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The Right of Victims of International Crimes to Reparations in the Aftermath of the 1994 Genocide against the Tutsi in Rwanda

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**The Right of Victims of
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Yves Sezirahiga

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The Right of Victims of International Crimes to Reparations in the Aftermath of the 1994 Genocide against the Tutsi in Rwanda

PhD thesis

to obtain the degree of PhD at the
University of Groningen
on the authority of the
Rector Magnificus Prof. C. Wijmenga
and in accordance with
the decision by the College of Deans.

This thesis will be defended in public on

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TABLE OF CONTENTS

Acknowledgments.....	i
<i>TABLE OF CONTENTS</i>	<i>iii</i>
Abbreviations and Acronyms.....	ix
<i>CHAPTER ONE</i>	<i>1</i>
<i>GENERAL INTRODUCTION</i>	<i>1</i>
1.1. Research context.....	1
1.2. Research question.....	8
1.3. Research objectives	9
1.4. Methodological approach	10
1.5. Structure of the thesis	14
1.6. Originality of the research.....	16
<i>PART I</i>	<i>18</i>
<i>VICTIMS' RIGHTS TO REPARATIONS AND THE RWANDAN RESPONSES TO THE CONSEQUENCES OF THE GENOCIDE AGAINST THE TUTSI</i>	<i>18</i>
<i>CHAPTER TWO</i>	<i>19</i>
<i>THE LEGAL FRAMEWORK OF THE RIGHTS TO AN EFFECTIVE REMEDY AND ADEQUATE REPARATIONS FOR THE VICTIMS OF GENOCIDE IN RWANDA</i>	<i>19</i>
2.1. Victims' rights to an effective remedy and adequate reparations under international human rights law	21
2.1.1. Victims' access to justice as a procedural component of the right to an effective remedy	24
2.1.2. Victims' right to reparations as a substantive component of the right to an effective remedy	30
2.2. The emergence of victims' right to reparations in international criminal law	34
2.2.1. The victims' redress framework of the International Criminal Tribunal for Rwanda (ICTR).....	35
2.2.1.1. The ICTR's property restitution regime.....	36
2.2.1.3. The ICTR's rehabilitation regime	41

2.2.2. Pursuit of reparations before the International Criminal Court (ICC)	43
2.2.2.1. Victims' right to reparations in international criminal law as a pragmatic compromise	44
2.2.2.2. The limits of the ICC's reparation regime in addressing mass violations of human rights constituting international crimes.....	48
2.2.2.2.1. The impact of the prosecutor's selection of charges on victims' participation in court proceedings and on reparation orders	49
2.2.2.2.2. Victims' interests and rights of the accused: a quest to find a balance	55
2.2.2.2.3. Victims' accessory role in the determination of reparations	57
2.3. Conclusion.....	60
CHAPTER THREE	61
GENOCIDE PERPETRATORS' ACCOUNTABILITY AND TRUTH-SEEKING IN RWANDA	61
3.1. The prosecution of genocide perpetrators before the Specialised Chambers in Rwanda	65
3.1.1. The principle of dual incrimination as an alternative solution to the lack of enabling legislation for the Genocide Convention	66
3.1.2. The mandate of the Specialised Chambers and its impact on the government of Rwanda's obligation to investigate, prosecute and punish	70
3.1.3. The categorisation of genocide suspects and its legal implications	73
3.1.4. The effects of the confession and guilty plea procedure on the realisation of victims' rights	75
3.2. Gacaca courts, the miracle solution to the genocide caseload	80
3.2.1. Citizens' participation and its effects on Gacaca proceedings	83
3.2.2. The conduct of Gacaca court proceedings	85
3.2.2.1. Compliance of the Gacaca pre-trial proceedings with international fair trial standards	86
3.2.2.2. The Gacaca trial proceedings and international fair trial standards	89
3.2.2.3. Effects of the flexibility and adaptability of the Gacaca system framework.....	91
Table 1: Situation of trials in Gacaca courts (June 2012)	94
Table 2: Situation of appeals in Gacaca courts of appeal (June 2012).....	95
3.3. Conclusion.....	95

CHAPTER FOUR..... 98

**GENOCIDE VICTIMS' ACCESS TO COURT AND PECUNIARY REPARATIONS IN
RWANDA 98**

4.1. The victims' *locus standi* under the Rwandan Genocide Organic Law 99

4.1.1. The victims' prerogative to initiate criminal proceedings and free access to court 100

4.1.2. The representation of genocide victims with no legal capacity 101

4.1.3. The Specialised Chambers' prerogative to issue reparations to genocide victims not yet identified..... 102

4.1.4. The joint civil liability of the genocide's masterminds for the harm caused countrywide 103

**4.2. The impact of the Gacaca organic laws on the rights to an effective remedy and adequate
reparations for the victims of the genocide against the Tutsi..... 106**

4.2.1. Dual standard in the treatment of the victims of the genocide against the Tutsi..... 106

4.2.2. State immunity from civil actions..... 107

4.2.3. The FARG's exclusive power to institute civil actions 110

4.2.4. The victims' compensation fund: an unfulfilled promise 111

4.3. The genocide victims' right to reparations in the post-Gacaca proceedings 112

4.3.1. The genocide victims' civil actions: an unfinished business 113

4.3.2. Challenges in the execution of the reparation awards issued by the Gacaca courts..... 115

4.4. Foreign domestic courts and the genocide against the Tutsi in Rwanda 117

4.4.1. Genocide victims' civil claims under the 1789 Alien Tort Claims Act and the 1991 Torture Victim
Protection Act..... 117

4.4.2. Genocide victims' civil claims under the principle of universal jurisdiction in Europe and Canada 119

4.5. Conclusion..... 122

CHAPTER FIVE 124

**THE MEASURES OF SATISFACTION, REHABILITATION AND GUARANTEE OF
NON-REPETITION 124**

**5.1. Government measures aimed at satisfaction of the victims of the genocide against the
Tutsi..... 124**

5.1.1. The exhumation of victims' bodies and their reburial at genocide memorial sites	125
5.1.2. Commemorations and tributes to the victims of the genocide against the Tutsi	130
5.2. The government's measures to guarantee non-repetition	135
5.2.1. Preventing and combating genocide to guarantee the non-repetition of conflicts	137
5.2.2. Unity and reconciliation as guarantees of non-repetition	140
5.2.3. The legislative reforms and ethnicity ban as guarantees of non-repetition	145
5.2.3.1. The legislative reforms and anti- denial laws	146
5.2.3.2. The promotion of national identity and the abolition of ethnic identities	148
5.3. The government's rehabilitation measures for the victims of the genocide against the Tutsi	152
5.3.1. The FARG packages and recipients' eligibility	153
5.3.2. The FARG: a philanthropic fund with reparative effects.....	157
5.4. Conclusion.....	159
<i>PART II</i>	<i>161</i>
<i>THE VICTIMS' PERCEPTIONS OF THE REPARATION MEASURES IN RWANDA</i>	<i>161</i>
<i>CHAPTER SIX</i>	<i>162</i>
<i>INTRODUCTION TO THE EMPIRICAL RESEARCH CONDUCTED IN RWANDA</i>	<i>162</i>
6.1. Methodology	163
6.2. Qualitative semi-structured interviews	164
6.3. Interviews with genocide survivors.....	165
6.4. Conduct of the interviews	168
6.5. Use of survivors' statements.....	168
<i>CHAPTER SEVEN.....</i>	<i>170</i>
<i>VICTIMS' PERCEPTIONS OF TRUTH-SEEKING/TRUTH-TELLING AND THE ACCOUNTABILITY OF PERPETRATORS</i>	<i>170</i>

7.1. The impact of truth-seeking/truth-telling and accountability on victims' psychological health	170
7.1.1. How victims can benefit from truth-seeking/truth-telling processes	171
7.1.2. Why truth-seeking/truth-telling processes can be potentially harmful	175
7.2. The therapeutic effect of the Gacaca system.....	177
7.2.1. The government's decision to prosecute and punish genocide perpetrators	177
7.2.2. The role of the Gacaca courts in defusing suspicion and mistrust between Hutu and Tutsi	179
7.2.2. Finding loved ones' bodies and giving them a proper burial.....	182
7.3. The retraumatising effect of the Gacaca system.....	183
7.3.1. The retraumatisation of genocide survivors.....	183
7.3.2. Disproportionality between the punishment and the harm suffered.....	186
7.3.3. The Gacaca system's failure to establish the causes and conditions leading to the genocide.....	188
7.4. Conclusion.....	190
<i>CHAPTER EIGHT</i>	<i>192</i>
<i>VICTIM-SURVIVORS' PERCEPTIONS OF REPARATION AND RECONCILIATION IN RWANDA.....</i>	<i>192</i>
8.1. The partial recognition of the harm suffered.....	192
8.2. The hierarchy of suffering and the categorisation of victims.....	194
8.3. Victim-survivors' feelings of social envy towards ex-combatants.....	198
8.4. Victim-survivors' perceptions of the unity and reconciliation of Rwandans in relation to reparations	199
8.4.1. <i>The abolition of ethnicity and the promotion of national unity.....</i>	200
8.4.2. <i>The lack of sincere and genuine apology and remorse.....</i>	204
8.5. Conclusion.....	206
<i>CHAPTER NINE.....</i>	<i>208</i>
<i>GENERAL CONCLUSION.....</i>	<i>208</i>

<i>BIBLIOGRAPHY.....</i>	<i>215</i>
<i>English summary</i>	<i>254</i>
<i>Nederlandse samenvatting.....</i>	<i>258</i>
<i>About the Author.....</i>	<i>263</i>

Abbreviations and Acronyms

AfrCHPR	African Court of Human and Peoples' Rights
AfrComHPR	African Commission of Human and Peoples' Rights.
Art.	Article
ASF	<i>Avocats Sans Frontières</i>
AU	African Union
CAT	Convention Against Torture
CNLG	National Commission for the Fight against Genocide Discrimination
CS	<i>Cour Supreme</i>
E.g	Example
EALA	East African Legislative Assembly
ECHR	European Convention for the Protection of Human Rights
ECtHR	European Court of Human Rights
Ed(s).	Editor(s)
Edn.	Edition
<i>et al.</i>	<i>et alii</i> (and others)
<i>etc</i>	<i>et cetera</i>
EU	European Union
FAR:	<i>Forces Armées Rwandaises</i>
FARG	<i>Fonds d'Assistance aux Rescapés du Genocide</i>
G.A/Res.	General Assembly Resolution
HC	High Court
HRC	Human Rights Committee

i.e.	That is
IACmHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
<i>Ibid.</i>	<i>Ibidem</i> (in the same place)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
IMT	International Military Tribunal
<i>Inter alia</i>	Among others
KIG	Kigali
MICT	Mechanism for International Criminal Tribunals
MINJUST	Ministry of Justice
N°	Number
NGO	Non-Governmental Organization
NSGC	National Service of Gacaca Courts
NSGJ	National Service of Gacaca Jurisdictions

NURC	National Unity and Reconciliation Commission
O.G.	Official Gazette
O.G.R.R:	Official Gazette of the Republic of Rwanda
O.L	Organic Law
OAS	Organization of American States
OAU	Organization for African Unity
P(p).	Page (s)
Para(s)	Paragraph(s)
Ph.D.	Doctor of Philosophy
PRI	Penal Reform International
Prof.	Professor
R.P	<i>Rôle Pénal</i>
R.C	<i>Rôle Civil</i>
Res.	Resolution
Rfws	Rwandan Francs
RPA	Rwandan Patriotic Army
RPE	Rules of Procedure and Evidence
RPF	Rwandan Patriotic Front
RTL	<i>Radio-Télévision Libre des Mille Collines</i>
SC	Security Council
SG	Secretary-General
STL	Special Tribunal for Lebanon
TGI	<i>Tribunal de Grande Instance</i>

TIG	<i>Travaux d'Intérêt Général</i> (community service)
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UN Doc.	United Nations Document
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
US/USA	United States
USD	United States Dollar
V.	Versus
Vol.	Volume

CHAPTER ONE

GENERAL INTRODUCTION

1.1. Research context

Twenty-seven years ago, Rwanda suffered massive violations of human rights in what is now known as the genocide against the Tutsi.¹

Poetically labelled the ‘Land of a Thousand Hills’ due to its hilly landscape, Rwanda is a landlocked country with a total area of 26,338 square kilometres. In early 1994, Rwanda had an estimated population of more than seven million, comprising three ethnic groups: the Hutu, the Tutsi and the Twa. The Hutu were estimated to represent roughly eighty-five per cent of the Rwandan population, the Tutsi fourteen per cent and the Twa only one per cent.²

In the precolonial era, Hutu, Tutsi and Twa were regarded as social classes.³ Anyone who owned a sizable herd of cattle was considered a Tutsi and – since Tutsi occupied the higher strata in the social system – was highly regarded. All farmers were Hutu, while potters and hunters were Twa.⁴ Social mobility between Hutu and Tutsi was possible: for instance, a Hutu who acquired a large number of cattle or other wealth could be integrated within the Tutsi community while an impoverished Tutsi – i.e. one with no cattle – would be regarded as Hutu.⁵ With the introduction of national identity cards by Belgians who divided Rwandans into three ethnic groups, what were previously ‘social groups’ (Hutu, Tutsi and Twa) came to be perceived as ethnicities.

From 1897 to 1918, Rwanda was a German colony and, after World War I, became a Belgian trusteeship under the League of Nations’ mandate.⁶ During the colonial period, the Tutsi were favoured over the Hutu by the Belgians, who introduced identity cards to distinguish a

¹ Law No. 69/2008 of 30 December 2008 relating to the establishment of the fund for support and assistance for the survivors of the genocide against the Tutsi and other crimes against humanity committed between 1 October 1990 and 31 December 1994, and determining its organisation, competence and functioning. *Official Gazette of the Republic of Rwanda*, no. special of 15 April 2009. See also the preamble of the Constitution of the Republic of Rwanda of 2003 revised in 2015, *Official Gazette of the Republic of Rwanda*, no. special of 24 December 2015.

² ‘Rwanda: A Brief History of the Country’, available at <https://www.un.org/en/preventgenocide/rwanda/historical-background.shtml>, accessed on 17 March 2020.

³ See S. M. Moss, ‘Representation of Social Identities in Rwanda’, in S. McKeown, R. Haji and N. Ferguson (eds), *Understanding Peace and Conflict Through Social Identity Theory: Contemporary Global Perspectives*, Peace Psychology Book Series, Cham: Springer, 2016, p. 207.

⁴ See J.-P. Chrétien, ‘Hutu et Tutsi au Rwanda et au Burundi’, in J.-L. Amselle and E. M’Bokolo (eds), *Au coeur de l’ethnie: Ethnies, tribalisme et Etat en Afrique*, Paris: La Découverte, 1985; R. Lemarchand, ‘Power and Stratification in Rwanda: A Reconsideration’, (1966) 24 *Cahier d’études Africaines* 592–610; J. Maquet, *The Premise of Inequality in Rwanda: A Study of Political Relations in a Central African Kingdom*, London: Oxford University Press, 1961.

⁵ See S. M. Moss, *supra* note 3, pp. 207–209.

⁶ Emmanuel, V., ‘Rwanda – A Chronology (1867–1994)’, 1 March 2010, available at <https://www.sciencespo.fr/mass-violence-war-massacre-resistance/en/document/rwanda-chronology-1867-1994.html>, accessed on 14 December 2020.

person's ethnic origin and set standards of distinction based on individual body shape.⁷ The dual treatment exacerbated the tendency of the minority to oppress the majority and thus led to ethnic tensions between Hutu and Tutsi.⁸ The tensions exploded into violence in 1959 in what is known as the Hutu revolution.

This revolution lasted from 1959 to 1961 and led to the overthrow of Rwanda's reigning Tutsi king, forcing him and as many as 333,000 Tutsi into exile.⁹ In early 1961, the victorious Hutu declared the country a republic and requested its independence.¹⁰ Following the referendum organised by the United Nations (UN), Rwanda obtained its independence from Belgium in July 1962,¹¹ a date that marked the official coming into power of the Hutu community.

In the years following independence, ethnically motivated violence continued¹² and thousands of Tutsi were killed, leading to new waves of refugees.¹³ As reported by Refworld, in 1963 'Tutsi exile guerrillas invade[d] Rwandan territory in three waves on November 25, December 20, and December 27',¹⁴ and in response to these Tutsi rebel incursions 5,000 to 14,000 Tutsi were killed and another 200,000 (out of a total of 600,000 Tutsis in the country) were forced into exile in Uganda, Zaire, Burundi and Tanzania.¹⁵

After several unsuccessful calls from the exiled Tutsi to return to Rwanda, in 1987 a group of Tutsi refugees in Uganda formed a political and military movement known as the Rwandan Patriotic Front (RPF), which invaded Rwanda from Uganda on 1 October 1990.¹⁶ The RPF attack marked the beginning of a three-year civil war during which all Tutsi inside Rwanda were labelled as accomplices of the RPF and the Hutu members of the opposition political parties were labelled as traitors.

⁷ Country Information and Policy Unit (UK Home Office), 'Rwanda Assessment', October 2000, para. 3.4, available at <https://www.refworld.org/pdfid/486a53300.pdf>, accessed on 14 December 2020.

⁸ History.com Editors, 'Rwandan Genocide', available at <https://www.history.com/topics/africa/rwandan-genocide>, accessed on 17 March 2020.

⁹ Ibid.

¹⁰ 'Rwanda Assessment', *supra* note 7, para. 3.5.

¹¹ Ibid.

¹² For details on the Hutu–Tutsi clashes, see Minorities at Risk Project, 'Chronology for Hutus in Rwanda', 2004, available at <https://www.refworld.org/docid/469f38d51e.html>, accessed on 24 August 2020. For details on the causes of the genocide against the Tutsi, see P. J. Magnarella, 'The Background and Causes of the Genocide in Rwanda', (2005) 3(4) *Journal of International Criminal Justice* 801–822; D. Nikuze, 'The Genocide against the Tutsi in Rwanda: Origins, causes, implementation, consequences, and the post-genocide era', (2014) 3(5) *International Journal of Development and Sustainability* 1086–1098; UN Commission on Human Rights, 'Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under Paragraph 20 of Resolution S-3/1 of 25 May 1994', E/CN.4/1996/68, 29 January 1996; African Rights, *Rwanda: Death, Despair and Defiance*, London: African Rights, 1994.

¹³ 'Rwanda: A Brief History of the Country', available at <https://www.un.org/en/preventgenocide/rwanda/historical-background.shtml>, accessed on 17 March 2020. See also Minorities at Risk Project, 'Chronology for Tutsi in Rwanda', 2004, available at <https://www.refworld.org/docid/469f38d6c.html>, accessed 24 August 2020.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ P. J. Magnarella, 'The Background and Causes of the Genocide in Rwanda', *supra* note 12 at 812.

The civil war that started in October 1990 took an even more dramatic turn in April 1994 following the assassination of President Juvénal Habyarimana, a Hutu. On 6 April 1994, Habyarimana's plane was shot down by a missile of unknown origin;¹⁷ his death set in motion the genocide against the Tutsi, the worst genocide on the African continent. While genocide obviously qualifies as a gross human rights violation, what distinguishes the genocide against the Tutsi in Rwanda from other mass violations of human rights¹⁸ is its intent to destroy one of the groups protected by the Genocide Convention, its exceptional brutality and speed, and the remarkably widespread participation of individuals from all walks of life, including ordinary citizens and religious, military and government leaders.¹⁹

Not only did the genocide against the Tutsi result in a substantial death toll, estimated to be between 800,000 and one million²⁰ Tutsi and moderate Hutu,²¹ it was also characterised by extensive sexual violence and led to hundreds of thousands of survivors²² who became orphaned, wounded, disabled, widowed, HIV/AIDS-positive,²³ and/or homeless. The number of pregnancies caused by rape has been estimated at 15,000.²⁴ In just three months (that is,

¹⁷ See J. Mutsinzi et al., 'Report of the investigation into the causes and circumstances of and responsibility for the attack of 06/04/1994 against the Falcon 50 Rwandan presidential aeroplane, registration number 9XR-NN', Government of Rwanda: Independent Committee of Experts (no date). See also M. Hourigan, 'Le rapport de Michaël Hourigan, enquêteur du TPIR, à la procureure Louise Arbour sur l'attentat du 6 avril 1994 (janvier 1997)', January 1997, available at https://rwandadelaguerreaugenocide.univ-paris1.fr/wp-content/uploads/2010/01/Annexe_49.pdf, accessed on 14 December 2020; R. Bonner, 'Unsolved Rwanda Mystery: The President's Plane Crash', *New York Times*, 12 November 1994, available at <https://www.nytimes.com/1994/11/12/world/unsolved-rwanda-mystery-the-president-s-plane-crash.html>, accessed on 14 December 2020.

