as a formal admission of guilt led judges of the Gacaca courts to consider a punishment that fitted the perpetrator as well as the crime.

An apology entailed a severe consequence if account is to be given to Rwandan custom and practice. As Dr Bideri explains, Rwandan culture and tradition 'is unique, and when people commit mistakes in your name, ethnicity ... you have a duty to apologise on behalf of your people'.<sup>78</sup> Within this view, the post-genocide Rwandan leadership has a conviction that although the burden of guilt is, in criminal law, individual, the burden of genocide – with which Rwanda is still battling – is of a political nature and, consequently, the genocide responsibility lay with the whole family of perpetrators or their community.<sup>79</sup> In this context, crimes of genocide are communal; hence they were, as Tower puts it, easily attributed to an entire family, neighbourhood, or group of

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<sup>75</sup> Cunningham op cit (n2) 573.

<sup>76</sup> PH Rehm & DR Beatty 'Legal consequences of apologizing' (1996) 1 *J Dispute Resol'n* 115 at 118.

<sup>77</sup> Burchell op cit (n40) 82.

<sup>78</sup> G Warigi 'Mass apology and Rwanda genocide: The ghosts that just won't rest' *Africa Review*, 22 August 2013, available at <http://www.africareview.com/special-reports/Mass-apology-and-Rwanda-genocide/979182-1963418-11lk40bz/index.html> accessed on 10 December 2015.

<sup>79</sup> Ibid.

friends.<sup>80</sup> With this understanding, punishment was imposed on third parties who apologised on behalf of the perpetrator and, essentially, expressed their regret at a situation in which they had no blame.<sup>81</sup> Friends and fathers are the main victims of this kind of justice. This practice led Towner to state that 'guilt by association is much alive and part of everyday life in Rwanda'.<sup>82</sup> In a Rwandan ideological context, the whole family of a perpetrator is not only viewed as the enemy of the victim, including his or her family, but also as an accomplice in the crime.<sup>83</sup> This is the norm from which the Hutu's collective guilt rhetoric derives.

Notwithstanding the weight and value of an apology, Rehm and Beatty hold the view that an apology in a criminal trial would lead to responsibility and accountability. To them, an accused should not express an apology before a court of law finds him or her guilty.<sup>84</sup> However, the absence of an apology would work against the interest of the convicted person and the public at large.<sup>85</sup> An apology is a sign that a convicted person accepts the blame and may be committed to change and it is taken into consideration as a mitigating factor by a sentencing judge. By contrast, in Gacaca processes, an accused was required to confess and apologise as a starting point of hearing the matter. Based on a confession and an apology, accused persons were of course found guilty and ultimately convicted.

## 4.2 Confession

A confession is a special type of admission of guilt.<sup>86</sup> In common law, a confession is defined as an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law.<sup>87</sup> In principle, a confession is admissible if it has been made before a court of law;

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<sup>80</sup> See EB Towner 'Truly public apologies: Third-party participation in Rwandan apologetic rhetoric' (2010) 11 *Qual Res Reports in Commun'n* 63 at 66.

<sup>81</sup> Confessions and apologies which were tendered by third parties on behalf of their relatives who had passed on, with a view to amending the relationship between families, led to convictions on the basis of complicity in the commission of acts of genocide or failure to act to prevent them. Put simply, it became culpability for omission. According to J Lewis 'Mass graves and a thousand hills: University student perspectives on the Gacaca courts in post-genocide Rwanda' (2010) 4 *Inquiry* 1 at 5 writes that Hutu and Tutsi students at the National University of Rwanda attested through interviews that 'often it is the perpetrators' families, who committed no wrong, who suffer the consequences'.

<sup>82</sup> Towner op cit (n80) 66.

<sup>83</sup> Ibid.

<sup>84</sup> Rehm & Beatty op cit (n76) 118.

<sup>85</sup> Rehm & Beatty op cit (n76) at 119.

<sup>86</sup> Schwikkard op cit (n1) 333.