¹⁸ The term 'mass violations of human rights' used throughout this chapter refers to systemic or large-scale violations, which are characterised by the large number of victims, including violations that amount to international crimes such as genocide, crimes against humanity and war crimes.

¹⁹ See P. Gourevitch, *We Wish to Inform You That Tomorrow We Will be Killed with Our Families: Stories from Rwanda*, New York: Farrar, Straus, and Giroux 1999; D. Belton, *When the Hills Ask for Your Blood: A Personal Story of Genocide and Rwanda*, New York: Doubleday, 2014.

²⁰ The estimated population of Rwanda in January 1991 was 7,590,235. See Office National de la Population ONAPO, *La population du Rwanda au 01 Janvier 1991* [The population of Rwanda as of 1 January 1991], April 1991; (20):27–30, available at <https://pubmed.ncbi.nlm.nih.gov/12343291/>, accessed on 25 October 2020.

²¹ M. P. Scharf, 'Responding to Rwanda: Accountability Mechanisms in the Aftermath of Genocide', (1999) 52(2) *Journal of International Affairs* 621. See also M. P. Scharf and M. Day, 'The Ad Hoc International Criminal Tribunals: Launching a New Era of Accountability', in W. A. Schabas and N. Bernaz (eds), *Routledge Handbook of International Criminal Law*, London: Routledge, 2011, p. 58; D. Shrager and E. Zacklin, 'The International Criminal Tribunal for Rwanda', (1997) 8(4) *European Journal of International Law* 501–502; P. C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation*, Oxford: Oxford University Press, 2012, p. 16; A. Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, New York: Human Rights Watch, 1999, p. 187 et seq.; N. Jones, *The Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha*, London: Routledge-Cavendish, 2011, p. 22 et seq.; J. M. Kamatali, 'The Challenge of Linking International Criminal Justice and National Reconciliation', (2003) 16 *Leiden Journal of International Law* 120 et seq.; G. Werle, *Principles of International Criminal Law*, 20th ed., The Hague: Asser Press, 2009, p. 17.

²² There are between 300,000 to 400,000 survivors of the genocide. The Rwandan Ministry of Social Affairs census of 2007 estimates the number to be 309,368, while IBUKA (the umbrella body of survivors' organisations in Rwanda) estimates it to be closer to 400,000. See <https://survivors-fund.org.uk/learn/statistics/>, accessed on 21 January 2020.

²³ More than sixty-seven per cent of women who were raped in 1994 during the genocide were infected with HIV. See <https://survivors-fund.org.uk/learn/statistics/>, accessed on 21 January 2020.

²⁴ Between 250,000 and 500,000 women were raped. See <https://survivors-fund.org.uk/learn/statistics/>, accessed on 21 January 2020. See also Save the Children, 'HIV and Conflict: A Double Emergency. Without War, We Could Fight AIDS', 1 July 2002, p. 5, available at <https://reliefweb.int/sites/reliefweb.int/files/resources/27F77B3A4C08A332C1256C13005A8A0E-save-africa->

about a hundred days), more than ten per cent of the general population and approximately seventy-five per cent of the Tutsi population were brutally killed.²⁵

The genocide against the Tutsi was committed against an ethnic group²⁶ and *in the name of ethnicity*.²⁷ Put another way, the genocide destroyed the social cohesion and make-up of Rwandan society that had developed and been relied upon over a period of centuries.²⁸ Yet, perhaps surprisingly, the post-genocide situation in Rwanda was characterised by a forced cohabitation of perpetrators, bystanders and survivors.

Like many other post-conflict societies that suffered gross violations of human rights, Rwanda had to deal with its past.²⁹ Faced with this reality, the post-genocide government³⁰ had to decide how genocide perpetrators were to be brought to trial and how the truth about the past was to be unveiled.³¹ Most importantly, it had to decide how to provide reparation to victims of the gross human rights violations of the past³² and how to reconcile Rwandans.³³ In general terms, the Rwandan post-genocide government was confronted with, and needed to address, problems related to what Elmar G. M. Weitekamp and Stephan Parmentier et al. call the building blocks or TARR (truth, accountability, reparation and reconciliation) model.³⁴

According to Weitekamp et al., unearthing the truth about past atrocities is crucial ‘not only because victims in general wish to know what happened to their beloved ones but also because societies have an interest in being aware of the patterns of gross human rights violations that have existed in the past’.³⁵ They emphasise that the truth ‘is the first step towards the acknowledgement, and the reconstruction of an individual and a collective

[9jul.pdf](#), accessed on 27 March 2020. See also C. Bijleveld, A. Morssinkhof and A. Smeulders, ‘Counting the countless – rape victimisation during the Rwandan genocide’, (2009) 19:2 *International Criminal Justice Review* 208–224.

²⁵ See P. Verwimp, ‘Death and survival during the 1994 genocide in Rwanda’, (2004) 58(2) *Population Studies* 233. See also H. M. Hintjens, ‘Explaining the 1994 Genocide in Rwanda’, (1999) 37(2) *Journal of Modern African Studies* 241.

²⁶ As mentioned above, after the Belgians introduced identity cards which divided Rwandans into three ethnic groups, what were previously ‘social groups’ (Hutu, Tutsi and Twa) came to be perceived as ethnicities.

²⁷ F. du Toit, ‘Reconciliation and Transitional Justice: The Case of Rwanda’s Gacaca Courts’, Institute for Justice and Reconciliation Africa Programme: Occasional Paper 2, 2011, p. 6.

²⁸ D. Nikuze, *supra* note 12 at 1095.

²⁹ L. Huyse, ‘Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past’, (1995) 20(1) *Law and Social Inquiry* 51–78.

³⁰ Named the ‘Government of National Unity’.

³¹ *Ibid.*

³² M. C. Bassiouni, ‘The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms’, final report, E/CN.4/2000/62, 18 January 2000.

³³ D. Bloomfield et al., *Reconciliation after Violent Conflict: A Handbook*, Stockholm: International Institute for Democracy and Electoral Assistance, 2003.

³⁴ E. G. M. Weitekamp, S. Parmentier et al., ‘How to deal with mass victimization and gross human rights violations: A restorative justice approach’, in U. Ewald and K. Turkovic (eds), *Large Scale Victimisation as a Potential Source of Terrorist Activities: Importance of Regaining Security in Post-Conflict Societies*, Amsterdam: IOS Press, 2006, pp. 217–241. See also S. Parmentier, ‘Global Justice in the Aftermath of Mass Violence: The Role of the International Criminal Court in Dealing with Political Crimes’, (2003) 41(1/2) *International Annals of Criminology* 203–224 and S. Parmentier and E. Weitekamp, ‘Political Crimes and Serious Violations of Human Rights: Towards a Criminology of International Crimes’, in S. Parmentier and E. Weitekamp (eds), *Crime and Human Rights*, Amsterdam and Oxford: Elsevier, 2007, pp. 109–144.

³⁵ E. G. M. Weitekamp, S. Parmentier et al., *supra* note 34.

memory of a horrendous past'.³⁶ The accountability of the perpetrators is another important aspect of a post-conflict regime in order 'to respond to the idea that "justice be done", and thus to re-establish the moral order of the victims and of society as a whole'.³⁷ In a similar vein, the authors also argue that the different individual or collective measures of reparations – such as restitution of goods, financial compensation, rehabilitation through social and medical measures, symbolic measures and guarantees of non-repetition of the alleged acts – address, and even undo, the injustices of the past, whereas reconciliation permits a post-conflict society to regain some form of social cohesion, important for its future development.³⁸

After the 1994 genocide against the Tutsi, the post-genocide government embarked on an unprecedented experiment of punishing the perpetrators of the genocide against the Tutsi while simultaneously pursuing national reconciliation. At the international level, in response to a request from the new government of Rwanda, the International Criminal Tribunal for Rwanda (ICTR) was created by resolution 955 of the UN Security Council on 8 November 1994. Domestically, Rwanda set up thirteen Specialised Chambers³⁹ in 1996 and more than 12,000 community-based courts⁴⁰ in 2002 (known as Gacaca courts, pronounced 'gachacha') which – in only ten years of operation – dealt with 1,958,634 cases involving 1,003,227 individuals who stood trial throughout the country.⁴¹

Since it was not an end in itself but rather a move forward to heal the country's wounds, the measures to hold perpetrators to account took place simultaneously with a number of other government policies addressing the pre-existing conditions that were believed to have caused the genocide. The key policy was the removal of the ethnicity categorisation from Rwandan identity cards and of the term 'ethnicity' itself from public discourse.⁴² To eradicate ethnic conflicts and foster national unity and reconciliation among Rwandans, the government of

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ See Organic Law No. 08/96 of 30 August 1996, on the organisation of prosecutions for offences constituting the crimes of genocide or crimes against humanity committed since 1 October 1990, *Official Gazette of the Republic of Rwanda*, no. 17 of 1 September 1996.

⁴⁰ See Organic Law No. 40/2000 of 26 January 2001, governing the creation of Gacaca courts and organising the prosecution of genocide crimes and other crimes against humanity committed in Rwanda, replaced in 2004 by Organic Law No. 16/2004 of 19 June 2004 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 1 October 1990 and 31 December 1994, *Official Gazette of the Republic of Rwanda*, no. special of 19 June 2004.

⁴¹ See A. L. M. de Brouwer and E. Ruvebana, 'The legacy of the Gacaca courts in Rwanda: Survivors' views', (2013) 13(5) *International Criminal Law Review* 937 and 950; R. Haveman, 'Gacaca in Rwanda: Customary Law in Case of Genocide', in J. Fenrich, P. Galizzi and T. Higgins (eds), *The Future of Customary Laws in Africa*, Cambridge: Cambridge University Press, 2011, pp. 387–422; K. Lahiri, 'Rwanda's "Gacaca" Courts: A Possible Model for Local Justice in International Crime?', (2009) 9 *International Criminal Law Review* 321–332; P. Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers*, Cambridge: Cambridge University Press, 2010.

⁴² See B. Hartley 'Rwanda's post-genocide approach to ethnicity and its impact on the Batwa as an indigenous people: An international human rights law perspective', (2015) 15:1 *QUT Law Review*, 51–70.

Rwanda created the National Unity and Reconciliation Commission (NURC) in 1999⁴³ and the *Commission Nationale de Lutte Contre le Génocide* (CNLG) in 2008 to prevent and fight against genocide.⁴⁴

To restore the dignity of the victims, Rwanda launched the official genocide commemoration programme in 1995 and created the *Fonds de soutien et d'assistance aux rescapés du génocide* (FARG) to improve the daily lives of the genocide survivors in direst need. In other words – as explained in detail in later chapters of this study – in the course of addressing both the pre-existing causes and the legacy of the genocide against the Tutsi, the government of Rwanda gradually launched a series of mechanisms and programmes that worked in parallel. The first was the above-mentioned official genocide commemoration programme in 1995, followed by the establishment of the Specialised Chambers in 1996,⁴⁵ FARG in 1998,⁴⁶ NURC in 1999,⁴⁷ the Gacaca courts in 2002⁴⁸ and finally the CNLG in 2008.⁴⁹

In addition, the above-mentioned ICTR was the result of a request from the post-genocide government in Rwanda. With the aim of ensuring that no one involved in the genocide against the Tutsi would escape responsibility, the post-genocide government of Rwanda requested the assistance of the UN Security Council to bring those responsible for the genocide to justice.⁵⁰ Following this request, the ICTR was created by the UN Security Council under chapter VII of the UN Charter.⁵¹ The ICTR, which formally closed after twenty years of operation on 31 December 2015, indicted ninety-three individuals and sentenced sixty-one who had borne great responsibility, including ministers, *bourgmestres*, priests, journalists and military commanders.⁵²

Despite the obligation to provide effective remedies and adequate reparations to victims whose human rights were violated being firmly embodied in all major international human

⁴³ Law No. 03/99 of 1999 establishing the National Unity and Reconciliation Commission, *Official Gazette of the Republic of Rwanda*, no. 6 of 15 March 1999.

⁴⁴ Law No. 09/2007 of 16 February 2007 on the attributions, organisation and functioning of the national commission for the fight against genocide, *Official Gazette of the Republic of Rwanda*, no. special of 19 March 2007.

⁴⁵ See Organic Law No. 08/96 of 30 August 1996, *supra* note 39.

⁴⁶ Law No. 2/1998 of 22 January 1998 establishing a national assistance fund for needy victims of genocide and massacres committed in Rwanda between 1 October 1990 and 31 December 1994, *Official Gazette of the Republic of Rwanda*, no. 3 of 1 February 1998.

⁴⁷ Law No. 03/99 of 1999, *supra* note 43.

⁴⁸ Organic Law No. 40/2000 of 26 January 2001, *supra* note 40.

⁴⁹ Law No. 09/2007 of 16 February 2007, *supra* note 44.

⁵⁰ N. Eltringham, 'A Legacy Deferred': The International Criminal Tribunal for Rwanda at 20 Years', 2014, p. 1, available <https://www.e-ir.info/pdf/48738>, accessed on 14 December 2020.

⁵¹ See the ICTR Statute as adopted by UNSC res. 955, UN Doc. S/Res/955, 8 November 1994.

⁵² B. Hola and A. Smeulers, *The Elgar Companion to the International Criminal Tribunal of Rwanda*, Cheltenham: Edward Elgar, 2016, pp. 44–75; B. Hola, C. Bijleveld and A. Smeulers, 'Consistency in International Sentencing – ICTY and ICTR Case Study', (2012) 9(5) *European Journal of Criminology* 539–552; B. Hola, A. Smeulers and C. Bijleveld, 'International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR', (2011) 9 *Journal of International Criminal Justice* 411–439; A. Leithhead, 'Rwanda genocide: International Criminal Tribunal closes', *BBC News*, 14 December 2015, available at <https://www.bbc.com/news/world-africa-35070220>, accessed on 6 January 2020.

rights treaties and declarations,⁵³ findings of individual criminal accountability before the ICTR were not accompanied by reparative measures, while, as will be discussed further in this thesis, the domestic laws related to the genocide in Rwanda limited reparations to property-related harm only.

Unlike the Statute and Rules of Procedure and Evidence of the ICTR, the Rome Statute that established the International Criminal Court (ICC) contains, for the first time in the history of international criminal law and justice, statutory provisions and mechanisms specifically put in place for victims' reparations.

In light of the above, the current development of the victims' rights to reparations in international criminal law calls for an in-depth analysis of what Rwanda has been able – or unable – to do for the victims of the genocide against the Tutsi and the factors that influenced the materialisation – or not – of the victims' right to effective and adequate reparation, as enshrined in all major international human rights treaties and declarations,⁵⁴ most of them ratified by Rwanda.

This study investigates whether a broad range of both judicial and non-judicial measures that Rwanda adopted to address the consequences of the genocide against the Tutsi led to the materialisation of the victims' right to reparations. In other words, it explores the various Rwandan legal and non-legal responses to the harm suffered by the victims of the genocide against the Tutsi and compares them to international standards on victims' reparation. Since international human rights law confers the status of 'victims' on those harmed by a human rights violation and allows them to seek reparation,⁵⁵ and since international human rights

⁵³ For example, article 8 of the Universal Declaration of Human Rights (UDHR); articles 2(3), 9(5) and 14(6) of the International Covenant on Civil and Political Rights (ICCPR); article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); article 39 of the United Nations Convention on the Rights of the Child (UNCRC); article 14 of the United Nations Convention against Torture (UNCAT), articles 1 and 51 of Geneva Convention I; article 50 of Geneva Convention II; article 129 of Geneva Convention III; article 146 of Geneva Convention IV; common article 1 of the Geneva Conventions; article 1(2) of Additional Protocol (AP) I; and article 75 of the Rome Statute of the International Criminal Court (ICC). It is also enshrined in regional instruments: articles 5(5), 13 and 41 of the European Convention on Human Rights (ECHR); articles 25, 68 and 63(1) of the American Convention on Human Rights (ACHR); article 21(2) of the African Charter on Human and Peoples' Rights (African Charter). See also the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA res. 40/34, 29 November 1985; article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance, UNGA res. 47/133, 18 December 1992. For comprehensive summaries of the evolution of international law in relation to reparations for gross human rights violations, see R. Falk, 'Reparations, International Law and Global Justice: A New Frontier', in P. de Greiff (ed.), *The Handbook of Reparations*, Oxford: Oxford University Press, 2006, pp. 428–503. See also A. C. Buyse, *Post Conflict Housing Restitution: The European Human Rights Perspective with a Case Study on Bosnia and Herzegovina*, Antwerp: Intersentia, 2007, pp. 113–137; J. M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge: Cambridge University Press, 2003, pp. 230–290; A. Carrillo, 'Justice in context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past', in P. de Greiff (ed.), *The Handbook of Reparations*, Oxford: Oxford University Press, 2006, pp. 504–538.

⁵⁴ Ibid.

⁵⁵ See for instance the UDHR.

law informed current international criminal law on victims' rights,⁵⁶ it provides a useful framework for assessing the rights of the victims of the genocide in Rwanda.

1.2. Research question

The widespread recognition of a victim's rights to a remedy and reparations finds its basis in several international human rights sources,⁵⁷ which guarantee both the procedural right of effective access to a remedy and the substantive right to a remedy.⁵⁸ In a number of judgments, of which the *Velásquez* case stands as the landmark, the Inter-American Court of Human Rights (IACtHR) affirmed victims' right to reparation as a general principle of international law in the following terms:

It is a principle of international law, which jurisprudence has considered 'even a general concept of law', that every violation of an international obligation which results in harm creates a duty to make adequate reparation.⁵⁹

By explicitly referring to 'a general concept of law', this judgment affected much more than the judicial situation of Honduras: the IACtHR here affirmed the universality of this principle.

Furthermore, in addition to the above-mentioned major international human rights treaties and declarations, other soft instruments such as the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles and Guidelines),⁶⁰ the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,⁶¹ the Report of the Working Group on Enforced and Involuntary Disappearances⁶² and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice⁶³ provide for standards and various forms that reparations may take in order to bring relief to victims. As is apparent from these soft law instruments, it is generally recognised that victims' reparation may take a number of forms, including restitution, compensation, rehabilitation, satisfaction, guarantees of non-repetition⁶⁴ and offenders' accountability.

⁵⁶ For details, see I. Bottiglieri, 'Redress for victims of crimes under international law', Leiden and Boston: Nijhoff, 2004.

⁵⁷ See the UDHR.

⁵⁸ D. Shelton, *Remedies in International Human Rights Law*, 1st edition, Oxford: Oxford University Press, 2001, p. 14.

⁵⁹ IACtHR, *Velásquez-Rodríguez v. Honduras* (compensatory damages) (art. 63(1) American Convention on Human Rights), Ser. C, no. 7, judgment of July 21 1989, para. 25.

⁶⁰ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law, GA res. 60/147 of 16 December 2005, UN Doc. A/Res/60/147 (UN Basic Principles and Guidelines).

⁶¹ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA 40/34, annex, 40 UN GAOR Supp. (no. 53), UN Doc. A/40/53, 1985, p. 214.

⁶² Report of Working Group on Enforced or Involuntary Disappearances, E/CN.4/1997/34, 13 December 1996.

⁶³ See rule 11(4).

⁶⁴ UN Basic Principles and Guidelines, principle 18. A detailed explanation of what each measure entails is provided in chapter two.

Against this background, it is important to note that, although some conventions indicate *expressis verbis* the form of remedy that should be provided to victims,⁶⁵ the extent of the reparations to be issued has been left to the discretion of national institutions, the standard being that of integral reparation, which seeks to ‘wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed’.⁶⁶

Therefore, even though redress for victims of gross and systematic violations such as those committed during the genocide against the Tutsi is a well-established principle – as explained in chapter two – its implementation or materialisation often encounters dilemmas that are worth discussing in the context of the post-genocide against the Tutsi in Rwanda.

As mentioned above, the genocide against the Tutsi resulted in an enormous number of victims. Those who were not killed were deeply affected by the killing of their loved ones, and many of them were left seriously injured, handicapped, traumatised and/or homeless.

In view of the foregoing, the main question of this study is: **‘To what extent has the right to reparations of the victims of the 1994 Rwandan genocide against the Tutsi been materialised?’**

While working on this question, a number of sub-questions were identified that will also be discussed:

- **To what extent do victims of gross human rights violations have a right to reparations?**
- **How did the Rwandan government address the harm caused to the victims of the genocide against the Tutsi?**
- **To what extent have the victims of the genocide against the Tutsi been given access to court to claim reparations for the harm they suffered?**
- **Is the assistance provided by the Rwandan government through the *Fonds de soutien et d’assistance aux rescapés du génocide* (FARG) a form of reparation to victims of genocide?**

1.3. Research objectives

In view of the above-mentioned research questions, the aim of this study is to assess the reparation mechanisms which have been made available to the victims of the genocide against the Tutsi in light of the meaning, nature, scope, content and effects of the rights to an

⁶⁵ For instance: prosecutions, compensation and rehabilitation in UNCAT; rehabilitation in CERD; reintegration in UNCRC; indemnity in article 3 of the Hague Convention (IV) on war on land; compensation in article 68 of Geneva Convention III and article 55 of Geneva Convention IV; rehabilitation and compensation in article 63 of the American Convention on Human Rights (ACHR); and compensation in article 27 of the African Charter on Human and Peoples’ Rights (African Charter).

⁶⁶ Permanent Court of International Justice, *Factory at Chorzów* case (*Germany v. Poland*) (claim for indemnity, merits), ser. A, no. 17, judgment of 13 September 1928, para. 125.

effective remedy and adequate reparation in international law, international human rights law and international criminal law.

The domestic legal framework through which the genocide victims exercised their rights to an effective remedy and reparation is assessed, and its compliance with international law in terms of victims' rights to an effective remedy and to reparation is discussed with the aim of shedding light on the implementation and consequences of the reparation mechanisms made available to the victims of the genocide against the Tutsi in Rwanda.

1.4. Methodological approach

To meet the research objectives, a combination of legal-dogmatic and empirical research methods was employed. The legal-dogmatic analysis was used to clarify the meaning, scope and significance of victims' rights to an effective remedy and adequate reparations. The primary method used in this study consists of a comprehensive analysis and scrutiny of the legal sources of international law as enshrined in article 38(1) of the Statute of the International Court of Justice (ICJ)⁶⁷ relating to victims' rights to an effective remedy and adequate reparations. Although article 38(1) of the ICJ Statute literally suggests that it is only meant to indicate the sources of law that the ICJ should apply, it has been overwhelmingly acknowledged that this article in fact demonstrates the 'universal perception as to the enumeration of sources of international law'.⁶⁸ According to article 38(1),

the Court shall apply: a) international conventions; b) international custom; c) the general principles of law recognized by civilized nations; and d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, with the first three being primary sources of international law and the last being subsidiary means to determine international law.

The primary sources – including national laws, international law instruments, resolutions, reports, and case law emanating from international and domestic jurisdictions in Rwanda and/or in foreign countries – are used to explain both the rights and the obligations deriving from the concept of effective remedy and adequate reparations.⁶⁹ As is further discussed in chapter two, this concept is said to be composed of two independent victims' rights, namely, the victims' right to equal and effective access to justice or effective domestic mechanisms, before which victims can bring their claims (procedural component), *and* the victims' right to

⁶⁷ See United Nations, Statute of the International Court of Justice, 18 April 1946, article 38(1).

⁶⁸ M. N. Shaw, *International Law*, 6th ed., Cambridge: Cambridge University Press, 2008, p. 71. See also H. Thirlway, 'The Sources of International Law' in M. D. Evans (ed.), *International Law*, 4th ed., Oxford: Oxford University Press, 2014, p. 95, and J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford: Oxford University Press, 2012, p. 22.

⁶⁹ I. Dobinson and J. Francis, 'Qualitative Legal Research', in M. McConville and H. C. Wing (eds), *Research Methods for Law*, Edinburgh: Edinburgh University Press, 2007, p. 19, citing W. Glanville, *Learning the Law*, 12th ed., London: Sweet and Maxwell, 2002, pp. 206–207.

adequate, effective and prompt reparation measures that aim to erase or mitigate the harm suffered (substantive component).⁷⁰

Given my focus on the entitlement to these rights by victims of the genocide against the Tutsi in Rwanda, for the purposes of this thesis the key provisions of international and regional instruments ratified by Rwanda include articles 2(3a), 9(5) and 14(6) of the International Covenant on Civil and Political Rights (ICCPR), article 14 of the United Nations Convention against Torture (UNCAT), article 39 of the United Nations Convention on the Rights of the Child (UNCRC) and article 27 of the African Charter on Human and Peoples' Rights (African Charter).

Since none of these human rights instruments ratified by Rwanda practically define the modalities and methods for the enforcement of victims' rights to an effective remedy and adequate reparations in case of gross human rights violations – such as those that occurred in the genocide against the Tutsi in 1994 in Rwanda – due regard is also to be given to the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly in 2005.⁷¹ Even though the UN Basic Principles and Guidelines are not legally binding, they nevertheless – as per their preamble – 'identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations'⁷² to provide for an effective remedy and adequate reparations for victims of human rights violations.

Specific consideration is given to the jurisprudence on victims' rights of the UN human rights treaty monitoring bodies such as the Human Rights Committee (HRC),⁷³ the Committee on the Elimination of Racial Discrimination (CERD),⁷⁴ the Committee on the Elimination of Discrimination against Women (CEDAW),⁷⁵ the Committee against Torture (CAT),⁷⁶ the

⁷⁰ See R. Manjoo, 'Introduction: Reflections on the concept and implementation of transformative reparations', (2017) 21(9) *International Journal of Human Rights* 1194.

⁷¹ See GA resolution 60/147 of 16 December 2005, UN Doc. A/Res/60/147 (UN Basic Principles and Guidelines).

⁷² *Ibid.*, preamble, para. 7. It should be noted that the UN Principles and Guidelines reflect already-established norms in international law. Even while they were still under discussion, the UN Principles and Guidelines had not only already been widely cited and referred to in jurisprudence by a number of human rights monitoring bodies, but had also been incorporated into the ICC Statute.

⁷³ The Human Rights Committee consists of eighteen independent experts and oversees the implementation of the International Covenant on Civil and Political Rights (ICCPR) by considering state reports, individual complaints and inter-state complaints, and preparing general comments, substantive statements and general discussions on topics addressed in the ICCPR.

⁷⁴ The Committee on the Elimination of Racial Discrimination (CERD) is composed of eighteen independent experts and oversees the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) by considering state reports, individual complaints, inter-state complaints and early-warning and urgent procedures, and preparing general comments. See ICERD, article 8.

⁷⁵ The Committee on the Elimination of Discrimination against Women (CEDAW Committee) is composed of twenty-three independent experts on women's rights and monitors compliance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by considering state reports, individual complaints, inter-state complaints and inquiry requests, and preparing general recommendations, statements and general discussions. See CEDAW, article 19.

Committee on the Rights of the Child (CRC)⁷⁷ and the Committee on Enforced Disappearances (CED).⁷⁸ The views of these human rights treaty bodies were given serious consideration throughout this work because – as noted by Rosanne van Alebeek and André Nollkaemper – ‘treaty bodies are the principal interpreters of the UN human rights treaties. They clarify the normative content of the often broadly phrased rights and obligations in these treaties’.⁷⁹ Taking the HRC as an example, Steiner has argued that this monitoring body also confronts the ICCPR’s ‘ambiguities and indeterminacy, [resolves] conflicts amongst its principles and rights [and works] out meanings of its grand terms’.⁸⁰

It is also important to note that, although the findings or jurisprudence of the monitoring bodies are not formally binding and have yet to reflect customary law, a recent decision of the ICJ acknowledged their interpretive capacity. In the *Ahmadou Sadio Diallo* case, the ICJ affirmed that:

The interpretation above is fully corroborated by the jurisprudence of the Human Rights Committee established by the Covenant to ensure compliance with that instrument by the States parties ... Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its ‘General Comments’.⁸¹

Most specifically, the ICJ emphasised that

although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security,

⁷⁶ The Committee against Torture (CAT) consists of ten independent experts and oversees the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment by considering state reports, individual complaints, inter-state complaints and inquiry requests, and preparing general comments, statements, reprisal letters and general discussions. See UNCAT, article 17.

⁷⁷ The Committee on the Rights of the Child (CRC) consists of eighteen independent experts and monitors compliance with the Convention on the Rights of the Child and its two protocols by considering state reports and inquiry requests, and preparing general comments, substantive statements and general discussions. See CRC, article 43.

⁷⁸ The Committee on Enforced Disappearances (CED) consists of ten independent experts and monitors the implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) by considering state reports, individual complaints, inter-state complaints and requests for urgent action and inquiries, and preparing general comments, substantive statements and thematic discussions. See ICPPED, article 26.

⁷⁹ R. van Alebeek and P. A. Nollkaemper, ‘The legal status of decisions by human rights treaty bodies in national law’, in H. Keller and G. Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge: Cambridge University Press, pp. 356–413.

⁸⁰ H. J. Steiner, ‘Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?’, in P. Alston and J. Crawford (eds), *The Future of UN Treaty Monitoring Bodies*, Cambridge: Cambridge University Press, 2000, p. 39.

⁸¹ ICJ, *Ahmadou Sadio Diallo, Republic of Guinea v. Democratic Republic of the Congo* (merits, judgment of 30 November 2010), ICJ Reports 2010, para. 66.

to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.⁸²

In light of the above, since the international *ad hoc* criminal tribunals (ICTY and ICTR) established by the UN Security Council under article VII of the UN Charter and the International Criminal Court (ICC) established by the state parties to the Rome Statute adjudicated (or adjudicate), among other offences, the crime of genocide, their input, if any, in the context of post-genocide societies might thus be enlightening. This is the reason why this study turns to these judicial institutions to explore the post-genocide legal measures enacted in Rwanda.

An in-depth analysis of legal norms and their interpretations by international courts and human rights monitoring bodies necessarily implies an engagement with the existing literature on the issue of victims' remedy and reparations in cases of mass violations of human rights or of international crimes. Therefore, to understand the ways in which the legal issues or developments related to victims' rights to an effective remedy and adequate reparations have been interpreted, the analysis of the relevant primary sources conducted in this study is accompanied by an exploration of the secondary sources that describe, interpret, analyse and process these primary sources. For this reason, the study draws on relevant literature from criminological and legal studies.

As a legal-dogmatic method alone cannot provide all the information needed to respond to the research question accurately, empirical research in the form of interviews with genocide survivors was conducted to allow a clear insight into how genocide survivors perceive the reparative mechanisms or measures made available to address the harm they suffered. Interviews – with genocide survivors and the minister of justice – conducted in Rwanda over a period of six months revealed the genocide survivors' perceptions of justice and their needs, as well as the government's position on the reparation of the harm caused to, or suffered by, the victims.

As is further explained in part II of this work, the interview questions were based on the above-mentioned TARR model developed by Weitekamp et al.⁸³ The findings from these interviews are presented in chapters seven and eight. The interviewees' first-hand accounts have been used to clarify, illustrate, underline, put into perspective and/or add nuance to various relevant issues pertaining to this study, such as the genocide perpetrators' accountability, the truth about the genocide, reparation due to the victims and reconciliation among Rwandans.

⁸² Ibid.

⁸³ E. G. M. Weitekamp, S. Parmentier, et al., *supra* note 34. See also S. Parmentier, *supra* note 34 and, S. Parmentier and E. Weitekamp, *supra* note 34.

1.5. Structure of the thesis

In order to clearly and comprehensively address the main research question (**‘To what extent has the right to reparations of the victims of the 1994 Rwandan genocide against the Tutsi been materialised?’**), this study is arranged into two parts and nine chapters. Part I, which is divided into five chapters, analyses the development of victims’ rights to reparations under international law and discusses the different mechanisms – legal, judicial and political – put in place by the Rwandan government to allow the victims of the genocide against the Tutsi to materialise their individual right to reparations.

Following the introductory chapter, which explains the research context, the research question and the importance of the study and its approach, chapter two offers an analytical review of the theoretical legal framework of the rights to an effective remedy and adequate reparations for the victims of the genocide against the Tutsi. This chapter explores the development of the rights to an effective remedy and adequate reparations within international human rights law, and how the latter influenced the current shift of international criminal law towards the recognition of victims’ rights to reparations. Chapter two emphasises that gross violations of human rights constituting international crimes cause mass-scale suffering to both individuals and society to an extent that goes beyond the concept of reparations as developed by international human rights courts and bodies. Having established the normative nature of the rights to an effective remedy and adequate reparations and related rights and obligations as well as the irreparability of the harm resulting from gross and mass violations of human rights such as the genocide against the Tutsi, chapter three then analyses the domestic legal and judicial responses to the genocide against the Tutsi in Rwanda. This chapter focuses mainly on the legal and judicial mechanisms put in place by the government of Rwanda to hold the genocide perpetrators accountable for their actions and the government’s role in attending to the genocide victims’ need for truth about the human violations they suffered. In other words, this chapter discusses the government’s measures to ensure both accountability and the search for, and disclosure of, the truth about past human rights violations. In so doing, chapter three highlights that, in rejecting amnesty, the government of Rwanda avoided perpetuating a culture of impunity that had characterised the history of ethnic conflicts in Rwanda until then. Instead, the government of Rwanda’s commitment to full or maximal accountability of the genocide perpetrators not only acknowledged and confirmed the harm suffered but also permitted the truth about the genocide against the Tutsi to emerge, however partial and distorted this truth might have been.⁸⁴

As reparations can be pecuniary or non-pecuniary in nature, chapter four explores the pecuniary reparations in the form of compensation and/or restitution made available to the victims of the genocide against the Tutsi. Complementing chapter three, which discusses the genocide perpetrators’ accountability and truth-seeking as forms of reparation, chapter four focuses on the substantive component of the rights to an effective remedy and adequate

⁸⁴ See chapter three for more details and discussion.

reparations, which involve adequate, effective and prompt reparation measures to erase or mitigate the harm inflicted on the victims. Practically, it analyses whether and to what extent the victims of the genocide against the Tutsi have been given access to court to claim reparations for the harm they suffered. In chapter four, it is claimed that pecuniary reparation for the harm suffered – other than property-related harm – is still unfinished business in Rwanda. The complexity involved in issuing judicial reparations to victims of the genocide against the Tutsi pushed the government of Rwanda to shift its focus from individualised judicial reparations to administrative assistance through the FARG and to symbolic and collective reparations, as discussed in chapter five.

Chapter five analyses non-pecuniary reparation mechanisms made available to the victims of the genocide against the Tutsi. It focuses on various programmes, projects and policies put in place by the government of Rwanda to deal with the legacy of the genocide against the Tutsi and assess how well they actually fit the concept of reparation. As is further fleshed out in chapter eight, a combination of various measures, such as memorialisation, prohibition of ethnic identification, anti-denial laws and promotion of unity and reconciliation policies, provided a certain satisfaction to the genocide survivors. Most importantly, chapter five argues that whereas the exhumation of dead bodies and reburial in memorial sites re-established the dignity of the victims, the government's memorialisation of the genocide against the Tutsi through memorial sites and through national, regional and international commemorations preserves the memory of the genocide against the Tutsi and provides a physical place where all genocide survivors can go and pay tribute to their family members. As will be shown, doing away with the ethnic labels for which people were killed was deemed to be the best guarantee for non-repetition of ethnic conflicts in Rwanda.

As a thorough analysis of the comprehensive reparative mechanisms put in place in Rwanda to address the harm inflicted on the victims requires us to go beyond legislation, case law and legal scholarly writings, an empirical study⁸⁵ was deemed best suited to test whether such mechanisms lived up to the expectations of the genocide survivors. Part II, which is divided into three chapters, presents and analyses the findings from the qualitative semi-structured interviews conducted in Rwanda with seventy-nine genocide victims/survivors. The objective of this part is to study the victims' perceptions of the reparation measures made available to them by the government of Rwanda. Accordingly, in line with the TARR model explained in chapter six,⁸⁶ chapter seven presents the survey findings on the victims' perceptions of the government's measures or mechanisms that aimed to establish both the truth about what happened in Rwanda and the accountability of the perpetrators, whereas chapter eight presents the survey findings related to the victims' perceptions of the reparation and reconciliation measures in Rwanda.

⁸⁵ See M. Partington, 'Empirical Legal Research and Policy-Making', in P. Cane and H. M. Kritzer, *The Oxford Handbook of Empirical Legal Research*, Oxford: Oxford University Press, 2010, pp. 1003–1020.

⁸⁶ E. G. M. Weitekamp, S. Parmentier, et al., *supra* note 34, pp. 217–241. See also S. Parmentier, *supra* note 34, at. 203–224 and S. Parmentier and E. Weitekamp, *supra* note 34, pp. 109–144.

Finally, chapter nine concludes the thesis. It synthesises the findings from the previous chapters in response to the main research question and subquestions, and concludes that, faced with a unique and nationally unprecedented post-genocide situation, Rwanda had to develop its own unique response and adopt its own approaches to reparations which would fit its particular situation. Without doubt, and as will be shown throughout this dissertation, the historical and political circumstances of the genocide against the Tutsi and the Rwandan post-conflict socio-economic situation influenced the Rwandan government responses to the consequences of the genocide against the Tutsi.

1.6. Originality of the research

There is a vast amount of academic literature on victims' right to reparations⁸⁷ following gross human rights violations. While many studies – using various terms – have highlighted the importance of the right of every victim to receive 'full reparation, adequate reparation or integral reparation',⁸⁸ others have analysed the different human rights monitoring bodies' approaches to reparations and national reparation programmes that dealt with the past legacies of mass atrocities,⁸⁹ or focused on redress in either human rights law,⁹⁰ international humanitarian law⁹¹ or international criminal law.⁹² Although the contribution of all this academic literature should be recognised, there is a deficit of recent research on how a country like Rwanda addressed the legacy of the genocide against the Tutsi. In light of the legal and non-legal reparation mechanisms set up by the government of Rwanda, this study aims to test whether the concept of full or integral reparation as established and recognised in international law can live up to its promises when applied to the specific context of the genocide against the Tutsi. Specifically, it seeks to analyse whether the reparative

⁸⁷ B. D. Jones, *Peacemaking in Rwanda: The Dynamics of Failure*, Boulder: Lynne Rienner, 2001; J. Ndurimana, *Rwanda 1994: Idéologie, méthodes et négationnisme du génocide des Tutsi à la lumière de la chronique de la région de Cyangugu: Perspectives de reconstruction*, Rome: Vivere In, 2003; N. Bugwabari, 'Enfermement et génocide en Afrique des grands lacs: Pistes pour un paradigme', (2005) 4 *Pan African Review of Innovation* 123–144; B. Sehene, *Le piège ethnique*, Paris: Dagorno, 1999; J.-P. Chrétien, 'Le Rwanda piégé par son histoire', (2000) *Esprit* 170–189; A. Des Forges, *Leave None to Tell the Story*, *supra* note 21; R. Verdier, E. Decaux and J.-P. Chrétien, *Rwanda: Un génocide du XXème siècle*, Paris: L'Harmattan, 1995; J. C. Willame, *Aux sources de l'hécatombe rwandais*, Paris: L'Harmattan, 1995; L. Mervern, *Conspiracy to Murder: The Rwandan Genocide*, London: Verso, 2004; C. Braeckman, *Rwanda: Histoire d'un génocide*, Paris: Fayard, 1994; M. Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*, Princeton and Oxford: Princeton University Press, 2001.

⁸⁸ A. J. R. Siri, 'El Concepto de Reparación Integral en la Jurisprudencia de la Corte Interamericana de Derechos Humanos', (2011) 1 *Revista Internacional de Derechos Humanos* 59–79; C. Rose, 'An Emerging Norm: The Duty of States to Provide Reparations for Human Rights Violations by Non-State Actors', (2010) 33 *Hastings International and Comparative Law Review* 307–343.

⁸⁹ H. Rombouts and S. Vandeginste, 'Reparation for Victims in Rwanda: Caught between Theory and Practice', in K. de Feyter et al. (eds), *Out of the Ashes: Reparations for Gross Violations of Human Rights*, Antwerp and Oxford: Intersentia, 2006, pp. 309–344; D. Cassel, 'The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights', in *ibid.*, pp. 191–223.