<sup>87</sup> *R v Becker* 1929 AD 167 and *S v Grove-Mitchell* 1975 (3) SA 417 (A).

and if it has been freely and voluntarily made in an accused person's sound and sober senses and without having been unduly influenced. As alluded to earlier, Hutus were compelled and manipulated by the post-genocide government to confess to their real or imagined crimes during genocide. Suspects could not have recourse to their fair trial rights.<sup>88</sup>

The defects or deficiencies in the Gacaca system of criminal prosecution were underlined by Longman and Snow. Longman observed that a large number of accused were convicted on the sole ground of confessing that they merely took part in patrols and vigilantism that the former government required all the population to attend.<sup>89</sup> Snow further attests that a higher number of accused were tried by the Gacaca courts on the basis of charges unsupported by evidence or supported by fabricated evidence or supported by a convict's confession.<sup>90</sup> The possibility of testing the credibility of public confessions and testimonies, including identifying and securing genuine evidence, was rare.<sup>91</sup> The problem of witness testimonies is that they most often turned out to be untrue, should they be cross-examined by legal counsels in the classical criminal justice system.<sup>92</sup> Under the Gacaca courts, testimonies were rarely challenged since no legal counsel(s) for a defendant could be allowed.

Generally, an accused was expected to admit to charges and thus confess and apologise, but a confession and an apology could be deemed to be truthful only if a confession implicated others.<sup>93</sup> Pursuant to this principle, confessing Hutus had to implicate others and an attempt to investigate the validity of such confessions was disregarded.<sup>94</sup> Lack of investigations regarding a series of implications on the basis of induced confessions was a violation of the due process of criminal law. For criminal norms, compliance, admission of guilt and confession should have been made voluntarily. In outlining

<sup>88</sup> Amnesty International op cit (n64) 19-25. See, too, Human Rights Watch *Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts* (2011) 27-80.

<sup>89</sup> Longman op cit (n30) 310.

<sup>90</sup> KH Snow 'The Rwanda hit list: Revisionism, denial, and the genocide conspiracy' *Conscious Being*, 12 March 2010, available at <http://www.consciousbeingalliance.com/2010/03/the-rwanda-hit-list> accessed on 14 February 2015 at 4. See too HRW op cit (n31) 38 which states that Hutus are found guilty 'on basis of simple accusation' (ie without adequate investigation or proof).

<sup>91</sup> Snow op cit (n90).

<sup>92</sup> Lin op cit (n19) 82 maintains that it may turn out that a witness did not actually see an incident him or herself but his relative or friend did.

<sup>93</sup> Longman op cit (n30) 308.

<sup>94</sup> Articles 1, 34(2), 36(2), & 54 of the Gacaca Organic Law No 16/2004.

sanctions against those who were not willing to confess,<sup>95</sup> accused persons obviously had to fabricate confessions and testimonies.

### 4.3 Truth-telling

Truth-telling is an institutionalised forum through which people demand to know the truth about past injustices or in response to institutionalised violence committed either by an authoritarian regime, a rebel group or by both.<sup>96</sup> Truth-telling helps a fragmented society transition to a reconciled society. In this sense, apology and confession are elements of truth-telling. Other patterns of truth-telling include gathering evidence for trials and ‘voice involves the personal accounts of victims, witnesses, family members and survivors, who tell their story in their own words’.<sup>97</sup> What is problematic is the ICTR’s findings that witnesses in Rwanda were unwilling to reveal the truths – on behalf of the Hutu accused – as a result of the fear that they might be persecuted by state agents.<sup>98</sup> As a result, the truth about abuses committed by Hutus is questionable and the truth about abuses committed by Tutsis is yet to be told.

### 4.4 Retributive justice system

In adopting a retributive justice system, the post-genocide government made it clear that it did not support the idea of granting amnesty to convicted Hutus. It is widely acknowledged that the retributive idea of justice, in order to restore the moral order, seeks to punish those who are found guilty of committing crimes. In other words, it is concerned with condemning crimes and ensuring that the criminals do not escape retribution.<sup>99</sup> Although it is widely argued that retribution should, in terms of contemporary criminal theories<sup>100</sup> be distinguished from absolute revenge, its principal objective is

<sup>95</sup> S Robins ‘Restorative approaches to criminal justice in Africa: The case of Uganda’ in R Bowd *The Theory and Practice of Criminal Justice in Africa* (2009) 57 at 63.

<sup>96</sup> DL Phillips ‘Justice, truth-telling and reconciliation’ *WebPublicaPress*, 11 June 2013, available at <http://webpublicapress.net/pPhillips-justice-truth-telling-and-reconciliation/>, accessed on 14 February 2015.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Kanyarukiga supra* (n64) para 26 and *Munyakazi supra* (n64) para 36.

<sup>99</sup> Kavuro *op cit* (n2) 157 (punishment is characterised by the exigencies of impersonality).