⁹⁰ D. Shelton, *supra* note 58.

⁹¹ A. McDonald, 'Rights to Legal Remedies for Victims of Serious Violations of IHL', doctoral thesis, Queen's University Belfast, 2003; L. Zegvald, 'Remedies for Victims of Violations of International Humanitarian Law', (2003) 85 *International Review of the Red Cross* 497–526.

⁹² F. McKay, 'Are Reparations Appropriately Addressed in the ICC Statute?', in D. Shelton (ed.), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court*, New York: Transnational Publishers, 2000, pp. 163–178.

mechanisms made available to the victims of the genocide against the Tutsi offered them conducive opportunities to materialise their rights to an effective remedy and adequate reparation.

The originality of this research resides in my extensive analysis of the historical and contextual frameworks as well as in the fact that I address the practical complexities of the subject matter under examination. My knowledge of the culture and language allowed me to get direct access to primary domestic sources, including relevant laws, court decisions and victims' accounts, with no need for interpreters or translators.

It should, however, be acknowledged that as much as my understanding of the historical, social and cultural context gives added value to my research, an inherent risk of bias based on my closeness to the situation cannot be ignored. To mitigate this risk, of which I am very much aware, and to guarantee scientific objectivity, I have systematically and throughout the whole duration of my research compared my findings with those of recognised academic scholars. In doing so, I have analytically justified any divergence and highlighted all points of agreement.

It is important to note that the analysis and discussion of the data related to my research ended in February 2021.

PART I

**VICTIMS' RIGHTS TO REPARATIONS AND THE
RWANDAN RESPONSES TO THE CONSEQUENCES OF
THE GENOCIDE AGAINST THE TUTSI**

CHAPTER TWO

THE LEGAL FRAMEWORK OF THE RIGHTS TO AN EFFECTIVE REMEDY AND ADEQUATE REPARATIONS FOR THE VICTIMS OF GENOCIDE IN RWANDA

‘Access to remedy in cases of human rights violations is not only a human right per se, but a prerequisite for the full enjoyment of human rights. It is only when people have access to justice and remedy when their human rights are infringed that the rights themselves become meaningful.’⁹³

Born out of the ashes of the horrific experiences of the Holocaust and World War II, international human rights law is principally founded on the protection of human rights and reflects the evolving status of the individual under international law. Recognised avenues of redress for violations of these rights have been provided to every individual by various global and regional human rights instruments, as detailed in this chapter. Almost all human rights treaties and conventions have recognised expressly or implicitly the rights to an effective remedy and adequate reparations for individuals whose rights have been violated. As observed by Manfred Nowak, ‘the right of victims of ... human rights violations to adequate reparation ... is already fairly well established under present international law’.⁹⁴

Almost all principal regional and international human rights treaties – some of them ratified by Rwanda – regard the rights to an effective remedy and adequate reparations as among the most fundamental and essential rights for the effective protection of all other human rights. As explained by Dinah Shelton, these rights aim not only to convert human rights into results but also to deter violations and restore the moral balance when wrongs are committed.⁹⁵

This chapter presents a comparative theoretical legal framework for understanding the rights to an effective remedy and adequate reparations by looking at their development within international human rights law and at how the latter influenced the current shift in international criminal law towards the recognition of victims’ rights to reparations. The aim of this chapter is to explore the theoretical legal framework of the rights to an effective remedy and adequate reparations for the harm suffered by the victims of the genocide against the Tutsi. In determining this theoretical legal framework, one of the research sub-questions

⁹³ International Organization of Employers, ‘Making Access to Remedy a Reality for All: Recommendations for Governments and UN Institutions’, 22 September 2014, p. 2.

⁹⁴ M. Nowak, ‘The right of victims of gross human rights violations to reparation’, in A. P. M. Coomans et al. (eds), *Rendering Justice to the Vulnerable—Liber amicorum in honour of Theo van Boven*, Boston: Springer, 2000, p. 218.

⁹⁵ See D. L. Shelton, ‘The Jurisprudence of Human Rights Tribunals on Remedies for Human Rights Violations’, in J.-F. Flauss (ed.), *International Protection of Human Rights and Victims’ Rights*, Brussels: Bruylant, 2009, p. 58.

(‘*To what extent do victims of gross human rights violations have a right to reparations?*’) is addressed and answered.

In this chapter, it is contended that even though international human rights law provides an important theoretical legal framework in the discussion of the rights of the victims of the genocide against the Tutsi in Rwanda, the reparatory justice emerging from this framework was not originally developed to address claims related to large-scale serious violations of human rights, such as genocide, crimes against humanity or war crimes. As discussed in this chapter, gross violations of human rights constituting international crimes (such as the genocide against the Tutsi, which the present study focuses on) caused mass-scale suffering to both individuals and society to the extent that full reparations became illusory and unrealistic. As evidenced by the jurisprudence of international criminal tribunals and courts discussed below, the irreparable nature of the violations, the large number of victims and the limited resources are some of the major factors that make the human rights principles of reparations unrealistic, insufficient and inadequate.

The first section of this chapter explores how various international and regional human rights treaties ratified by Rwanda and related treaties or charter-based bodies have interpreted or explained the scope and meaning of the victims’ rights to an effective remedy and adequate reparations. This section emphasises the universal nature of the recognition of the victims’ rights to an effective remedy and adequate reparations and, since genocide is obviously a gross human rights violation, the recognition of these rights for the victims of the genocide against the Tutsi. Building on the first section, the second section highlights the influence of international human rights law in the development of victims’ rights in international criminal law. In this section, it is highlighted that even though the incorporation of victims’ rights within the ICC’s Rome Statute marked a serious advancement in international criminal law, translating the promises of reparations (i.e. equal access to remedy and *restitutio in integrum*) into reality in the case of mass atrocities remains challenging and difficult. To substantiate this, the second section compares and discusses the reparation regimes of the ICTR/Y and ICC.

In conclusion, drawing on the critical analysis of the influence of international human rights law in the development of victims’ rights in international criminal law, this chapter acknowledges the limitations of international criminal justice in granting reparations to victims of international crimes such as genocide, crimes against humanity and war crimes. Ultimately, it shows that although the accommodation of victims’ rights to an effective remedy and adequate reparations within international criminal law reflects an international consensus on the importance of reparation in addressing the consequences of international crimes, the enormity of the evil associated with those crimes ‘explodes the limits of the law’,⁹⁶ and the mass victimisation that ensues ‘oversteps and shatters any and all legal systems’.⁹⁷

⁹⁶ H. Arendt, *On Violence*, London: Allen Lane, 1970, p. 54.

⁹⁷ *Ibid.*

2.1. Victims' rights to an effective remedy and adequate reparations under international human rights law

Rwanda is a party to several instruments recognising and establishing the state's duty to provide effective remedy and adequate reparations to victims of human rights abuses.⁹⁸ At the global level, article 8 of the UDHR extends the right to an 'effective remedy' by the appropriate national tribunal for any violations of a person's fundamental rights as protected by the constitution or by law.⁹⁹ Articles 2(3), 9(5) and 14(6) of the ICCPR recognise a 'right to an effective remedy' and 'compensation'.¹⁰⁰ Article 6 of the ICERD obligates state parties to assure 'effective protection and remedies' and access to 'just and adequate reparation or satisfaction' for violations of the rights contained therein.¹⁰¹ Article 39 the UNCRC requires state parties to 'take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim'.¹⁰² Lastly, article 14 of the UNCAT mandates state parties to 'ensure in [their] legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible'.¹⁰³ To comply with all these relevant rules of international law, Rwanda is supposed to provide an effective remedy for affected individuals, including appropriate reparation if a violation is proven.¹⁰⁴

At the regional level, in contrast to other international and regional human rights systems, the African Charter¹⁰⁵ – the principal human rights instrument in Africa – does not explicitly contain a specific provision on the right to an effective remedy.¹⁰⁶ Apart from the general state obligation, contained in article 1, to recognise and give effect to the rights, duties and freedoms enshrined in the African Charter, the right to an effective remedy is derived merely from article 7(1), which establishes the general right of 'every individual to have his/her cause heard' by competent national organs so as to redress the violation of rights recognised

⁹⁸ It is important to note that Rwanda is a monist country, and ratified international and regional human rights instruments have force of law in Rwanda upon their ratification. During the genocide against the Tutsi, they were second only to the constitution in Rwanda's hierarchy of norms; this situation persisted until the revision of the 2003 Rwandan Constitution in December 2015. The revised constitution placed all ratified treaties in third place after the constitution and organic laws.

⁹⁹ Universal Declaration of Human Rights, GA res. 217 (III) A, UN Doc. A/RES/217(III), 10 December 1948, article 8, acceded by Rwanda 18 September 1962.

¹⁰⁰ International Covenant on Civil and Political Rights, 999 UNTS 171, entered into force 23 March 1976, articles 2(3), 9(5) and 14(6), acceded by Rwanda 16 April 1975.

¹⁰¹ International Convention on the Elimination of All Forms of Racial Discrimination, GA res. 2106 (XX), annex, 20 UN GAOR Supp. (no. 14), UN Doc. A/6014, 1966, 660 UNTS 195, entered into force 4 January 1969, article 6, acceded by Rwanda 16 April 1975.

¹⁰² Convention on the Rights of the Child, 2 September 1990, 2133 UNTS 161, article 39, ratified by Rwanda 24 January 1991.

¹⁰³ UNCAT, article 14.

¹⁰⁴ See chapter two for more details and discussion.

¹⁰⁵ African Charter on Human and Peoples' Rights, adopted in Nairobi 27 June 1981 and entered into force 21 October 1986, ratified by Rwanda 1 July 1983.

¹⁰⁶ See G. M. Mulisa, 'The right to an effective remedy under the African Charter on Human and Peoples' Rights', (2006) 6 *African Human Rights Law Journal* 447–448.

‘by conventions, laws, regulations and customs in force’.¹⁰⁷ Complementing this, article 26 establishes the state’s duty to ‘guarantee the independence of the courts and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and the protection of the rights and freedoms guaranteed in the African Charter’. In *Noah Kazingachire et al. v. Zimbabwe*, the African Commission on Human and Peoples’ Rights (African Commission) noted that ‘although the African Charter does not expressly provide for the right to adequate remedy, reparation or compensation; this right is a well-established principle of international law’.¹⁰⁸ In interpreting the right to an effective remedy,¹⁰⁹ the African Commission, in its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, emphasised that states are under the obligation to ensure that any person whose rights have been violated has an effective remedy from a competent judicial body, which shall be enforced by a competent authority.¹¹⁰ Likewise, article 27(1) of the protocol establishing the African Court on Human and Peoples’ Rights stipulates that if ‘the Court finds that there has been violation of a human or peoples’ rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation’.

Although all the above human rights instruments applicable to Rwanda unanimously recognise the rights to an effective remedy and adequate reparations for victims of human rights violations, they nevertheless do not provide guidance as to how such rights are to be practically upheld, especially in the case of massive or widespread human rights violations such as those resulting from the genocide against the Tutsi in Rwanda in 1994.

This loophole has, however, been filled by the adoption of various soft laws and by the practice of various human rights courts and bodies that have interpreted the relevant treaties’ provisions, thereby setting up the contours of the rights to an effective remedy and adequate reparations. In particular, in assessing whether these rights are upheld, international and regional human rights treaties have been interpreted in light of the guidance provided in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, adopted by the UN

¹⁰⁷ See AfrComHPR, *Tsatsu Tsikata v. Republic of Ghana* (Communication 322/2006), 14 October 2014, para. 146; AfrComHPR, *Egyptian Initiative for Personal Rights and Interights v. Egypt* (Communication 334/06), 3 March 2011, para. 123; AfrComHPR, *Civil Liberties Organization v. Nigeria* (Communication 129/94), 22 March 1995; AfrComHPR, ‘Dakar Declaration and recommendations on the right to fair trial’, seminar, 9–11 September 1999, Dakar, para. 7.

¹⁰⁸ AfrComHPR, *Noah Kazingachire et al. v. Zimbabwe* (Communication 295/04), 2 May 2012, para. 209.

¹⁰⁹ Inspired by the position of similar UN, European and American human rights monitoring bodies.

¹¹⁰ AfrComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, available at http://hrlibrary.umn.edu/research/ZIM%20Principles_And_G.pdf, accessed on 27 June 2019, para. C, p. 5. See also Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation, adopted at the International Meeting on Women’s and Girls’ Right to a Remedy and Reparation, held in Nairobi from 19 to 21 March 2007. Although not of a binding nature, African soft law, while it does not create new rights or obligations, provides for a comprehensive interpretation regarding the provisions on access to judicial remedy and right to reparation enshrined in various human rights instruments to which Rwanda is a signatory, thus including the provisions of the declaration. Other treaties that play a great role in the development of the right to an effective remedy and adequate reparation include – at the international level – article 75 of the ICC Statute and – at the regional level – articles 5(5), 13 and 41 of the ECHR and articles 25, 63(1) and 68 of the IACHR.

General Assembly in 2005.¹¹¹ Although it is an instrument of soft law with no binding force, it nonetheless reflects international standards about the treatment of victims.¹¹² Constant reference to the UN Basic Principles and Guidelines in the jurisprudence of numerous human rights bodies and in several legal instruments¹¹³ proves their importance with respect to the determination of survivors' various needs and rights and the various forms of reparation that are needed. They not only set the international standards that states ought to comply with when dealing with victim reparation issues but also complement and strengthen the states' obligation to provide for an effective remedy and adequate reparation in cases of gross violations of international human rights law.

Since the UN Basic Principles and Guidelines 'do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations',¹¹⁴ the fact that they were adopted ten years after the genocide against the Tutsi does not hamper their great importance in establishing Rwanda's government's obligation to provide an effective remedy and adequate reparations to the victims of the genocide against the Tutsi. They help to establish a common view¹¹⁵ about the existing Rwandan obligations to provide an effective remedy and adequate reparations resulting from the ICCPR, ICERD, UNCRC, UNCAT and African Charter.

In clarifying the remedies for gross violations of international human rights law and serious violations of international humanitarian law – such as those suffered by the victims of the genocide against the Tutsi – the UN Basic Principles and Guidelines affirm in paragraph 11 that victims have the rights to:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.

Thus, in addressing the harm suffered by the victims of the genocide against the Tutsi, Rwanda is – in the terms of the UN Basic Principles and Guidelines – specifically required to:

- (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;

¹¹¹ M. C. Bassiouni, 'The Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', UN Doc. E/CN.4/2005/L.48, 13 April 2005. See also UNGA res. 60/147, UN Doc. A/RES/60/147, 16 December 2005.

¹¹² See E. Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Leiden: Nijhoff, 2010.

¹¹³ The ICC Statute contains an indirect reference to forthcoming principles in its article 75; these are also mentioned in the International Convention on the Protection of All Persons from Enforced Disappearance, adopted in December 2006, article 24(5).

¹¹⁴ UN Basic Principles and Guidelines, preamble.

¹¹⁵ T. van Boven, 'Victims' rights to a remedy and reparation: The new United Nations principles and guidelines', in C. Ferstman, M. Goetz and A. Stephen (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, The Hague: Brill, 2009.

- (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, ... irrespective of who may ultimately be the bearer of responsibility for the violation; and
- (d) Provide effective remedies to victims, including reparation.¹¹⁶

In other words, as can be inferred from the UN Basic Principles and Guidelines and as generally confirmed in the academic literature,¹¹⁷ justice for the victims of the genocide against the Tutsi demands the fulfilment of three interrelated victims' rights, namely, a procedural right in the form of access to justice; a substantive right to reparations; and, lastly, a right of access to relevant information regarding the exercise of these two rights.¹¹⁸

2.1.1. Victims' access to justice as a procedural component of the right to an effective remedy

Access to justice is 'not only a fundamental right in itself, but it is an essential prerequisite for the protection and promotion of all other civil, cultural, economic, political and social rights'.¹¹⁹ Without access to justice, human rights commitments remain only promises of good intention, since it would be impossible to enjoy and ensure the realisation of any other right, whether civil, political or economic. Access to justice is defined as 'the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards'.¹²⁰

Therefore, since the substantial rights are meaningless if they are not accompanied by enforcement mechanisms or cannot be enforced, various human rights treaties consider the state's obligation to provide effective remedy as a guarantee of enjoyment of the rights guaranteed therein.¹²¹ Similarly, various human rights monitoring bodies also regard the right to an effective remedy as the main individual right through which other rights are guaranteed and protected.¹²² For instance, the Committee on the Rights of the Child¹²³ noted that:

¹¹⁶ Ibid., para. 3.

¹¹⁷ See D. Shelton, *Remedies in International Human Rights Law*, 2nd ed., Oxford: Oxford University Press, 2006, pp. 7 and 16.

¹¹⁸ UN Basic Principles and Guidelines, para. 11.

¹¹⁹ M. Sepúlveda Carmona, 'Report of the Special Rapporteur on extreme poverty and human rights', A/67/278, United Nations, New York, 9 August 2012, para. 91.

¹²⁰ C. Hassane et al., *The World Bank Legal Review: Legal Innovation and Empowerment for Development*, Washington DC: World Bank Publications and Nijhoff, 2013. See also United Nations Development Programme Asia-Pacific Regional Centre, *Programming for Justice: Access for All: A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice*, Bangkok: UNDP, 2005, p. 5.

¹²¹ Article 2(2) ICCPR; article 2(c) and (d) CERD; article 2(a) CEDAW; article 4 UNCRC; article 4(1)(a) CRPD; article 2(1) UNCAT; article 17(2) ICPPED.

¹²² HRC, General Comment 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, 1994, para. 11; HRC, General Comment 29 on derogations during a state of emergency, UN Doc. CCPR/C/21/Rev.1/Add.11, 2001, para. 14; report of the Special Representative on human

for rights to have a meaning, effective remedies must be available to address the violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties.¹²⁴

In interpreting article 2(3) of the ICCPR, which spells out the obligations of the state parties to the covenant to ensure that any person whose rights are violated has an effective and enforceable remedy,¹²⁵ the Human Rights Committee¹²⁶ has emphasised that state parties must give effect to this provision by ‘establish[ing] appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law’.¹²⁷ In other words, substantial rights embodied in the ICCPR in particular – or in various human rights instruments in general – can only be materialised if a victim can access an adequate and effective remedy to redress the violation of his/her rights. In fulfilling the procedural obligation to provide an effective remedy to victims of human rights violations, states are therefore required to develop procedural and institutional mechanisms that victims may access and use. Access to those mechanisms allows victims to obtain recognition of the violation, cessation of the violation if it is ongoing, and adequate reparation. Tracy A. Thomas relates the right to remedy to the concept of *ubi jus ibi remedium*¹²⁸ in order to emphasise that a right can only protect a person insofar as that person has access to a remedy following a violation of that right.¹²⁹

Against this background it can be claimed that guaranteeing access to justice offers an individual whose substantive rights have been violated the opportunity of redress, and it is only when there are clear laws and competent institutions capable of examining and addressing the allegation of human rights violations that all other human rights are better protected and realised.

It is, however, important to note that the existence – or establishment – within a state of procedural and institutional mechanisms that victims of human rights violations can access and use is not in and of itself sufficient to meet the states’ obligations to provide an effective remedy. The practice and jurisprudence of several human rights monitoring bodies have determined three major criteria – availability, effectiveness and sufficiency – that such mechanisms should fulfil. Since these criteria are vague, determining whether a remedy is available, effective and sufficient or adequate requires an evaluation of the exact

rights defenders, UN Doc. A/56/341, 2001, para. 9; report of the Special Rapporteur on violence against women on cultural practices in the family that are violent towards women, UN Doc. E/CN.4/2002/83, 2002, para. 116.

¹²³ The expert body that monitors state compliance with the UN Convention on the Rights of the Child.

¹²⁴ CRC, General Comment 5 on general measures of implementation of the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/5, 27 November 2003, para. 24.

¹²⁵ ICCPR article 2(3)(c).

¹²⁶ The HRC is established under article 28 of the ICCPR. It has eighteen experts, who must be nationals of state parties to the Covenant. Although the views of the HRC are not legally binding *stricto sensu*, they can be seen as the most authoritative interpretations of the ICCPR.

¹²⁷ HRC, General Comment 31 on the nature of the general legal obligation imposed on state parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 15.

¹²⁸ ‘There is no right without a remedy’.