<sup>100</sup> As explained by among others, A von Hirsch *Doing Justice: The Choice of Punishments* (1976). See too *S v Makwanyane* 1995 (3) SA 391 (CC) para [223] that ‘The ethos of new culture ... suggests a change in mental attitude from vengeance to an appreciation of the need for understanding, from retaliation to reparation and from victimisation to *Ubuntu*.’

viewed as vengeance or retaliation.<sup>101</sup> Hence retributive punishment is enforced in accordance with the principle of proportionality. Under this principle, the punishment must essentially fit the crime.<sup>102</sup> In that case, the punishment to be imposed by the Gacaca courts must necessarily inflict individual harm which is in proportion to the seriousness of the crime.<sup>103</sup> Consequently, the retributive idea of justice seeks to ensure that individuals who committed crimes of genocide and crimes against humanity should get what they deserve.

Traditionally, for serious crimes, death penalty, life imprisonment or sentences of 15 years or above are normatively and practically penalties that retributive theory's punitive measures would suggest; but the imposition of sentence always depends on the nature of a crime. In most cases, parole and commutation of sentence are ruled out for ensuring that a perpetrator does not evade payback.<sup>104</sup> In a retributive justice system, punishment is inevitable and inexorable. It is also imperative where the state is committed to ending impunity. Whereas the ICTR, for example, made it clear that confession, apology or remorse were matters to be considered as mitigating factors at the sentencing stage,<sup>105</sup> the Gacaca cases were tried on the basis of threshold requirements of remorse, repentance, confessions and apologies, whereby accused were found guilty on that basis. Accordingly, retributive punitive measures were taken, but, as noted above, arts 55 and 56 of the Gacaca Organic Law obligated Gacaca judges to consider the said requirements as mitigating factors at the sentencing stage. The severity of the retributive approach is reflected in the case of Jean Kambanda, the former Prime Minister of the Hutu regime. The ICTR Appeal Chamber objected to reducing the term of life imprisonment imposed on him by the Trial Chamber on the grounds that although he had pleaded guilty, he neither showed remorse nor expressed apology and sympathy for the victims of genocide.<sup>106</sup> What this tells us is that pleading guilty without showing remorse or expressing apology would still attract maximum penalty that fits the crime committed.

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<sup>101</sup> In its traditional and cultural sense, retributive justice is based on 'the literal application of the biblical injunction of an eye for an eye, and a tooth for a tooth'. See *Makwanyane* supra (n100) para [129].

<sup>102</sup> Burchell op cit (n40) 72 (the principle of proportionality).

<sup>103</sup> B Wringe 'Why punish war crimes? Victor's justice and expressive justifications of punishment' (2006) 25 *Law and Philos'y* 159. See too *The Prosecutor v Kambanda* (1998) Case No ICTR 97-23, para 29.

<sup>104</sup> On the issue of rejecting an early release, see Kavuro op cit (n2) 166-167 where he maintains that the ICTR refused Georges Ruggiu's application for early release based on the ground that he committed crimes of utmost gravity.

<sup>105</sup> *Kambanda v The Prosecutor* (2000) Case No. ICTR 97-23-A paras 119-124.

<sup>106</sup> *Kambanda Prosecutor* supra (n105) para 118.

In any criminal justice system, confessions and apologies would lead to punishment. In situations where a confession was made freely and voluntarily, the court would proceed to sentencing an accused person; hence a trial was no longer needed. In retributive theories, the Gacaca had jurisdiction to impose a prison sentence ranging from 25 years to the death penalty or life imprisonment for perpetrators who committed serious genocide crimes.<sup>107</sup> The death penalty was abolished in 2007 and replaced by 'life imprisonment with special provisions'.<sup>108</sup> The conditions of life imprisonment with special provisions were explained by the minister of justice, indicating 'they will be tough in that [the convicts] will regret not having been hanged'.<sup>109</sup> Serious crimes were ranked in the first and second category.<sup>110</sup> Minor crimes were offences only committed against property, which were ranked in the third category.<sup>111</sup> It was only crimes of this nature that were designated to be dealt with in terms of the restorative theory of justice.

For justice to ensue, the paper argues that the determination of fairness in obtaining a confession or an apology was fundamentally imperative. This is so because the Gacaca's rules of procedure and evidence take cognisance of the penal codes of criminal procedure as they are applied by ordinary Rwandan courts. Added to this, the reliance on the system of confession, repentance, and apology arrangements to determine guilt or innocence makes a strong appeal to the application of the said codes.<sup>112</sup> The Gacaca courts could not apply a retributive theory of justice in a pure form in relation to sentencing and thus ignore the general principles of criminal law in its trial processes. Pragmatically, it seems as though the mixture of Western criminal procedures and Rwandan reconciliatory ethos obscured criminal norms, principles, and standards. According to Longman, the ways that general principles of criminal law were overlooked were reinforced by political pressure<sup>113</sup> which led to deviation from the norms of

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<sup>107</sup> Articles 72 and 73 of the Gacaca's Organic Law No 16/2004.

<sup>108</sup> Article 4 of the Organic Law No 31/2007 of 25 July 2007 relating to the abolition of the death penalty. It defines the term 'special provisions' as imprisonment in isolation and more specific modalities for its application have to be described by legislation. For further discussion on imprisonment with special provisions, see JD Mujuzi 'Making sense of the Rwandan law relating to serving life imprisonment with special provisions' (2011) 11 *Afr HR LJ* 296.

<sup>109</sup> HRW op cit (n31) 31-32.

<sup>110</sup> Article 51 of the Gacaca's Organic Law No 16/2004.

<sup>111</sup> *Ibid.*

<sup>112</sup> Accused persons were encouraged to confess both before they had been prosecuted and again following their pre-sentencing hearings in return for a reduced sentence. See arts 54-63 of the Gacaca's Organic Law No 16/2004 and C Mibenge 'Enforcing international humanitarian law at the national level: The Gacaca jurisdiction of Rwanda' (2004) 7 *Yrbk Internat'l Humanitarian L* 410 at 416.

<sup>113</sup> Longman op cit (n30) 309-310 maintains that judges were reluctant to find an accused innocent for fear that they could be punished for finding a Hutu not guilty.

criminal proceedings to more coercive trial processes.<sup>114</sup> Apologies were admitted as sufficient evidence without determining the context in which the apologies were obtained or even expressed. The legal consequence of admitting a confession and an apology as proof of the commission of a genocide crime was to deliver verdicts. In analysing the verdicts delivered in this manner, both Human Rights Watch and Amnesty International concluded that these trials were a sham.<sup>115</sup> In light of the above, one may argue that the politics of apology served to subject an accused to retributive penalties. The politics of apology in the realm of retributive justice would only attract assimilation of punishment with retaliation and this is inconsistent with the notions of understanding, forgiveness and reconciliation. The Gacaca court system was all about rancour and revenge and was not a reconciliatory forum.

#### 4.5 Restorative justice system

In light of the above, it comes with no surprise that the post-genocide government was opposed to the application of the restorative idea of justice. Historically, within a Western context, the idea of restorative justice 'originally began as an effort to rethink the needs and roles implicit in crimes'.<sup>116</sup> This kind of justice is mainly concerned with the needs that were not being met in the pursuit of retributive and deterrent types of justice. The main purpose of restorative justice is not to inflict harm in proportion to the gravity of the crime, or to incapacitate perpetrators so that they should not endanger the wellbeing of the community. It is to restore fairly the relationship that has been fractured by their harmful actions (crimes) through expansion of the circle of legitimate participants beyond the prosecution and the

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<sup>114</sup> Ibid. See too in HRW *Law and Reality* op cit (n31) 74-75 that the public was scared to defend an accused because any statement could 'bring misfortune'. That was self-incrimination. Due to this problem, officials sought other mechanisms to influence public testimonies 'through the promise of rewards or through intimidation, mistreatment, detention or threat of prosecution'.

<sup>115</sup> See, for example, Amnesty International op cit (n64) 8, 26-31: the introduction of the sectarianism and genocide ideology laws had the cumulative result of deterring people from exercising their right to freedom of expression. Fear of legal repercussions encouraged the people to desist from expressing legal and moral opinions and testifying for an accused person in criminal trials. See, too, HRW *Justice Compromised* op cit (n88) 90: for the fear of being ostracised by the community, people with relevant information that could have helped an accused person, chose not to come forward or to speak out, fearing repercussions from the government or reprisals by the authorities.