¹²⁹ T. A. Thomas, ‘*Ubi Jus, Ibi Remedium*: The Fundamental Right to a Remedy’, (2004) 41 *San Diego Law Review* 1640.

circumstances of each individual case, taking into consideration the personal circumstances of the applicant and the legal and political context in which the remedies exist.¹³⁰ According to the African Commission,

a remedy is considered available if the petitioner can pursue it without any hindrance, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.¹³¹

A remedy is therefore deemed to be available if the applicant (the victim) is capable of exercising a specific remedy and if he/she can make use of it in the circumstances of his/her particular case without any obstacle. States do indeed have an obligation to remove legal, practical and other relevant impediments that make the remedy unavailable.¹³² The impediments identified by various human rights monitoring bodies include denial of access to courts or other legal procedures for bringing a claim to protect the infringed right,¹³³ excessive legal fees with no legal aid available to poor victims,¹³⁴ undue delay,¹³⁵ court jurisdiction ouster clauses¹³⁶ and an inability on the part of the victim to return to his/her country because of reasonable fear of persecution.¹³⁷ According to the African Commission,

remedies, the availability of which is not evident, cannot be invoked by the state to the detriment of the complainant. Therefore, in a situation where the jurisdiction of the courts has been ousted by decrees whose validity cannot be challenged or questioned, ... local remedies are deemed not only to be unavailable but also non-existent.¹³⁸

In the same case, the African Commission emphasised that

¹³⁰ International Justice Resource Center, 'Exhaustion of Domestic Remedies in the United Nations System', August 2017, p. 1.

¹³¹ AfrComHPR, *Jawara v. Gambia* (merits), 27th ordinary session, AHRLR 107, 27 April–11 May 2000, para. 32.

¹³² See N. J. Udombana, 'So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights', (2003) 97 *American Journal of International Law* 1–37.

¹³³ HRC, *Vicente et al. v. Colombia* (Communication 612/1995), views of 29 July 1997, UN Doc. CCPR/C/60/D/612/1995, para. 5.2.

¹³⁴ See e.g. HRC, *Quelch v. Jamaica* (Communication 292/1988), views of 23 October 1992, UN Doc. CCPR/C/46/D/292/1988, para. 8.2; see also HRC, *Henry v. Jamaica* (Communication 230/1987), views of 1 November 1991, UN Doc. CCPR/C/43/D/230/1987, para. 7.3.

¹³⁵ CAT, *Ali v. Tunisia* (Communication 291/2006), views of 26 November 2008, UN Doc. CAT/C/41/D/291/2006, para. 7.2; see also HRC, *Rajapakse v. Sri Lanka*, (Communication 1250/2004), views of 5 September 2006, UN Doc. CCPR/C/87/D/1250/2004, para. 6.1.

¹³⁶ AfrComHPR, *Constitutional Rights Projects, Akamu et al. v. Nigeria* (Communication 148/96), 26th ordinary session, 1–15 November 1999, paras 9–11. See also AfrComHPR, *Constitutional Rights Projects, Lakwot et al. v. Nigeria* (Communication 87/93), paras 6–10, and AfrComHPR, *Civil Liberties Organization v. Nigeria* (Communication 151/96), 26th ordinary session, 1–15 November 1999, paras 11–16.

¹³⁷ AfrComHPR, *Rights International v. Nigeria* (Communication 215/98), merits decision, 26th ordinary session, 1999, para. 24. See also AfrComHPR, *John D. Ouko v. Kenya* (Communication 232/99), merits decision, 28th ordinary session, 2000, para. 19; AfrComHPR, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan* (Communication 379/09), merits decision, 15th extraordinary session, 2014, paras 53–55.

¹³⁸ AfrComHPR, *Jawara v. Gambia*, *op. cit.*, para. 34.

the existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which it will lack the requisite accessibility and effectiveness. Therefore, if the applicant cannot turn to the judiciary of his country because of a generalized fear for his life (or even those of his relatives), local remedies would be considered to be unavailable to him.¹³⁹

Once it is determined that a remedy is available, the next step is to assess whether it is effective. A remedy is considered effective if it exists within the domestic legal system and offers a reasonable prospect of success. To be effective, remedies must be binding – i.e. legally enforceable¹⁴⁰ – and capable in practice of providing the redress sought by the applicant. To meet this criterion, the institutions put in place should be independent, should have the ability to invoke the guaranteed right and should have the capacity to afford the redress that is sought. Additionally, states have to put in place competent authorities with the ability and capacity to enforce the law and any such remedies granted by courts and tribunals.

From the decisions of most international human rights monitoring bodies, it appears that judicial institutions are preferred over non-judicial bodies (administrative, or other appropriate authorities)¹⁴¹ as they are generally considered better suited to fairly hearing and addressing the victim's claims. In determining whether a particular remedy is effective, the HRC has often considered the nature of the alleged violation. In cases of serious violations of human rights involving violations of the right to life in general or enforced disappearances in particular, the HRC has explicitly provided that an effective remedy for such violations is judicial.¹⁴² It also emphasises that to be effective, remedies must ensure procedural guarantees for 'a fair and public hearing by a competent, independent and impartial court'.¹⁴³ Similarly, the CERD regards the judicial nature of a remedy and its independence as fundamental to its effectiveness.¹⁴⁴

Commenting on article 2(3) of the ICCPR, Manfred Nowak argues that 'the decisions made exclusively by political and subordinate administrative organs (especially governments) do

¹³⁹ Ibid., para. 35.

¹⁴⁰ CERD, *D. R. v. Australia* (Communication 42/2008), views of 15 September 2009, UN Doc. CERD/C/75/D/42/2008, para. 6.4.

¹⁴¹ African Commission, *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Center for the Protection of Human Rights) v. Kenya* (Communication 375/09), 7 November 2011, paras 53–55. See also African Commission, *Gabriel Shumba v. Zimbabwe* (Communication 288/2004), merits decision, 51st ordinary session, 2012, para. 57, and African Court, *Konaté v. Burkina Faso* (application no. 004/2013), judgment on merits, 5 December 2014, para. 92; African Court, *Beneficiaries of the Late Norbert Zongo v. Burkina Faso* (application no. 013/2011), judgment on merits, 28 March 2014, para. 68.

¹⁴² HRC, *Basnet v. Nepal* (Communication 2051/2011), views of 26 November 2014, UN Doc. CCPR/C/112/D/2051/2011, para. 7.4. See also HRC, *Kroumi v. Algeria* (Communication 2083/2011), views of 19 November 2014, UN Doc. CCPR/C/112/D/2083/2011, para. 7.4; HRC, *Berzig v. Algeria*, (Communication 1781/2008), views of 18 January 2012, UN Doc. CCPR/C/103/D/1781/2008, para. 7.4.

¹⁴³ HRC, *Arzuaga Gilboa v. Uruguay* (Communication 147/1983), views of 1 November 1985, UN Doc. CCPR/C/OP/2 at 176, para. 7.2.

¹⁴⁴ CERD, *L. R. et al. v. Slovak Republic* (Communication 31/2003), views of 3 October 2005, UN Doc. CERD/C/66/D/31/2003, para. 9.2.

not constitute an effective remedy within the meaning of paragraph 3(b)'.¹⁴⁵ The HRC has also made clear that extraordinary remedies such as applications for annulment or review cannot be considered effective remedies; thus, the remedies that an applicant must exhaust are ordinary judicial remedies. This is also the view of the African Commission, which has said that the remedies that need to be exhausted under article 56(5) of the African Charter are those of a judicial nature and should not be subjected to the discretion of public authorities.¹⁴⁶ States are therefore required to establish functioning courts of law or other tribunals presided over by independent, impartial and competent individuals exercising judicial functions.

Endorsing the African Commission's view that effective remedies are those that offer a prospect of success,¹⁴⁷ the African Court has also ruled that an effective remedy should be assessed 'in terms of its ability to solve the problem raised by the complainant(s)'.¹⁴⁸ In this context, it should be noted that the HRC,¹⁴⁹ CERD,¹⁵⁰ African Commission¹⁵¹ and African Court¹⁵² exclude exceptional and extraordinary judicial remedies from the remedies that need to be exhausted. For instance, in the case of *Bautista v. Colombia* concerning disappearances, torture and killings, the HRC noted that disciplinary measures against the military officials and the award of a compensatory claim by an administrative tribunal were inadequate and insisted that, in such cases, the state party should also expedite criminal proceedings leading to the prompt prosecution and conviction of the persons responsible.¹⁵³

Likewise, in the case of Mr D. R., who claimed that a number of Australian laws unlawfully restricted his rights to social security, education and nationality on the basis of his national origin and thus violated article 2(1) of the ICERD, the CERD rejected the state's contention that the communication was inadmissible because the complainant failed to submit a complaint to the state party's Human Rights and Equal Opportunity Commission

¹⁴⁵ M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, Kehl: N. P. Engel, 2005, p. 64. See also HRC, General Comment 31, *supra* note 127, para. 15.

¹⁴⁶ AfrComHPR, *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Center for the Protection of Human Rights) v. Kenya*, *supra* note 141, paras 53–55.

¹⁴⁷ AfrComHPR, *Gabriel Shumba v. Zimbabwe* (Communication 288/2004), merits decision, 51st ordinary session, 2012, para. 57.

¹⁴⁸ AfCtHPR, *Konaté v. Burkina Faso* (application no. 004/2013), judgment on merits, 5 December 2014, para. 92. See also AfCtHPR, *Beneficiaries of the Late Norbert Zongo v. Burkina Faso* (application no. 013/2011), judgment on merits, 28 March 2014, para. 68.

¹⁴⁹ HRC, *Bautista v. Colombia*, (Communication 563/1993), final views of 27 October 1995, paras 8.2–10.

¹⁵⁰ CERD, *D. R. v. Australia* (Communication 42/2008), 75th session, 3–21 August 2009, para. 6.4.

¹⁵¹ See AfrComHPR, *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Center for the Protection of Human Rights) v. Kenya*, *supra* note 141, paras 53–55; African Commission, *Alfred B. Cudjoe v. Ghana* (Communication 221/98), admissibility decision, 25th ordinary session, 1999, paras 12–14.

¹⁵² AfCtHPR, *Umuhoza v. Republic of Rwanda* (application no. 003/2014), judgment, 24 November 2017, paras 71–73. See also AfCtHPR, *Thomas v. United Republic of Tanzania* (application no. 005/2013), judgment on merits, 20 November 2015, para. 65; AfCtHPR, *Abubakari v. United Republic of Tanzania*, (application no. 007/2013), judgment on merits, 3 June 2016, para. 68; AfCtHPR, *Onyachi v. United Republic of Tanzania* (application no. 003/2015), judgment, 28 September 2017, para. 56; AfCtHPR, *Guehi v. United Republic of Tanzania* (application no. 001/2015), judgment, 7 December 2018, para. 51.

¹⁵³ HRC, *Bautista v. Colombia*, *supra* note 149, paras 8.2 and 10.

(HREOC).¹⁵⁴ In its conclusion, the CERD noted that even if the complainant had submitted a complaint and the HREOC had decided in his favour, the decision would not have a binding effect on the state, and thus the remedy would not have been effective.¹⁵⁵

Lastly, a remedy is deemed sufficient if it can redress the alleged violations. Remedies that are purely discretionary and not subject to judicial oversight – such as a presidential pardon in the case of a prison sentence or a request for review of a court’s decision that would depend on the discretionary powers of the court – are not sufficient to qualify as judicial remedies.

It is worth noting that different monitoring bodies have repeatedly affirmed that states’ obligation to provide an effective remedy requires a thorough and impartial investigation into allegations of gross human rights violations.¹⁵⁶ For instance, in *S. Jegatheeswara Sarma v. Sri Lanka*, a case involving an enforced disappearance, the HRC stated that

in accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author’s son, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the violations suffered by the author’s son, the author and his family.¹⁵⁷

On various occasions, the HRC has stated that in the event of serious human rights violations – such as breaches of the right to life,¹⁵⁸ arbitrary detention,¹⁵⁹ torture and other forms of ill

¹⁵⁴ CERD, *D.R. v. Australia* (Communication 42/2008), *supra* note 140, para. 6.4.

¹⁵⁵ *Ibid.*

¹⁵⁶ Report of the Special Rapporteur on the question of impunity of perpetrators of human rights violations (civil and political), UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 1997, para. 27. See also HRC resolution 17/5 A/HRC/17/L.19, 2011, para. 4; HRC resolution 10/24, ‘Torture and other cruel, inhuman or degrading treatment or punishment: The role and responsibility of medical and other health personnel’, 2009, paras 6–7 and 11; HRC resolution 21/4, ‘Enforced or involuntary disappearances’, 2012, paras 18(b)–(f); HRC Concluding Observations on Colombia, UN Doc. CCPR/CO/80/COL, 26 May 2004, paras 10 and 15; HRC Concluding Observations on Lithuania, UN Doc. CCPR/CO/80/LTU, 4 May 2004, para. 10; HRC Concluding Observations on Suriname, UN Doc. CCPR/CO/80/SUR, 4 May 2004, para. 11; HRC Concluding Observations on Kuwait, UN Doc. CCPR/CO/KWT, 27 July 2000, para. 13.

¹⁵⁷ HRC, *S. Jegatheeswara Sarma v. Sri Lanka* (Communication 950/2000), UN Doc. CCPR/C/78/D/950/2000, 2003, para. 11. See also HRC, *Hugo Rodríguez v. Uruguay* (Communication 322/1988), UN Doc. CCPR/C/51/D/322/1988, 1994, para. 12(3). See also HRC, *José Vicente and Amado Villafañe Chaparro et al. v. Colombia* (Communication 612/1995), UN Doc. CCPR/C/60/D/612/1995, 1997, para. 8.8; HRC, *Blanco v. Nicaragua* (Communication 328/1988), UN Doc. CCPR/C/51/D/328/1988, 1994, para. 11.

¹⁵⁸ See e.g. HRC, *Bleier Lewenhoff and Valino de Bleier v. Uruguay* (Communication 30/1978), views of 29 March 1982, paras 14 and 15; HRC, *Dermi Barbató v. Uruguay* (Communication 084/1981), views of 21 October 1982, para. 11; HRC, *Vicente et al. v. Colombia*, *supra* note 125, para. 8.8; HRC, *Telitsin v. Russian Federation* (Communication 888/1999), views of 29 March 2004, para. 7.6; HRC, *Khemraadi B. et al. v. Suriname* (Communications 146/1983 and 148–154/1983), views of 4 April 1985, para. 16; HRC, *Bautista v. Colombia*, *supra* note 149, paras 8.6 and 10.

¹⁵⁹ See for instance HRC, *Hugo Rodríguez v. Uruguay*, *supra* note 157, para. 12.3; HRC, *Medjnoune v. Algeria* (Communication 1297/2004), views of 14 July 2006, para. 10; HRC, *Zelaya et al. v. Uruguay* (Communication 328/1988), views of 18 August 1994, para. 10.6; HRC, *Chongwe v. Zambia*, (Communication 821/1998), views of 25 October 2000, para. 5.3.

treatment,¹⁶⁰ or enforced disappearance¹⁶¹ – the right to an effective remedy requires a criminal investigation to be conducted and the prosecution, trial and punishment of those responsible for these infringements. Similarly, after identifying that grave or massive violations of human rights against Black Mauritians had been perpetrated, the African Commission recommended that Mauritania ‘arrange for the commencement of an independent enquiry in order to clarify the fate of the persons considered as disappeared, identify and bring to book the authors of the violations perpetrated at the time of the facts arraigned’.¹⁶² In this sense, it can be said that the duty to conduct thorough and impartial investigations into allegations of gross and serious human rights violations is of great importance for the victims of such violations, since their right to a remedy cannot be effectively guaranteed when state authorities do not investigate such violations seriously or deliberately conceal the facts.

In sum, in the context of the serious human rights violations that characterised the genocide against the Tutsi, it can be said here that, with respect to the procedural component of the right to an effective remedy, Rwanda is under the international obligation to not only investigate the gross violations of human rights that constituted the genocide against the Tutsi and punish those responsible, but also to put in place accessible domestic legal mechanisms that offer a prospect of success to the victims of the genocide against the Tutsi. Practically, to meet the standards of availability, effectiveness and sufficiency, those mechanisms should allow investigations into the human rights violations related to the genocide against the Tutsi and be capable of addressing the harm suffered by the victims.¹⁶³

2.1.2. Victims’ right to reparations as a substantive component of the right to an effective remedy

The second component of the right to an effective remedy is the outcome that victims are entitled to expect from the effective exercise of the procedural component detailed in the previous subsection. Even though the language used varies, all the international human rights treaties discussed above regard victims’ right to reparations as a component of their right to an effective remedy that aims at erasing – as far as possible – the consequences of the violations of their human rights.

¹⁶⁰ See HRC, *Santullo Valcada v. Uruguay* (Communication 9/1977), views of 26 October 1979, para. 12; HRC, *Quinteros Almeida v. Uruguay* (Communication 107/1981), views of 21 July 1983, paras 11, 15 and 16; HRC, *Mulezi v. Democratic Republic of the Congo* (Communication 962/2001), views of 8 July 2004, para. 7; HRC, *Tshitenge Muteba v. Zaire* (Communication 124/1982), views of 24 July 1984, paras 12 and 13; HRC, *Hugo Rodríguez v. Uruguay*, *supra* note 157, para. 12.3; HRC, *Zelaya et al. v. Uruguay*, *supra* note 159, para. 10.6.

¹⁶¹ See HRC, *Quinteros Almeida v. Uruguay*, *supra* note 160, paras 11, 15 and 16; HRC, *Barbarín Mojica v. Dominican Republic* (Communication 449/1991), views of 15 July 1994, para. 5.5; HRC, *Celis Laureano v. Peru* (Communication 540/1993), views of 25 March 1996; HRC, *Bautista v. Colombia*, *supra* note 149, paras 8.6 and 10.

¹⁶² AfCtHPR, *Malawi African Association et al. v. Mauritania*, (Communications 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98), 11 May 2000, recommendation 1.

¹⁶³ Compliance with this obligation is discussed consecutively in both chapter three and chapter four.

Despite this recognition, it should be noted that no legally binding instrument applicable to Rwanda has explicitly defined the concept of reparations.¹⁶⁴ A definition has, however, been gradually developed through the jurisprudence of human rights treaty bodies, which provides more specific guidance on what adequate reparations demand. The HRC affirmed that reparations are a central part of an effective remedy and concluded that the components of reparations encompass restitution, compensation, rehabilitation, measures of satisfaction and guarantees of non-repetition.¹⁶⁵ The HRC noted that

article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.¹⁶⁶

Similarly, in *Kepa Urra Guridi v. Spain*, the CAT concluded that there had been a violation of article 14(1) of the Convention against Torture¹⁶⁷ and affirmed that

article 14 of the Convention not only recognizes the right to fair and adequate compensation but also imposes on States the duty to guarantee compensation for the victim of an act of torture. The Committee considers that compensation should cover all the damages suffered by the victim, which includes, among other measures, restitution, compensation, and rehabilitation of the victim, as well as measures to guarantee the non-repetition of the violations, always bearing in mind the circumstances of each case.¹⁶⁸

With more details and guidance on the content of each form of reparations, the UN Basic Principles and Guidelines also provide that reparations can take one or a combination of five different forms, namely, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹⁶⁹ Restitution aims at re-establishing the victim's *status quo ante*,¹⁷⁰ and is

¹⁶⁴ Rwanda has not yet ratified the International Convention for the Protection of All Persons from Disappearances, which reaffirmed the concept of reparation by incorporating the five elements of the UN Basic Principles and Guidelines in article 24(5).

¹⁶⁵ HRC, General Comment 31, *supra* note 127, para. 16. Other United Nations human rights treaties include similar provisions. See UNCAT, article 14, and ICPED, article 24(4) (compensation); article 24(5)(b) (rehabilitation); article 24(5)(c) (satisfaction); and article 24(5)(d) (guarantee of non-repetition).

¹⁶⁶ *Ibid.*

¹⁶⁷ It reads: 'Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.'

¹⁶⁸ CAT, *Kepa Urra Guridi v. Spain* (Communication 212/2002), UN Doc. CAT/C/34/D/212/2002, 17 May 2005, para. 6.8.

¹⁶⁹ UN Basic Principles and Guidelines, GA res. 60/147, annex, para. 18, UN Doc. A/RES/60/147, 2005.

broadly interpreted to include return of property, restoration of liberty, citizenship and other legal rights, return to place of residence and restoration of employment,¹⁷¹ while compensation is the payment of money for economically quantifiable impairment arising from human rights violations, such as bodily injury, emotional distress, pain, suffering and lost prospects.¹⁷² According to James Crawford, ‘awards of compensation encompass material losses (loss of earnings, pensions, medical expenses) and nonmaterial damage (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium), the latter usually quantified on the basis of an equitable assessment’.¹⁷³ Perhaps more specific in its scope, rehabilitation includes medical and psychological care as well as legal services.¹⁷⁴

In contrast to restitution, compensation and rehabilitation, satisfaction is a non-financial form of reparation for moral damage or damage to dignity or reputation. It consists of, among other things, acknowledgement of violations, full and public disclosure of the truth, formal apologies and acceptance of responsibility, and commemoration of victims.¹⁷⁵

Lastly, measures of the guarantee of non-repetition include review and reform of laws allowing for violations, institutional reform of the military to ensure it is under civilian control and accountability, and human rights and humanitarian law training for police and armed forces. They all aim to help prevent the reoccurrence of similar violations.¹⁷⁶

In light of the above, it can be claimed that the concept of reparation echoes the array of measures or programmes aimed at redressing the different harms a victim may have suffered due to the violations of his/her human rights. In this respect, unlike restitution, compensation, rehabilitation and satisfaction, which focus on the restoration of the *status quo ante* and make it necessary to look backwards, the guarantees of non-repetition are meant to prevent further crimes and are thus future-oriented.

In terms of appropriate standards, irrespective of the nature of the harm, reparations must be ‘proportional to the gravity of the violation and the circumstances of each case’¹⁷⁷ and should cover both material losses and non-material or moral suffering. This proportionality test, used in the UN Basic Principles and Guidelines, reflects the *restitutio in integrum* reparative standard developed by the Permanent Court of International Justice (PCIJ) in the *Factory at Chorzów* case¹⁷⁸ and subsequently widely endorsed and reaffirmed several times

¹⁷⁰ P. de Greiff, ‘Justice and Reparations’, in P. de Greiff (ed.), *The Handbook of Reparations*, Oxford: Oxford University Press, 2006, pp. 451–452.

¹⁷¹ UN Basic Principles and Guidelines, para. 19.

¹⁷² *Ibid.*, para. 20.

¹⁷³ Text of draft articles on state responsibility with commentaries by Special Rapporteur James Crawford, adopted by the ILC at its 53rd session, 2001.

¹⁷⁴ UN Basic Principles and Guidelines, para. 21.

¹⁷⁵ *Ibid.*, para. 22.

¹⁷⁶ *Ibid.*, para. 23.

¹⁷⁷ *Ibid.*, principle 20.

¹⁷⁸ PCIJ, *Factory at Chorzów* case (*Germany v. Poland*) (merits), Ser. A, no. 17, 1928, p. 47.

both by the ICJ¹⁷⁹ and by regional human rights courts.¹⁸⁰ Articulating the standards of reparation for a recognised harm in the *Factory at Chorzów* case,¹⁸¹ the PCIJ concluded that reparations

must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution would bear ... such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.¹⁸²

The above PCIJ ruling shows that the main objective of reparations arising from the principle of *restitutio in integrum* is the restoration of the *status quo ante*, i.e. of the situation that would have existed had no breach occurred. The principle of *restitutio in integrum* originates in the law of state responsibility in the context of wrongful conduct of states¹⁸³ and is rooted in private law remedies, thereby reflecting the ideal of corrective justice that seeks to correct past wrongs. Antoine Buyse notes that ‘the most technical sense the goal of reparations is ... to turn back the time as if no harm was done; the reparation functions as a kind of magical wand’.¹⁸⁴

Given that the human rights reparations standard of returning to the situation that existed before the harm was developed in response to individual cases dealing with a portion of all victimised people, it can be rightly questioned whether such a standard is workable in cases of mass violations of human rights that constitute international crimes. In other words, it raises the question of whether reparative human rights principles can live up to their promise of *restitutio in integrum* in cases of mass violations, such as those suffered by victims of the genocide against the Tutsi in Rwanda.

While the IACtHR – the first regional court to have issued reparation orders in cases of mass victimisation¹⁸⁵ – has upheld that the main purpose of reparations is ‘to eliminate the effects

¹⁷⁹ See for instance ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*; Report 2005, p. 82, para. 259; ICJ, *Gabcikovo-Nagymaros Project case (Hungary/Slovakia)*, ICJ report of advisory opinions and orders of 1997, p. 7, paras 149–152.

¹⁸⁰ ECtHR, *Papamichalopoulos v. Greece (article 50)*, Ser. A, no. 330-B, 1995, para. 36; IACtHR, *Velásquez Rodríguez v. Honduras*, Ser. C, no. 4, 1989, pp. 26–27 and 30–31.

¹⁸¹ PCIJ, *Factory at Chorzów case, (Germany v. Poland)*, jurisdiction, Ser. A, no. 9, 1927, p. 21. ‘It is a principle of international law and even a general conception of law that any breach of an engagement involves an obligation to make reparation in an adequate form ... reparation is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.’

¹⁸² PCIJ, *Factory at Chorzów case (Germany v. Poland)* (merits), *supra* note 178, p. 47.

¹⁸³ See J. Crawford, *Articles on Responsibility of States for Internationally Wrongful Acts: The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge: Cambridge University Press, 2002.

¹⁸⁴ A. C. Buyse, ‘Post-Conflict Housing Restitution: The European Human Rights Perspective with a Case Study on Bosnia and Herzegovina’, Leiden: School of Human Rights Research Series, vol. XXV, 2007, p. 115.

¹⁸⁵ T. Antkowiak, ‘Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond’, (2008) 46 *Columbia Journal of Transnational Law* 418; J. M. Pasqualucci, ‘Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure’, (1996) 18 *Michigan Journal of International Law* 6; N. Roht-Arriaza, ‘Reparations in International

of the violation committed’¹⁸⁶ (*restitutio in integrum*), it nevertheless also acknowledged that such an ideal is neither always materially possible nor appropriate.¹⁸⁷ Recognising the irreparable nature of the harm resulting from gross or mass violations of human rights, the IACtHR highlighted that reparations should help victims by making their suffering less unbearable.¹⁸⁸ Put another way, in recognising the international principle of *restitutio in integrum*, the IACtHR acknowledges that in certain cases the harm suffered can only be attenuated, but not erased.

2.2. The emergence of victims’ right to reparations in international criminal law

As observed by Ilaria Bottiglieri, ‘while the notion of individual criminal responsibility for grave violations of human rights and humanitarian law developed over the years and gained legal specificity and support, states did not grant similar recognition to the ancillary idea of compensating victims of crimes under international law by way of an international mechanism’.¹⁸⁹ Since its origin, international criminal law has traditionally focused on the punishment of individual perpetrators, and all criminal proceedings involving international crimes have thus aimed at individual accountability. This approach, generally referred to as retributive justice,¹⁹⁰ is reflected in the extremely limited legal status awarded to victims in the proceedings of the Nuremberg International Military Tribunal (IMT)¹⁹¹ and the Tokyo International Military Tribunal for the Far East (IMTFE).¹⁹² It is particularly well documented that, before the IMT, victims remained largely absent, even as witnesses.¹⁹³ Explaining the status of victims in the post-WWII military trials, Benjamin Ferencz remarked that ‘trials under the auspices of the Allied armies were an entity unto themselves. They played no significant role in the lives of the victims. The survivors were not even in the audience’.¹⁹⁴

Law and Practice’, in M. C. Bassiouni (ed.), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization and Post Conflict Justice*, vol. I, Antwerp: Intersentia, 2010, p. 661.

¹⁸⁶ IACtHR, *Velásquez Rodríguez v. Honduras* (reparations and costs), judgment of 21 July 1989, para. 26. See also IACtHR, *Juvenile Reeducation Institute v. Paraguay* (preliminary objections, merits, reparations and costs), judgment of 2 September 2004, para. 261.

¹⁸⁷ IACtHR, *Aloboetoe et al. v. Suriname* (reparations and costs), judgment of 10 September 1993, para. 49.

¹⁸⁸ IACtHR, *Bulacio v. Argentina* (merits, reparations and costs), judgment of 18 September 2003, para. 25.

¹⁸⁹ I. Bottiglieri, *supra* note 56, p. 195.

¹⁹⁰ That is, justice favouring accountability through criminal punishment.

¹⁹¹ Established by the Charter of the International Military Tribunal, annexed to the London Agreement of 8 August 1945. See United Nations, ‘Agreement for the prosecution and punishment of the major war criminals of the European Axis (“London Agreement”)', 8 August 1945, 82 UNTC 280, available at <https://www.refworld.org/docid/47fdb34d.html>, accessed on 17 November 2020.

¹⁹² International Military Tribunal for the Far East (IMTFE), charter dated 19 January 1946, amended charter of 26 April 1946, Treaties and Other International Acts Series 1589, available at https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.3_1946%20Tokyo%20Charter.pdf, accessed on 23 January 2020.

¹⁹³ Y. Danieli, ‘Reappraising the Nuremberg Trials and Their Legacy: The Role of Victims in International Law’, (2005) 27 *Cardozo Law Review* 1642. See also L. Zegveld, ‘Victims as a Third Party: Empowerment of Victims?’, (2019) 19 *International Criminal Law Review* 323; S. Garkawe, ‘Victims and the International Criminal Court: Three Major Issues’, (2003) 3 *International Criminal Law Review* 345–346.

¹⁹⁴ Y. Danieli, *supra* note 193 at 1642.

This trend was perpetuated at both the ICTY and at the ICTR, and later at the Mechanism for International Criminal Tribunals (MICT)¹⁹⁵ that replaced them, which offered a relatively limited legal reparation regime, at the Extraordinary Chambers in the Courts of Cambodia (ECCC)¹⁹⁶ and at the Special Court for Sierra Leone,¹⁹⁷ which all have a ‘modest’ victims’ redress framework. One explanation for this trend is that these criminal courts, and especially the UN *ad hoc* tribunals, were created at a period when victims’ right to reparations fell outside the scope of international criminal law. By contrast with international human rights law, victims having a right to reparations in international criminal law is a very recent development that underwent a remarkable evolution over a short period of time, from its origins prior to the ICTR and ICTY in the early 1990s to the adoption of the ICC’s Rome Statute in 1998.

2.2.1. The victims’ redress framework of the International Criminal Tribunal for Rwanda (ICTR)

The ICTR is a ‘sister’ court to the ICTY (with almost identical provisions) that was established by the UN Security Council on 8 November 1994 for the purpose of prosecuting persons responsible for genocide and other serious violations of humanitarian law in Rwanda in 1994. From its conception – and as presented in the relevant statute – the ICTR was not conceived as a means of providing justice for victims as such. Its mandate was conceptualised almost exclusively in terms of the prosecution and punishment of individual perpetrators. According to article 1 of the ICTR Statute, its principal mission was

to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring states between 1 January 1994 and 31 December 1994.

The focus on punishing perpetrators rather than redressing the harm resulting from the genocide against the Tutsi can also be inferred from article 19(1) of the statute, whose wording seems to prioritise the rights of the accused, which must be ‘fully respected’, whereas those of the victims need only to be shown ‘due regard’:

¹⁹⁵ MICT, Rules of Procedure and Evidence, as amended on 26 September 2016, MICT/1/Rev.2, rule 130.

¹⁹⁶ Chapter XI, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (ECCC), NS/RKM/1004/006. Rules 23 and 100 of the Internal Rules of the ECCC (Rev. 6), 17 September 2010. Victims can take part in criminal proceedings before the ECCC and claim reparation provided they are a victim of a crime that falls within the jurisdiction of the court. For details see R. Killean and L. Moffett, ‘What’s in a Name? “Reparations” at the Extraordinary Chambers in the Courts of Cambodia’, (2020) *Melbourne Journal of International Law*, available at <https://ssrn.com/abstract=3603179>, accessed on 28 August 2020.

¹⁹⁷ The Lomé Agreement contained no direct reference to the specific term ‘reparations’ but referred to ‘rehabilitation’ in article XXVIII: ‘The Government, through the National Commission for Resettlement, Rehabilitation and Reconstruction and with the support of the International Community, shall provide appropriate financial and technical resources for post-war rehabilitation, reconstruction and development.’ For details, see C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, Cambridge: Cambridge University Press, 2012, pp. 164–184.

The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.¹⁹⁸

This is, however, not to say that the concept of reparation was absent from the ICTR's mandate. On the contrary, it should be highlighted here that the ICTR was specifically created to address certain elements of reparation, namely, the investigation of the facts and the punishment of individual perpetrators. However, Jorda and Hemptinne have noted that, in the furtherance of the ICTR's mission, the victims were reduced to mere objects of international criminal proceedings rather than being regarded as subjects and beneficiaries of rights entitled to present their own interests.¹⁹⁹ As detailed below, this is precisely what is reflected in the ICTR victims' redress framework, which was based on three types of reparations: restitution, compensation and rehabilitation.²⁰⁰ While property restitution was the only direct form of redress within the ICTR's jurisdiction, compensation issues were delegated to national courts or other competent organs, and rehabilitation was introduced as an assistance programme subsequent to the amendment of rule 34 of the ICTR RPE.²⁰¹

2.2.1.1. The ICTR's property restitution regime

The first form of redress is property restitution, which is provided in article 23(3) of the ICTR Statute²⁰² and developed further in rule 88(B) of the ICTR RPE. Under article 23(3) of the ICTR Statute, the Trial Chamber is entitled to issue an order for restitution if it is found that the unlawful taking of property was associated with a crime under the statute. According to the terms of this article,

in addition to imprisonment, the Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.²⁰³

Similarly, rule 88(B) of the ICTR RPE emphasises that

¹⁹⁸ Article 19(1) of the ICTR Statute.

¹⁹⁹ See C. Jorda and J. de Hemptinne, 'The Status and Role of the Victim', in A. Cassese et al. (eds), *The Rome Statute of International Criminal Court: A Commentary*, Oxford: Oxford University Press, 2002, p. 1389.

²⁰⁰ See P. Chifflet, 'The Role and Status of the Victim', in G. Boas and W. Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY*, The Hague: Martinus Nijhoff, 2003, pp. 75–111; S. Malmström, 'Restitution of Property and Compensation to Victims', in R. May et al. (eds), *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald*, The Hague: Kluwer Law International, 2001, pp. 373–384.

²⁰¹ Rule 34 of the ICTR RPE reads: '(A) There shall be set up under the authority of the Registrar a Victims and Witnesses Support Unit consisting of qualified staff to: (i) Recommend the adoption of protective measures for victims and witnesses in accordance with Article 21 of the Statute; (ii) Ensure that they receive relevant support, including physical and psychological rehabilitation, especially counselling in cases of rape and sexual assault; and (iii) Develop short term and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family. (B) A gender sensitive approach to victims and witnesses protective and support measures should be adopted and due consideration given, in the appointment of staff within this Unit, to the employment of qualified women.'

²⁰² This provision is similar to article 24(3) of the ICTY Statute.

²⁰³ Article 23(3) of the ICTR Statute.

if the Trial Chamber finds the accused guilty of a crime and concludes from the evidence that unlawful taking of property by the accused was associated with it, it shall make a specific finding to that effect in its judgement. The Trial Chamber may order restitution as provided in Rule 105.²⁰⁴

A plain reading of the above provisions combined with rule 105(A) of the ICTR RPE, which provides that a request for restitution can only be initiated by the prosecutor or by the chamber operating *proprio motu*,²⁰⁵ indicates that, at the ICTR, victims were very much regarded as passive contributors/witnesses rather than as judicially entitled actors. Indeed, as per rule 105(A) of the ICTR RPE,²⁰⁶

after a judgement of conviction containing a specific finding as provided in Rule 88 (B), the Trial Chamber shall, at the request of the Prosecutor, or may, at its own initiative, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate.²⁰⁷

Rules 88(B) and 105 of the ICTR RPE clearly exclude the victims' *locus standi* before the tribunal as they subject the restitution order to three basic requirements that do not involve victims: initiation by the prosecutor or *proprio motu* by the Trial Chamber; conviction of the accused; and existence of a link between the crime and the property taken.²⁰⁸

Until the ICTR's official closure in December 2015, no single restitution order under rules 88 and 105 accompanied any of the sixty-two convictions, even though issues of unlawful taking of property were raised in certain cases. Attempts for restitution orders, through application for leave to appear as an *amicus curiae*, by African Concern in the case of *Prosecutor v. Alfred Musema*²⁰⁹ and by the government of Rwanda in the case of *Prosecutor v. Théoneste Bagosora et al.*²¹⁰ were unsuccessful. In these two cases, the ICTR Trial Chamber concluded that the requests for property restitution orders were premature since the indictment contained no charge of unlawful taking of property,²¹¹ and since, pursuant to rule 105, a hearing on restitution can only take place after a judgment of conviction that specifically includes findings on the unlawful taking of property is issued.²¹² In light of the right to a fair trial, this case law is hardly surprising, as an accused cannot be tried or convicted for crimes not specifically listed in the indictment. In these above-mentioned cases, as the indictments

²⁰⁴ Rule 88(B) of the ICTR RPE.

²⁰⁵ *Ibid.*, rule 105.

²⁰⁶ Common to both the ICTR and the ICTY.

²⁰⁷ Rule 105(A) of the ICTR RPE.

²⁰⁸ See A. L.-M. de Brouwer, 'Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families', (2007) 20 *Leiden Journal of International Law* 214–215.

²⁰⁹ ICTR, *Prosecutor v. Musema*, decision on application by African Concern for leave to appear as *amicus curiae*, ICTR-96-13, 17 March 1999.

²¹⁰ ICTR, *Prosecutor v. Bagosora et al.*, decision on *amicus curiae* request by the Rwandan government, ICTR-98-41-T, 13 October 2004.

²¹¹ ICTR, *Prosecutor v. Musema*, ICTR-96-13, *supra* note 209, paras 10–11.

²¹² ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, *supra* note 210, paras 5–6.

contained no charges on unlawful taking of property, the accused were neither tried nor convicted for this and no restitution was awarded.

In addition to the tribunal's position in the above-mentioned cases, the absence of a restitution order under rules 88 and 105 can also partially be explained by the fact that the ICTR tried those who bear the *greatest responsibility* – i.e. the masterminds – on the grounds of their superior or command responsibility liability. Therefore, by contrast with the direct perpetrators, whose direct physical perpetration could easily be associated with, or could lead to, the misappropriation of the victims' property, most of the individuals prosecuted by the ICTR were liable for having been the organisers, planners and instigators of the crimes. Associating them with misappropriation of particular property of the victims would thus have been difficult to prove. This might explain the fact that the prosecution did not include pillage (or unlawful taking of property) within the indictments; a non-inclusion which, as explained earlier, logically implies that this crime remains absent from the judgment and from the conviction, thereby hampering any attempt to request restitution orders.

Most disconcertingly, the ICTR reparation framework recognised the right to restitution for victims of property theft, while victims who survived serious human rights violations constituting international crimes were left with no remedies²¹³ as discussed below.

2.2.1.2. The ICTR's indirect compensation regime

The ICTR's compensation scheme is regulated by rule 106 of the ICTR RPE, which delegates all compensation-related matters to the 'national courts or other competent bodies ... pursuant to their relevant national legislation'. The ICTR registrar was thus assigned the responsibility of transmitting the judgments detailing convictions to the relevant national authorities, as evidence of the convicted person's culpability to be relied upon by victims. Rule 106 of the ICTR RPE reads:

- (A) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim.
- (B) Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation.
- (C) For the purposes of a claim made under Sub-Rule (B) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.²¹⁴

This rule is rooted in UNSC resolution 827 (1993) establishing the ICTY, whose statute contains an identical provision on compensation. In this resolution, the UNSC declared that 'the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law'.²¹⁵ For Ilaria Bottigliero, delegating

²¹³ I. Bottigliero, *supra* note 56, p. 202.

²¹⁴ Similar to rule 106 of the ICTY RPE and to rule 105 of the SCSL RPE, as amended on 7 March 2003.