<sup>116</sup> H Zehr & A Gohar *The Little Book of Restorative Justice* (2015) 9.

defence team to include actual victims and community members.<sup>117</sup> Restorative justice is concerned with the question of redressing wrongdoings committed, including the wrongs of the past. In this context, the victims judicially claim redress. This approach to justice inevitably initiates a 'dialogue about the nature of the event that has taken place, and what can be done to put matters right'.<sup>118</sup> In that context, it places the emphasis on restoring harmony, peace-building, and reintegration of perpetrators into the community rather than applying the right criminal-law principles.<sup>119</sup> However, it carries with it some punitive elements in that it does not entirely exclude retributive or deterrence measures.<sup>120</sup>

In an African context, the justice system is collectivist, where an accused person has no individual rights or duties other than within his or her community. The accused and the community 'are mutually complementary'.<sup>121</sup> The collective aspect dominates the restorative idea of justice, which somehow rejects Western punitive measures because it steers away from penal measures in the form of revenge (or retaliation), banishment, exclusion, or imprisonment.<sup>122</sup> The system is concerned with shaming an accused and then reintegrating him or her back into the community once the initial expression of community repugnance had been demonstrated.<sup>123</sup> It mainly focuses on community affairs aimed at reconciling the parties and restoring harmonious relations within the community as well as ensuring that members of the community, more precisely, families of involved parties always fully participate in the resolution of the conflict.<sup>124</sup> Restorative justice is therefore described as

[a] cooperative process aimed at addressing past wrongs with an emphasis on the need for healing for both the wronged and the wrongdoers. Parties involved in a specific offence collectively resolve how to deal with the aftermath of the offence. It implies restoring a normalised everyday life, and creating and confirming people's sense of being and belonging.<sup>125</sup>

<sup>117</sup> Ibid. See further B Hudson 'Restorative justice: The challenges of sexual and racial violence' (1998) 25 *J Law & Soc'y* 237 at 241 and also Mibenge op cit (n112) 442 on why Rwanda rejected adherence to fair trial standards.

<sup>118</sup> Hudson op cit (n117) 241.

<sup>119</sup> Ibid.

<sup>120</sup> Zehr & Gohar op cit (n116) 11 and Burchell op cit (n40) 82.

<sup>121</sup> Rusagara op cit (n73) 20.

<sup>122</sup> I Keevy 'Ubuntu versus the core values of the South African Constitution' (2009) *J Jurid'l Sci* 19 and *S v Maluleke* 2008 (1) SACR 49 (T) at para [35].

<sup>123</sup> *Maluleke* supra (n122) at para [30].

<sup>124</sup> *Maluleke* supra (n122) para [30].

<sup>125</sup> Chitsike op cit (n62) 10.

Archbishop Tutu described it as

‘another kind of justice ... which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships – with healing, harmony and reconciliation.’<sup>126</sup>

These views suggest that restorative justice can apply to all crimes, be they serious or minor but this was not the case with the Gacaca. Within Gacaca jurisdiction, any crime against an individual was considered to be a crime of a serious nature. Only crimes against property were of a less serious character and were actually dealt with in terms of the restorative justice system. In the context of restorative understanding, perpetrators could, in principle, be ‘sentenced to civil reparation of what they have damaged’.<sup>127</sup> In practice, the victim and/or family members would usually compile and submit a list of the properties that were damaged and/or stolen and the Gacaca would deliberate on how much the accused owed the victim or members of the family.<sup>128</sup>

As a procedural mechanism to determine substantive guilt authoritatively, the features of restorative justice were reflected in public participation in trial processes and deliberations of verdicts. Considering penalties that were imposed by the Gacaca courts, it is clear that it was concerned as much with retributive punishment as with ensuring that perpetrators got what they deserved. Its aims were not those of correcting imbalances and restoring broken relationships.

More obvious is a tension between restorative and retributive systems in the applicability of their principles in the genocide cases. With restorative justice, an apology and a confession could have pointed in the direction of reconciliation because an act of confessing and apologising was illustrative of willingness to make up a loss or injury, whereas retribution appealed to a punitive dimension. Smith offers a nuanced theory of the meaning and social function of apology by stating that an apology is acceptance because, in apologising, a person acknowledges ‘causal moral responsibility and the blame at issue’.<sup>129</sup>

Proponents of restorative justice have identified four objectives which make it essential in post-conflict societies such as Rwanda. They include (i) responding fully to a victim’s need; (ii) preventing recidivism by way of reintegrating perpetrators into a community; (iii) allowing perpetrators to responsibly and actively participate in communal affairs; and (iv) establishing an operational community

<sup>126</sup> D Tutu ‘Truth and Reconciliation Commission of South Africa Report’ (2000), Vol 1, 9 para 36. See too Robins *op cit* (n95) 63.

<sup>127</sup> Article 75 of the Gacaca’s Organic Law No 16/2004.

<sup>128</sup> HN Brehm, C Uggen & J-D Gasanabo ‘Genocide, justice, and Rwanda’s Gacaca courts’ (2014) 30 *J Contemp Crim Jus* 333 at 340.

<sup>129</sup> N Smith ‘Commentary: The penitent and the penitentiary: Questions regarding apologies in criminal law’ (2010) 27 *Crim Jus Ethics* 2, 81.

that is committed to promoting rehabilitation of both perpetrators and victims and to preventing the recurrence of similar crimes.<sup>130</sup> To achieve these goals, restorative justice focuses on wrong, harm, injury or damage. Once one of these aspects is identified, an obligation arises for a wrongdoer to restore the *status quo* or redress the harm. It is, as noted above, the participants who decide on what a wrongdoer should do to repair damages or redress harm or injury.<sup>131</sup>

In a transitional justice system, restoration is viewed as the best option in a conflict situation because it serves as a 'tool for negotiating the truth, a collective search for conflict resolution, the reconciliation of conflicting interests and interested parties, and lasting peace'.<sup>132</sup> The post-genocide government did not view restorative justice in its pure form as an option. Eventually, the truth was negotiated on the basis of mandatory confession and apologies as well as public testimonies.<sup>133</sup> Proceeding from this vein, genocide trials complied neither with general criminal norms and practices nor reconciliatory tenets.

#### 4.6 The biased nature of Rwanda's transitional justice

For supporting the current narrative of genocide, Gacaca disregarded the recognition of the fact that justice is constructed procedurally and substantively on the basis of the principle of fairness or impartiality. It can therefore be argued that justice as fairness would have been rendered to all victims if acts of genocide could officially have remained classified as Rwandan genocide and if the path to reconciliation could have been paved by both conflicting parties as happened in South Africa or Burundi.<sup>134</sup> A negotiated reconciliatory path would have been possible if regard had been given to abundant damning evidence demonstrating that both Hutu and Tutsi were involved in wanton mass killings. The roots of bias in addressing past injustices derive from the administrative measures of renaming the Rwandan genocide Tutsi genocide in 2008 and of designing reconciliatory laws through the lens of the victors' wishes. The latter is in conflict with the *nemo iudex in sua causa* principle, which literally means that no one can be a judge in his own case.

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<sup>130</sup> Chitsike op cit (n62) 10.

<sup>131</sup> Ibid.

<sup>132</sup> S Ndlovu-Gatcheni 'Book review: Restorative justice in Africa: From trans-dimensional knowledge to a culture of harmony' (2013) 43 *Africa Insight* 117 at 118.

<sup>133</sup> Article 29 of the Gacaca's Organic Law No 16/2004 states that every Rwandan citizen has a duty to participate in the Gacaca courts' activities and that refusal and omission to testify shall be prosecuted.

<sup>134</sup> Both the ICTR and the Gacaca courts were created not to try the vanquished only, but to try both sides.

The radical move to justify the current version of genocide is conceived in terms of the recognition by the post-genocide government, after 18 years, of the Tutsi as the main target.<sup>135</sup> The implication of this recognition is a restriction of genocide to Tutsis only; the restriction which was constitutionally imposed regardless of various documents demonstrating the culpability of the RPF forces.<sup>136</sup> Moreover, the restriction made it impossible to call the Tutsi leaders to account.<sup>137</sup> With regard to the RPF culpabilities, Longman writes:

‘The RPF killed thousands of people as it advanced across the country in 1994, thousands more in massacres and summary executions after taking office, and tens of thousands during the 1996 invasion of [the Democratic Republic of the Congo (DRC)].’<sup>138</sup>

With respect to RPF’s mass atrocities perpetrated in the DRC, the 2010 UN Mapping Report provides details of grave cases of mass killings, sexual violence, attacks on children, and other abuses committed indiscriminately against Hutu refugees.<sup>139</sup> According to the report, mass atrocities committed by the RPF against Hutu refugees could, if proven before a competent court, be characterised as crimes of genocide.<sup>140</sup> These facts were, it can be argued, not ignored initially. Prior to 2008, there was no law or policy that stated that genocide was exclusively committed against the Tutsi. Even the 2001 and 2004 organic laws governing Gacaca jurisdiction did not explicitly or implicitly exclude Hutu victims.