²¹⁵ UNSC, res. 827 (1993), 3217th meeting, S/RES/827 (1993), 25 May 1993, para. 7.

compensation to national courts and other competent organs was justified by the fear that ‘the tribunals would not be able to handle a potentially very high number of compensation claims’.²¹⁶

Just like article 23(3) of the ICTR Statute and rule 88(B) of the ICTR RPE on the restitution order, rule 106 turned out to be an empty shell and has failed to be of any particular help to victims of the genocide against the Tutsi. By explicitly stating that victims may bring their civil claims before ‘a national court or other competent body’, the interests of those victims harmed by the violations addressed by the ICTR were left to the protection of domestic courts. Similarly, by expressly providing that such victim claims were to be brought ‘pursuant to the relevant national legislation’, victims were left at the mercy of national courts to the extent permitted by domestic law: what victims were entitled to claim was thus highly dependent on particular national legislation and political policy. For instance, as will be further explained in chapter four, in Rwanda victims of genocide and of other crimes within the ICTR jurisdiction were only allowed to seek reparation for looted property.

The language of rule 106(B) of the ICTR RPE, which explicitly uses the phrase ‘pursuant to the relevant national legislation’, is in line with principles of state sovereignty and acts as an implicit reminder that the ICTR has no power to alter domestic law or domestic jurisdictional rules. In practice, this means that the victims of the genocide against the Tutsi need to satisfy the admissibility conditions of the relevant domestic courts. Put another way, the victims’ chances to obtain reparation depend on whether the domestic legislation foresees the possibility of compensation and, if so, on whether resources can be extracted from the offender or whether the state has the political will to assume that responsibility.²¹⁷ As will be detailed in chapter four, the domestic responses in this area were very limited, thus emptying rule 106 of any reach. Up until today, more than a quarter of a century after the genocide, none of the genocide victims have relied on an ICTR conviction judgment as evidence before a Rwandan court in order to obtain compensation, because the Rwandan legal framework limited the victims’ reparation claims to looted property.

Van Boven explained the failure of the ICTR’s reparation regime – including compensation – by pointing out that the reparation provisions were included in the ICTR RPE ‘as a symbolic afterthought rather than being expected to produce concrete results’.²¹⁸ Interestingly, a similar view prevailed at the ICTY. Some ICTY²¹⁹ judges affirmed that the tribunal’s approach under rule 106 appeared ‘unlikely to produce substantial results in the near future’.²²⁰ According to Morris and Scharf, one of the reasons for excluding direct reparation from the ICTY reparation scheme stemmed from the wording of the UNSC resolution

²¹⁶ I. Bottiglieri, *supra* note 56, p. 201.

²¹⁷ S. Malmström, *supra* note 200, pp. 373–384.

²¹⁸ T. van Boven, ‘The position of the victim in the Statute of the ICC’, in H. von Hebel et al. (eds), *Reflections on the ICC: Essays in Honour of Adriaan Bos*, The Hague: Asser Press, 1999, p. 77 et seq. and pp. 81–80.

²¹⁹ Referring to the similar rule 106 of the ICTY.

²²⁰ UNSC, letter dated 12 October 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General, S/2000/1063, appendix, 3 November 2000, para. 45.

establishing the tribunal, which explicitly provided that it was established for the sole purpose of prosecution.²²¹ The fear of distraction of the tribunal from its principal mission, i.e. prosecution, and the potential impact of a reparation mandate on its limited resources here also justified the exclusion of a direct reparation scheme.²²²

This failure of the *ad hoc* tribunals in relation to victims' rights did not go unnoticed. Some ICTY judges and the then ICTR chief prosecutor Carla Del Ponte advocated changing the tribunals' Statutes to embrace a more victim-centred framework, but their efforts were not successful.²²³ When addressing the UNSC in 2000, Carla Del Ponte observed that

it is regrettable that the Tribunals' statutes ... make only a minimum of provision for compensation and restitution to people whose lives have been destroyed ... my office is having considerable success in tracing and freezing large amounts of money in the personal accounts of the accused. Money that could very properly be applied by the courts to the compensation of the citizens who deserve it ... I would therefore respectfully suggest to the Council that the present system falls short of delivering justice to the people of Rwanda and the former Yugoslavia, and I would invite you to give serious and urgent consideration to any change that would remove this lacuna.²²⁴

Similarly, and in a parallel move, some ICTR/Y judges expressed concern over the tribunals' lack of reparation mandate, affirmed the general trend towards the recognition of a right to compensation in international law and concluded that victims of crimes within the tribunals' jurisdiction were entitled to compensation. However, they rejected the idea of amending the tribunals' Statutes and Rules of Procedure and Evidence to incorporate a compensation mechanism. The rationale behind not revising the tribunals' frameworks to allow them to provide direct compensation was the fear that the tribunals themselves would not be able to handle a potentially high number of compensation claims while simultaneously dealing with the prosecution of individuals accused of the most serious crimes.²²⁵ As a suitable alternative, they instead advocated the UNSC creating another organ with an international compensation mandate²²⁶ – like the UN Claims Commission set up after the Gulf War. While this suggestion was unfortunately overlooked, the concerns and suggestions raised by the ICTR/Y judges and prosecutor at the time informed the incorporation of the victims' reparation regime in the ICC's Rome Statute, which entrusts the implementation of the Court's reparation orders to the Trust Fund for Victims (TFV).

²²¹ V. Morris and M. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, New York: Transnational Publishers, 1995, p. 288.

²²² *Ibid.*

²²³ See A. L. M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, Antwerp and Oxford: Intersentia, 2005, pp. 406–409.

²²⁴ Address by the chief prosecutor of the ICTY/ ICTR, Carla Del Ponte, to the Security Council on 21 November 2000, ICTY press release JL/P.I.S./542-e, available at <https://www.icty.org/en/press/address-security-council-carla-del-ponte-prosecutor-international-criminal-tribunals-former>, accessed on 27 January 2020.

²²⁵ See I. Bottiglieri, *supra* note 56, p. 201, and V. Morris and M. P. Scharf, *supra* note 213, pp. 167 and 286–287.

²²⁶ See Report in UN Doc. S/2000/1063, 3 November 2000.

2.2.1.3. The ICTR's rehabilitation regime

Despite the criticisms associated with the property restitution and compensation regimes, the ICTR's rehabilitation scheme was commendable. Rehabilitation was introduced in the ICTR's legal framework in 1998 as an assistance programme, and not as a form of reparations, in response to the outcry from victims and witnesses, most of them HIV/AIDS-positive, who had no access to medical treatment, while such treatment was provided to defendants.²²⁷

Violence against women and girls constitutes a well-documented and tragically widespread strategy element of the genocide against the Tutsi in Rwanda in which between 250,000 and 500,000 girls and women were raped, and many were then killed.²²⁸ Although not all cases of HIV/AIDS among rape survivors can be attributed to the sexual violence they survived, it is estimated that between seventy and eighty per cent of the surviving women were infected with HIV.²²⁹

Following the request of the victims living with HIV/AIDS to access the same medical treatment as that of the ICTR suspects, rule 34 of the ICTR RPE was amended and the Victims and Witness Support Unit (VWSU) was mandated to ensure that victims and witnesses 'receive relevant support, including physical and psychological rehabilitation, especially counselling in cases of rape and sexual assault; and to develop short term and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family'.²³⁰ Thanks to the amendment of rule 34, antiretroviral treatment was provided to victims of sexual violence appearing as witnesses before the ICTR,²³¹ who could now benefit from the medical services of the medical unit set up in Rwanda.²³²

However, although the ICTR's rehabilitation programme was highly commendable, as it did improve the life of the victims of rape and sexual assaults, it is nevertheless unfortunate – to say the least – that not all women who contracted HIV/AIDS as a result of the genocide against the Tutsi benefited from the programme. Those who were not witnesses or potential witnesses did not receive any support and the majority of survivors of sexual assaults thus remained untreated and continued to die on a daily basis due to lack of treatment.

²²⁷ E. Christine, 'The Right to Reparation in International Law for Victims of Armed Conflict', Cambridge: Cambridge University Press, 2012, p. 95. See also A. L. M. de Brouwer, *supra* note 223, pp. 207–237.

²²⁸ UN Commission on Human Rights, 'Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Degni-Ségui', *supra* note 12, para. 16.

²²⁹ Amnesty International, 'Marked for Death: Rape Survivors Living with HIV/AIDS in Rwanda', AI Index: AFR 47/007/2004, 5 April 2004, p. 3, available at <https://www.amnesty.org/en/documents/AFR47/007/2004/en/>, accessed on 23 October 2020.

²³⁰ Rule 34 of the ICTR RPE.

²³¹ A. L. M. de Brouwer, *supra* note 223, pp. 207–237. See also ICTR, 'Press Release: ICTR Launches Victim Support Initiative in Rwanda', ICTR/INFO-9-2-242, 26 September 2000; International Crisis Group, 'International Criminal Tribunal for Rwanda: Justice Delayed', Africa Report no. 30, 7 June 2001, p. 37.

²³² A. L. M. de Brouwer, *supra* note 223, p. 206.

The decision to provide antiretroviral treatment to victims infected with HIV/AIDS as a result of the genocide against the Tutsi was contested by Jean-Paul Akayesu's lawyers, who argued that the ICTR did not have the legal mandate to do so and that the neutrality of the registrar was thus compromised. Responding to their letter, the then ICTR registrar, Agwu Ukiwe Okali, explained that the antiretroviral treatment provided to victims and witnesses was part of the ICTR's assistance mandate under article 21 of its statute and rule 34 of its RPE, which authorise the provision of support to victims and witnesses for their physical and psychological rehabilitation. Okali further emphasised that neutrality does not mean passivity or inaction, any more than impartial services means 'no services to anyone'.²³³

Although Okali contended that these measures were a form of limited 'restitutive justice' and a 'moral necessity', a close look at the circumstances that led to the amendment of rule 34 and the implementation of the rehabilitation programme reveals that victims' rights were only realised where they coincided with the mandate of the tribunal, i.e. to prosecute those responsible for mass atrocities, and not with a wider conception of justice for victims.²³⁴ As noted earlier, antiretroviral treatments were only provided to victims of sexual violence who appeared as witnesses before the ICTR.

In September 2000, in addition to antiretroviral treatments for HIV-positive victims, Okali initiated an assistance programme comprising legal assistance, housing and psychological assistance for definite and potential witnesses in Rwanda.²³⁵ The ICTR's assistance programme was implemented by five women's associations, including only one genocide victims' association – AVEGA Agahozo – which received US\$36,000 for medical and psychological assistance for victims.²³⁶ Following the conviction of Jean-Paul Akayesu, the mayor of Taba commune, and in an effort to offer concrete assistance to women who had testified in Arusha and especially in the *Akayesu* case, the ICTR contributed fifteen per cent (i.e. US\$52,000) of the overall costs incurred by the construction of twenty-three houses in what is known as the 'Peace Village' in Taba, in which these women can live and receive medical care.²³⁷ According to Rombouts, the 'Peace Village' is in fact the result of the tribunal's willingness 'to offer some concrete assistance to women who had testified in Arusha'.²³⁸

It should be noted that all these ICTR's assistance programs are to a great extent worthy and in line with the rehabilitation measures as provided for, or defined by, the UN Basic Principles and Guidelines. Nevertheless, since they seem to have not gone beyond a victims/witnesses approach, the ICTR rehabilitation scheme echoes Luke Moffett's opinion

²³³ See letter appended to ICTR/INFO-9-12-017, 9 October 2000.

²³⁴ See S. Malmström, *supra* note 200, p. 384.

²³⁵ S. Vandeginste, 'Victims of Genocide, Crimes against Humanity, and War Crimes in Rwanda: The Legal and Institutional Framework of Their Right to Reparation', in J. Torpey, *Politics and the Past: On Repairing Historical Injustices*, Lanham, MD: Rowman & Littlefield, 2003, p. 254. See also H. Rombouts, *Victim Organizations and Politics of Reparation: A Case Study on Rwanda*, Antwerp: Intersentia, 2004, pp. 464–468.

²³⁶ *Ibid.*, pp. 465–466.

²³⁷ S. Vandeginste, 2003, *supra* note 235, p. 254.

²³⁸ H. Rombouts, *supra* note 235, p. 466.

that victims' rights 'were only functional to facilitate the Tribunals' mandate in prosecuting those most responsible, rather than to meet their specific needs and interests'.²³⁹ To a large extent, a close review of the practice of the ICTR in terms of victims' needs and interests corroborates Moffett's observation that justice for victims of mass atrocities is often rhetorically used by the tribunals to justify punishment and legitimise their existence, without, however, meeting the victims' needs.²⁴⁰ In his words, 'victims in international criminal tribunals are considered as objects, in the sense that justice is done on the basis of their suffering, without recognising them as subjects having needs and interest in determining the substantive outcomes'.²⁴¹

In conclusion, even though the overall attention given to victims' rights in ICTR proceedings has been inadequate, it should be recognised that with the prosecution of the perpetrators of heinous crimes of international concern, the ICTR has not only acknowledged the occurrence of such crimes but also recognised the suffering of those who were victimised. Its jurisprudence contributed to the international recognition of the harm suffered by the victims of the genocide against the Tutsi. Most importantly, the ineffectiveness of the ICTR's redress regimes – as discussed above – reflects the limits of the traditional retributive approach adopted by international criminal justice mechanisms in delivering reparations or justice to victims. However, lessons were drawn, and the experience of the ICTR with respect to victims' rights resulted in the groundbreaking provisions of the ICC's Rome Statute, which constitute a landmark for the affirmation of the rights of victims of international crimes.

2.2.2. Pursuit of reparations before the International Criminal Court (ICC)

The adoption of the Rome Statute in 1998, which established the ICC, marked a new chapter in the history of victims' rights to reparations in international criminal law. The ICC framework went beyond the traditional retributive approach of international criminal law, which until then had been limited to investigating and prosecuting international crimes committed by individual perpetrators.

The ICC's reparation regime is set out in articles 75 and 79 of its statute and further elaborated in rules 94 to 99 of its RPE. It involves two different institutions, namely, the court and the Trust Fund for Victims (TFV). While the court is entrusted with the power to issue reparation awards upon conviction, such reparation awards are implemented by the TFV, which is also mandated with providing general assistance to victims of crimes falling within the jurisdiction of the court. In fact, while the court's reparation awards are exclusively linked to the conviction of the accused and are thus provided after conviction, the TFV may provide assistance to all victims of crimes falling within the jurisdiction of the court even prior to a conviction.²⁴²

²³⁹ L. Moffett, *Justice for Victims before the International Criminal Court*, New York: Routledge, 2014, p. 85.

²⁴⁰ *Ibid.*, p. 85.

²⁴¹ *Ibid.*

²⁴² Trust Fund for Victims (TFV), Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3, articles 42 and 46.

In general, as aptly summarised by Ilaria Bottigliero, the ICC's victims' reparation regime rests on three main pillars:

- The active participation of the victims and their families at various stages of proceedings;
- The establishment of implementation procedures for the victims' right to reparation, including the creation of a trust Fund; and
- The institution of a Victim and Witness' Unit with broad competence over victims' related questions.²⁴³

Although victims were acknowledged in the ICC legal framework as stakeholders in international criminal proceedings and although the court was entrusted with the authority to award reparations in favour of victims, the legal status of victims is still accessory to criminal proceedings. As is discussed below, victims of crimes falling within the court's jurisdiction have been granted participation to the court's proceedings and given the opportunity to present their views and concerns, but they are still treated as objects rather than subjects. Not only does their participation – or access to court – depend fully on the discretion of the court but also, by contrast with the accused, the Rome Statute does not afford any rights – only interests – to the victims of the crimes within the ICC jurisdiction. Neither the victims nor their legal representatives are parties to the case but simply participants, able to present their views and concerns when the court deems it appropriate.²⁴⁴

From a practical point of view, due to the high number of potential reparation claims arising from mass victimisation, their impact on both the conduct of the proceedings and the length of the trials, and the lack of sufficient financial resources, the ICC's approach towards victims' rights could be a defensible strategy for repairing the unrepairable. To substantiate this, and before discussing victims' *locus standi* in ICC proceedings, the historical background of victims' right to reparations in the Rome Statute will be briefly assessed to explore the context in which the victims' right to reparations was incorporated in the Rome Statute and to determine how such context influenced the current ICC jurisprudence with regard to victims.

2.2.2.1. Victims' right to reparations in international criminal law as a pragmatic compromise

Unlike the UN *ad hoc* criminal tribunals, the ICC is the first international criminal law court where doing justice is conceived both as referring to the prosecution and punishment of perpetrators of international crimes *and* as a means to remedy the harm suffered by the victims of these crimes. However, as various scholars have demonstrated, the ICC's reparation regime is not the result of a planned framework but rather a pragmatic compromise reached at a late stage in the negotiations at the Rome Conference.²⁴⁵ According to Conor McCarthy,

²⁴³ I. Bottigliero, *supra* note 56, p. 215.

²⁴⁴ Article 68(3) of the ICC Statute.

²⁴⁵ For a detailed discussion of the history of the Rome Statute's reparations regime and the development of proposals relating to the Trust Fund for Victims, see O. Triffterer (ed.), *Commentary on the Rome Statute of the*

the creation of a regime of victims' rights in international criminal law to deal with the harm suffered by individual victims is not an obvious extension of international criminal law, but illustrates a potentially significant shift in international criminal justice.

The historical background of the Rome Statute shows that the inclusion of victims' rights was the consequence of concerted work by states and international NGOs,²⁴⁶ against a background of a progressive development of the position of the individual in international law and the need to avoid the same criticisms as those made against the *ad hoc* criminal tribunals. As one commentator noted,

It was the failure of these Tribunals to take the interests of victims sufficiently into account that motivated many NGOs, individuals, and some governments to argue for a new approach that would safeguard the interests of victims at the ICC.²⁴⁷

The first draft – on which basis the ICC Statute was developed – proposed by the International Law Commission (ILC) provided for the establishment of a trust fund for victims but did not entrust the court with the power to issue reparation awards.²⁴⁸ It only entrusted it with the power to order the forfeiture of property and proceeds acquired in the course of committing a crime, and funds from the forfeiture of property were supposed to be transferred to the proposed Trust Fund for Victims or, where appropriate, to national authorities.²⁴⁹ Shortly afterwards, due to the reticence of states to endorse the ILC draft, the provisions on forfeiture and restitution were abandoned and a general obligation on state parties to recognise the judgments of the court – similar to that of the ICTY/R – was proposed so that victims could rely on those judgments while seeking reparations at the national level.²⁵⁰

Leaving victims' reparations to domestic courts was mostly justified by the fear that assigning power to an international court to award reparations in respect of crimes under its jurisdiction might involve the responsibility of states and eventually be used to make

International Criminal Court: Observer's Notes, Article by Article, 2nd ed., London: Hart, 2008, pp. 1399 and p. 1439. See also R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results*, The Hague: Kluwer, 1999, pp. 262 and 319.

²⁴⁶ Organised under the umbrella of the NGO Coalition for the ICC (CICC). The coalition included REDRESS, Amnesty International, Juristes sans Frontières, the Women's Caucus for Gender Justice, Human Rights Watch and No Peace Without Justice. See I. Bottiglieri, *supra* note 56, p. 213.

²⁴⁷ E. Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience', in D. McGoldrick et al. (eds), *The Permanent International Criminal Court: Legal and Policy Issues*, Oxford: Hart, 2004, p. 320.

²⁴⁸ See ILC, 'Report of the Commission to the General Assembly on the work of its forty-sixth session, Article 47(3)(c), ILC Draft Statute for an International Criminal Court', Yearbook of the International Law Commission, vol. II, part 2, A/CN.4/SER.A/1994/Add.1, 1994, p. 60.

²⁴⁹ See report of the Working Group on the Draft Statute for an International Criminal Court, A/CN.4/L.488/Add.3, 12 July 1993, p. 8.