The recognition of genocide as Tutsi genocide had the potential to exclude some Hutus from a group of genocide survivors and has resulted in labelling all Hutus – victims and perpetrators alike – as ‘*genocidaire*’. The biased approach to addressing past abuses has been morally and consistently opposed by Hutus, who continue to claim that the majority who perished were their loved ones and that those who caused their deaths should equally and criminally be held liable. This is a sentiment that will simply not go away, and was, on 16 January

<sup>135</sup> The paper does not deny that there was no genocide against Tutsis; rather it argues that there was also genocide against Hutus. However, the post-genocide government continues to deny the occurrence of genocide against both Tutsi and Hutu, mostly for political reasons.

<sup>136</sup> For the documentation of mass atrocities committed by the RPF, see note 13 above.

<sup>137</sup> See Hartmann op cit (n12) 261-272; and Erlinder *International Justice* op cit (n12) 142

<sup>138</sup> Longman op cit (n28) 309.

<sup>139</sup> UN Office of the High Commissioner for Human Rights ‘Democratic Republic of the Congo: Report of the Mapping Exercise Documenting the Most Serious Violation of Human Rights and International Law Committed within the Territory of Democratic Republic of Congo between March 1993 and June 2003’, 1 October 2010, (UN Mapping Report), para 22.

<sup>140</sup> UN Mapping Report op cit (n139) paras 28, 191-268.

2010, echoed by Ms Ingabire (a Hutu and an opposition party leader), who declared that:

‘For us to reach reconciliation, we need to empathise with everyone’s sadness. It is necessary that for the Tutsis who were killed, those Hutus who killed them understand that they need to be punished for it. It is also necessary that for the Hutus who were killed, those people who killed them understand that they need to be punished for it too. Furthermore, it is important that all of us, Rwandans from different ethnic groups, understand that we need to unite, respect each other and build our country in peace. What brought us back to the country is for us to start that path of reconciliation together and find a way to stop injustices so that all of us Rwandans can live together with basic freedoms in our country.’<sup>141</sup>

In response to the defiance of the Hutu community, the post-genocide government adopted a range of sectarian laws with the sole purpose of criminalising and penalising those who might argue otherwise. In that context, Ms Ingabire was prosecuted and convicted for her public statement.<sup>142</sup> She was sentenced to eight years in prison by the High Court and, on appeal, a term of imprisonment was extended by the Supreme Court to 15 years.<sup>143</sup> A number of politicians, journalists and human rights activists who share the same view as Ms Ingabire were also arrested and prosecuted on the ground of denying Tutsi genocide and of implicating the RPF in the Rwandan genocide.<sup>144</sup>

Irrefutably, genocide-related matters are predominantly political which has a negative impact on dealing with them on the basis of impartiality and without fear, favour or prejudice. This was acknowledged by Del Ponte (former Chief ICTR Prosecutor), Pillay (former ICTR President) and Karugarama (former Minister of Justice). Acknowledging that the doctrine of impartiality had been ridiculed, Del Ponte asserted that the principles of international criminal justice

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<sup>141</sup> VI Umuhoza ‘Unity and reconciliation speech at Gisozi Genocide Memorial Centre’ *Victoire Ingabire Umubozza*, [2010], available at <http://www.victoire-ingabire.com/Eng/victoires-quotes/>, accessed on 17 October 2015.

<sup>142</sup> Immediately after her speech, Ms Ingabire was arrested and charged with a number of genocide crimes, including divisionism, revisionism and genocide denial.

<sup>143</sup> Preamble of the P7\_TA (2013) 0233: ‘European Parliament Resolution of 23 May 2013 on Rwanda: Case of Victoire Ingabire (2013/2641(RSP)’. See too *Ingabire Umubozza Victoire*, Urubanza RP 0081-0110/10/HC/KIG, para 451.

<sup>144</sup> Other cases worth mentioning include that of Mr Leonard Kavutse, leader of the opposition MDR party (High Court, Case No. RP 0004/05/HC/KIG-RP 41.934/KIG, decision of 20 April 2005); former President Pasteur Bizimungu and former Minister Ntakirutinka (Tribunal de première Instance de Kigali, judgement RP 4064/KIG, RMP 8394/S14, decision of 7 June 2004).

were not applied without fear or favour due to international politics.<sup>145</sup> Pillay concurred with her. She stated that justice at the ICTR was more selective and political.<sup>146</sup> Clarity on Pillay's statement can be inferred from a statement of Karugarama's in which he stressed that crimes committed during the dark days of 1990-1994 were of a political nature 'that need[ed] to be resolved politically'.<sup>147</sup> A political approach had at both international and national levels, implications for undermining the autonomy of the genocide courts with regard to their ability to prosecute without prejudice. Put politically, the Gacaca court system was used as a mechanism to justify that Hutus were responsible for the calamity that befell Rwanda instead of using the court to ensure justice for all. It was utilised to promote the post-genocide government's political ideology, based on an assumption which holds that there cannot be an innocent Hutu,<sup>148</sup> even if he or she is a child.<sup>149</sup>

## 5 Concluding remarks

Although what happened in Rwanda brought about unspeakable suffering to Rwandan society and shocked the conscience of humanity, it is not only Tutsis who suffered from genocide crimes. For that reason, tolerance and understanding was a requisite in that the post-genocide government could have crafted a transitional justice system that was concerned with dispensing criminal justice for all, taking into consideration elements of restorative justice. With this framework, the Gacaca courts could have observed and promoted the human dignity of each and every Rwandan. It should have paid attention to the criminal principles regulating acceptance of a confession,

<sup>145</sup> Hartmann op cit (n12) 271-272 quotes Ms C Del Ponte (former Chief UN Prosecutor) stating that: 'It was unfair that politics undermines our work. I find it wounding to see that we have managed to ridicule the principles of international justice ... because Kagame has signed a bi-lateral agreement with the United States.' See too Erlinder *International Justice* op cit (n12) 144.

<sup>146</sup> Ms N Pillay said: 'Yes, justice can be selective, it can be political. But if you ask me if justice is being done here (at the ICTR), I can say, YES!' See Erlinder op cit (n12) 156.

<sup>147</sup> In November 2003, HRW researchers interviewed Mr T Karugarama (former Minister of Justice) and other senior officials in the ministry of justice who asserted that justice was a political problem. See HRW *Law and Reality* op cit (n31) 19.

<sup>148</sup> HRW op cit (n87) at 36.

<sup>149</sup> Mibenge op cit (n112) 417 attests that Hutu children who were accused of participating in genocide, including those who were mere onlookers, were thrown into jail without subjecting them to criminal proceedings. Children are criminally liable for the crime of genocide ideology at the age of 12 and may be committed to rehabilitation for a year and their 'parents, guardians, teachers and headmasters may be punished by 15 to 25 years in prison'. See HRW op cit (n31) 42 and Amnesty International *Safer to Stay Silent* op cit (n64) 15.

an apology and a testimony. Recognition of human rights of both victims and perpetrators was essential. In so doing, victims should not have been limited only to Tutsis; rather all victims (i.e. Hutu and Twa) could have been recognised and their cases should have been heard. In confronting past injustices, transitional justice is actually concerned with recognising all wrongdoings and acknowledging the pain and suffering of all victims, taking into account what they have been through. All those victims, whose integrity was physically and psychologically affected and who were reeling from myriad losses, should have been afforded justice. Dispensing criminal justice for all is a cornerstone of putting an end to a culture of impunity.

However, what is self-evident from the analysis of the invocation of politics of apology in Gacaca trials is that post-genocide Rwanda sought to use confessions and apologies to justify the moral atrocities of Hutus as a group, instead of promoting justice. The functioning of the transitional justice system was morally constrained by political interference. The Gacaca courts lacked judicial independence. In politicising the genocide crimes, these institutions particularly became tools to be used to give credence to the RPF's narrative of genocide and no effort was made to investigate and prosecute mass atrocities by the RPF. The paper concludes by noting that contribution to national reconciliation cannot be done through prosecuting one side for the conflict or through coerced confessions and apologies. Those who are compelled to confess and apologise against their will cannot be said to be willing to reconcile. The prospect of achieving peace, justice and accountability in Rwanda was indeed tarnished by the politics of apology that sought to prove a point of collective blame and, alternatively, to convey a message to the world that Hutus shared the common purpose of destroying Tutsis as a group. The bias approach has many implications. It promotes impunity and perpetuates injustice, ethnic conflict, social division and economic instability. Without fairness in dispensing justice, it is difficult to restore harmony in a post-conflict society.