²⁵⁰ See ILC, 'Summary Record of the 2,356th Meeting', Yearbook of the International Law Commission, vol. I, A/CN.4/SER.A/1994, 1994, p. 193. See also ILC, 'Article 58, ILC Draft Statute for an International Criminal Court and attached commentary', Yearbook of the International Law Commission, vol. II, part 2, A/CN.4/SER.A/1994/Add.1, 1994, p. 66.

reparation orders against them.²⁵¹ Moreover, as with the ICTY/R, another concern was the effect that dealing with reparations for the harm caused by international crimes could have on the court's primary mission, i.e. the prosecution and punishment of those responsible for international crimes. Despite these concerns, delegates from the United Kingdom, France, Japan and a number of NGOs joined together to support a more ambitious regime of victim redress than that proposed by the ILC.²⁵²

Fortunately, the ICC's reparation scheme was incorporated in the statute, notably as a result of support from certain influential states and a lobbying campaign by NGOs calling for the establishment of a strong regime of victims' redress.²⁵³ Conor McCarthy claims that 'the form ultimately taken by the Statute's reparations regime largely reflects an amalgamation of proposals developed by the United Kingdom and France, on one hand, and Japan on the other'.²⁵⁴ He specifically affirms that 'it was the French Delegation that originally made the antecedent proposals of what ultimately became article 75 and subsequently claimantly pushed for the inclusion of a regime for victim redress throughout the negotiations'.²⁵⁵

With the incorporation of article 75 – subsequently developed in the Rules of Procedure and Evidence²⁵⁶ – into the Rome Statute, the ICC became the first international criminal court to go beyond the traditional retributive scope and to encompass elements of restorative justice by granting the victims of crimes falling within its jurisdiction the opportunity to participate in the criminal proceedings, to present their views and concerns, and to ultimately claim compensation for the harm suffered.²⁵⁷

Under article 75, the ICC is entrusted with the power to determine the scope and extent of the harm suffered by the victims and *may* make 'appropriate' reparations to, or in respect of, victims. The language of article 75 is worthy of attention as it explicitly indicates that there is no obligation for the court to order a reparation award. Rather, this is one option open to it. Still, the ICC judges were assigned the task of establishing the principles relating to reparations for victims, which include restitution, compensation and rehabilitation. Under rule 97(1), the court enjoys considerable discretion and flexibility to decide the most suitable type and modalities of reparations,²⁵⁸ and to grant individual or collective reparations, a combination of both, or neither.²⁵⁹ As emphasised in principle 34 of the first reparations principles developed in the *Thomas Lubanga* case (*Lubanga* principles), 'reparations are not

²⁵¹ C. McCarthy, *Reparations and Victim Support in the International Criminal Court*, Cambridge: Cambridge University Press, 2012, p. 51.

²⁵² *Ibid.*, p. 52.

²⁵³ *Ibid.*, p. 51.

²⁵⁴ *Ibid.*, pp. 51–52. See also D. Donnat-Cattin, 'Article 75', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Baden-Baden: Nomos Verlag, 1999, pp. 965–978.

²⁵⁵ C. McCarthy, *supra* note 251, p. 51.

²⁵⁶ See rules 85 to 99 of the ICC RPE.

²⁵⁷ See S. Sacouto and C. Cleary, 'Victims' Participation in the Investigation of the International Criminal Court', (2008) 17 *Transitional Law and Contemporary Problems* 86.

²⁵⁸ Rule 97(1) of the ICC RPE.

²⁵⁹ *Ibid.*, rule 97(1).

limited to restitution, compensation and rehabilitation, as listed in article 75 of the Statute. Other types of reparations, for instance those with a symbolic, preventative or transformative value, may also be appropriate'.²⁶⁰

It is worth noting that as the UN Basic Principles and Guidelines were then still under development,²⁶¹ the reference in article 75(1) of the ICC Statute to 'principles relating to reparations' indicates the deliberate intention to establish principles of reparations inspired by international standards on reparations.²⁶² According to Anne-Marie de Brouwer, 'a footnote attached to the final report of the Working Group on Procedural Matters of the Rome Conference ... strongly indicates that the principles for reparations should be inspired by developing international standards on reparations'.²⁶³

However, even though the ICC victims' rights framework was inspired by international human rights law standards, international criminal law and international human rights law significantly differ in at least one respect. While regional human rights courts and international and regional human rights monitoring bodies rely on state responsibility to issue reparation awards to victims of human rights violations, the ICC reparation regime is based on the principle of individual criminal responsibility. The exclusion of any form of state responsibility was a necessary compromise to obtain the approval of the current reparation regime as enshrined in article 75 of the ICC Statute.²⁶⁴ Thus, by contrast with the human rights law framework discussed in the first section of this chapter, under the ICC scheme, reparations are solely directed against the accused, and exclusively borne by the convicted. While shifting responsibility from states to individuals permitted the endorsement of the Rome Statute, it unfortunately reduced the chances of fully materialising victims' rights: as it stands, the ICC scheme leaves some victims without any remedy, since many perpetrators are indigents, whose defence and family visit costs are often covered by the court.²⁶⁵

²⁶⁰ *Lubanga* principles, order for reparations, ICC-01/04-01/06-3129-AnxA 03-03-2015 1/20 NM A A2 A3, principle 34.

²⁶¹ The UN Basic Principles and Guidelines were adopted in 2005. They are the outcome of revisions of earlier drafts, namely UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993 (first version); UN Doc. E/CN.4/Sub.2/1996/17, 24 May 1996 (second version); UN Doc. E/CN.4/1997/104, 16 January 1997 (third version); UN Doc. E/CN.4/2000/62, 18 January 2000 (fourth version). See F. McKay, *supra* note 92, p. 174. See also K. Bonneau, 'The Reparation Regime of Victims before the International Criminal Court', presentation, Grotius Centre for International Legal Studies, The Hague, 13 May 2004, and A. L. M. de Brouwer, *supra* note 223, pp. 220–221.

²⁶² *Ibid.*

²⁶³ *Ibid.*

²⁶⁴ F. McKay, *supra* note 92, pp. 163–178. See also G. Robertson, *Crimes against Humanity: The Struggle for Global Justice*, 2nd ed., London: Penguin, 2002, p. 386.

²⁶⁵ See for instance ICC, *Prosecutor v. Bemba Gombo*, public redacted version of 'Order in relation to advanced legal assistance fees', Trial Chamber III, ICC-01/05-01/08, 17 July 2018, and ICC, *Prosecutor v. Ntaganda*, public redacted version of 'Decision on Defence "Request for review of the Registrar's decision of 21 June 2019" dated 5 July 2019 (ICC-RoR220-01/19-1-Conf-Exp)', ICC-RoR220-01/19-2-Conf-Exp, 17 September 2019, See also W. St-Michel et al., 'Strengthening the Role of Defence at the International Criminal Court: Reflections on How Defence Is and Can Be Supported for Greater Effectiveness and Efficiencies', (2018) 18(3) *International Criminal Law Review* 517–539.

2.2.2.2. *The limits of the ICC's reparation regime in addressing mass violations of human rights constituting international crimes*

The ICC has so far ordered reparations in three cases: *Prosecutor v. Thomas Lubanga Dyilo*,²⁶⁶ *Prosecutor v. Katanga*,²⁶⁷ and *Prosecutor v. Al Mahdi*.²⁶⁸ A careful review of the ICC's reparation regime as it has been interpreted and applied in these cases reveals that, even though victims' rights are taken into consideration during the court proceedings, in practice victims are merely recipients rather than real rights-holders. As discussed below, the implementation of the ICC's reparation regime in the above-mentioned cases shows that victims still have little power in the institution, however celebrated it may be for having given them agency and a voice.²⁶⁹ As noted by Liesbeth Zegveld, 'before the ICC victims have a third-party role'.²⁷⁰

As detailed below, there are several limitations within the ICC's reparation regime that continue to impede victims' rights to effective remedy (i.e. access to court or participation in proceedings) and adequate reparations (i.e. right to be awarded reparation). Those limitations can be attributed to the particularity of the violations adjudicated by the ICC, especially with respect to their magnitude. It may also be attributed to the clash between the retributive and restorative justice approaches that coexist in the set-up adopted by the court. As Laurel Fletcher remarks,

mass violence generates populations of victims who believe that retributive justice and compensation are important priorities. The ICC framework promises to respond to both, but the logics of scale overwhelm the institutional capacity to deliver fully on either. Not all crimes will be prosecuted and not all victims will be eligible for reparations.²⁷¹

In practice, as discussed below, not only is victims' participatory status determined by the situation under investigation and, subsequently, dependent on the specific charges selected by

²⁶⁶ ICC, *Prosecutor v. Lubanga Dyilo*, decision establishing the principles and procedures to be applied to reparations, Trial Chamber I, ICC-01/04-01/06, 7 August 2012, and ICC, *Prosecutor v. Lubanga Dyilo*, judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with amended order for reparations, Annex A and public annexes 1 and 2, Appeals Chamber, ICC-01/04-01/06 A A 2 A 3, 3 March 2015.

²⁶⁷ ICC, *Prosecutor v. Katanga*, order for reparations pursuant to article 75 of the Statute with one public annex (Annex I) and one confidential annex *ex parte*, Common Legal Representative of the Victims, Office of Public Counsel for Victims and Defence Team for Germain Katanga (Annex II), Trial Chamber II, ICC-01/04-01/07, 24 March 2017.

²⁶⁸ ICC, *Prosecutor v. Al Mahdi*, reparations order, Trial Chamber VIII, ICC-01/12-01/15, 17 August 2017.

²⁶⁹ For the opinion that the ICC is 'victim-centred', see e.g. L. Moffett, 'Reparations for Victims at the International Criminal Court: A New Way Forward?', (2017) 21(9) *International Journal of Human Rights* 1205; C. van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', (2011) 44(1) *Case Western Reserve Journal of International Law* 479.

²⁷⁰ L. Zegveld, 'Victims as a Third Party: Empowerment of Victims?', (2019) 19(2) *International Criminal Law Review* 321–345.

²⁷¹ L. E. Fletcher, 'Refracted justice: The imagined victim and the International Criminal Court', in C. De Vos, S. Kendall and C. Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Intervention*, Cambridge: Cambridge University Press, 2016, p. 324.

the prosecutor, but it is also contingent on the discretion of the court and has to be assessed and proved at each level of the proceedings (2.2.2.2.1.). Most interestingly, whereas participatory status is granted as long as it is not prejudicial to, or inconsistent with, the rights of the accused (2.2.2.2.2.), reparations orders – which are issued in a separate proceeding and after the conviction of the accused – do not necessarily require the presence of the victims or their representatives (2.2.2.2.3.).

2.2.2.2.1. The impact of the prosecutor's selection of charges on victims' participation in court proceedings and on reparation orders

Victims' participation in criminal proceedings before the ICC is one of the most notable aspects of the Rome Statute and has been applauded by several commentators, who variously refer to it as a 'significant step forward',²⁷² a 'major innovation',²⁷³ a 'major structural achievement'²⁷⁴ and a 'landmark development'.²⁷⁵ They all acknowledge that victims' participation ensures that their interests are taken into account and thus helps to restore their dignity and shed light on the circumstances of the crimes adjudicated by the court.

However, even though victims' participation is undoubtedly a significant step towards recognition of the rights of victims of mass atrocities within international criminal justice, the ICC judges were left with broad discretionary power to determine the victims' participatory rights. This has resulted in multiple restrictions, so much so that it is difficult to concretely assess whether victims are really parties with complete legal capacity within the ICC's reparation regime.

Victims' eligibility to participate in criminal proceedings before the court is strictly limited. It not only depends on the prosecutor's selection of charges²⁷⁶ but also on whether the victims meet specific eligibility conditions. Rule 85(a) establishes four criteria that have to be cumulatively met: they must (1) be a natural person; (2) who suffered harm; (3) caused by a crime; (4) that is within the jurisdiction of the court.

Interestingly, even when these conditions are all fulfilled, victims' participation is not a 'once-and-for-all-event'.²⁷⁷ Victims willing to participate in the court proceedings must submit a new application prior to each hearing or stage in the proceedings.²⁷⁸ Their

²⁷² A. Di Giovanni, 'The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?', (2006) 2 *Journal of International Law and International Relations* 25–26.

²⁷³ Victims' Rights Working Group, 'Victim Participation at the International Criminal Court: Summary of Issues and Recommendations', November 2003, at 2, available at http://www.vrwg.org/VRWG_DOC/2003_nov_VRWG_participation.pdf, accessed on 12 March 2021.

²⁷⁴ C. Stahn et al., 'Participation of Victims in Pre-Trial Proceedings of the ICC', (2006) 4 *Journal of International Criminal Justice* 219.

²⁷⁵ R. S. Lee, 'Victims and Witnesses', in Roy S. Lee (ed.), *International Criminal Court Elements of Crimes and Rules of Procedure and Evidence*, Ardsley: Transnational Publishers, 2001, p. 456.

²⁷⁶ L. Moffett, 2017, *supra* note 269 at 1207.

²⁷⁷ ICC, *Prosecutor v. Lubanga Dyilo*, decision on victims' participation, ICC-01/04-01/06-1119, 18 January 2008, p. 101.

²⁷⁸ See e.g. rule 89 of the ICC RPE.

participatory status is defined at a given stage of the proceedings according to the particular and specific object or aim of that stage, and is not automatically transferred to the next stage.

This is reflected in the different tests applicable at different stages of the proceedings. In determining whether the applicants may be accorded the status of victim, Pre-Trial Chamber I has ruled that, in the context of the investigation, the test to be used is that of ‘grounds to believe’, found in article 55(2) of the statute. As soon as a warrant of arrest is issued, the test, as enshrined in article 58(1)(a) of the statute, is that ‘there are *reasonable* grounds to believe’, whereas at the confirmation of charges the test is, per article 61(7) of the statute, that of ‘establish[ing] *substantial* grounds to believe’.²⁷⁹

At the investigation stage, victim status can only be granted to those fulfilling the condition of rule 85(a) that they show *prima facie* evidence that they suffered harm as a result of the criminal conduct falling within the temporal, territorial and subject-matter jurisdiction of the ICC.²⁸⁰ In light of these considerations, Pre-Trial Chamber I held that

with regard to the applications currently under consideration, the Chamber notes that, for the time being, no case has been initiated through the issuance of a warrant of arrest or a summons to appear by the Chamber under article 58 of the Statute in the light of the investigation of the situation in the territory of the DRC under way since 1 July 2002. At this stage, therefore, the Chamber can accord the status of victim only in connection with the situation in the DRC. As the applicants have applied to be accorded the status of victim ‘at the investigation, trial or sentencing stage’, once a case ensues from the investigation of the DRC situation, the Chamber will automatically address the question of whether the applicants seem to meet the definition of victims set out in rule 85 of the Rules in connection with such a case.²⁸¹

Similarly, for the purposes of participating in trial proceedings, the Appeals Chamber has made it clear that the ‘harm alleged by a victim and the concept of personal interests under article 68(3) of the Statute must be linked with the charges confirmed against the accused’.²⁸²

As can be inferred from these tests, not all victims of crimes falling within the court’s jurisdiction have the chance to participate in the proceedings. Furthermore, victims who are recognised as such and authorised to participate in one stage of the proceedings may be prohibited from participating in the subsequent stages. Likewise, if the prosecutor decides not

²⁷⁹ ICC, *Situation in the Democratic Republic of Congo*, decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04, 17 January 2006, paras 97–100.

²⁸⁰ ICC, *Situation in Darfur, Sudan*, corrigendum to decision on the applications for participation in the proceedings of applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, ICC-02/05, 14 December 2007, paras 4–5 and 49.

²⁸¹ ICC, *Situation in the Democratic Republic of Congo*, *supra* note 279, para. 68.

²⁸² ICC, *Prosecutor v. Lubanga Dyilo*, judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s decision on victims’ participation of 18 January 2008, ICC-01/04-01/06-1432, 11 July 2008, para. 2.

to prosecute pursuant to article 53 of the statute, victims who participated in the investigation of a situation are suddenly left without recourse.²⁸³

This is what happened, for instance, in the *Lubanga* case concerning the Democratic Republic of the Congo (DRC),²⁸⁴ as certain victims who were granted participatory status were subsequently denied this status. Six applicants were denied the status of victims by Pre-Trial Chamber I, which ruled that they did not meet the criteria set forth in rule 85.²⁸⁵ Pre-Trial Chamber I ‘consider[ed] that applicants VPRS 2, VPRS 3 and VPRS 6 have not demonstrated any causal link between the harm they suffered and the crimes contained in the arrest warrant against Thomas Lubanga Dyilo’,²⁸⁶ whereas ‘applicants VPRS 1, VPRS 4 and VPRS 5 have not provided sufficient evidence to allow the Chamber to consider that there are reasonable grounds for believing that the harm they have suffered is directly linked to the crimes contained in the arrest warrant against Thomas Lubanga Dyilo or that they have suffered harm by intervening to help direct victims in the case or to prevent the latter from becoming victims because of the commission of these crimes’.²⁸⁷

Therefore, in view of the above-mentioned ICC’s interpretation of rule 85, it is quite obvious that acquiring participatory status as a victim at a given stage of ICC proceedings is fully determined by the specific object of that stage. In other words, despite the broad definition of a ‘victim’ under rule 85(a),²⁸⁸ at every level of ICC proceedings the causal link to be proved is much narrower, and the court must re-examine whether a person already admitted at a certain stage as a victim still qualifies as a victim at another stage of the proceedings.

However, being granted participatory status does not necessarily grant a right to reparations, and the last assessment of a victim’s participatory status is conducted at the level of reparation proceedings after the conviction of the perpetrator. Only those who can prove that their interests have been affected by a specific criminal act that the accused is found guilty of are eligible for reparations, as has been affirmed in the *Thomas Lubanga* case by both Trial Chamber I and the Appeals Chamber.²⁸⁹ Endorsing Trial Chamber I’s decision defining the direct and indirect victims eligible for reparations in the case, the Appeals Chamber regarded the child soldiers who were conscripted, enlisted or used actively to participate in hostilities under Thomas Lubanga’s control as direct victims, and their parents as indirect victims.²⁹⁰

²⁸³ See J. de Hemptinne and F. Rindi, ‘ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Stage of Proceedings’, (2006) 4 *Journal of International Criminal Justice* 348–349.

²⁸⁴ ICC, *Prosecutor v. Lubanga Dyilo*, decision on the applications for participation in the proceedings submitted by VPRS 1 to VPRS 6, ICC-01/04-01/06-172, 29 June 2006, para. 9.

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*, para. 6.

²⁸⁷ *Ibid.*, para. 9.

²⁸⁸ ‘Victims means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.’

²⁸⁹ ICC, *Prosecutor v. Lubanga Dyilo*, judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of August 7, 2012, with amended order for reparations (Annex A) and public annexes 1 and 2, Appeals Chamber, ICC-01/04-01/06-3129, 3 March 2015, para. 8.

²⁹⁰ *Ibid.*, para. 190. See also ICC, *Prosecutor v. Lubanga Dyilo*, redacted version of decision on ‘indirect victims’, Trial Chamber I, ICC-01/04-01/06, 8 April 2009, paras 50–51.

The court explicitly excluded from the indirect victims' category those who suffered harm as a result of the conduct of direct victims,²⁹¹ thereby exclusively placing child soldiers in the victim category regardless of whether they had committed crimes. According to the court in this particular case, the victims of the criminal acts of the child soldiers – even though they were victims of the situation – were not indirect victims eligible for reparations because the harm they suffered was not linked to the harm inflicted on the child soldiers who were the victims in this case.

Put another way, child soldiers – whose criminal acts included torture, massacres, widespread rape and looting²⁹² – were awarded reparations,²⁹³ while those affected by their criminal acts or conduct were left without any remedy despite their contribution to the criminal proceedings. As a result, a number of victims who participated in a criminal process that lasted for twelve years were ultimately excluded at the reparation phase and from the award of reparations.²⁹⁴ In excluding victims who suffered from harm caused by child soldiers, the court overlooked the fact that they were effectively victimised by the perpetration of crimes Thomas Lubanga was convicted of.

In the *Katanga* case, the victims of rape and sexual slavery were likewise refused eligibility for reparations as the court considered that physical and psychological harm incurred by those victims could not be attributed to Katanga.²⁹⁵ Even though Trial Chamber II acknowledged that Ngiti combatants from Walendu-Bindi *collectivité* committed the crimes of rape and sexual enslavement, which constitute crimes against humanity and war crimes, it nevertheless did not grant reparations as it found Mr Katanga not guilty of being an accessory to such crimes; put differently, the harm suffered by the victims were not the result of one of the crimes for which Mr Katanga was convicted.²⁹⁶ Similarly, in the *Al Mahdi* case, the court excluded victims who suffered bodily harm or had their property (household items, livestock, store wares, etc.) damaged during the attack on protected buildings.²⁹⁷ As Al Mahdi was liable for the destruction he caused to protected buildings, the court adopted an extremely strict eligibility test and thus refused to order reparations for bodily harm because Al Mahdi 'was not convicted of any crimes against persons, nor did the Chamber make any factual findings in relation to crimes against persons'.²⁹⁸ Furthermore, it denied reparations for other property damaged during the attack on protected buildings because Al Mahdi 'was

²⁹¹ Ibid.

²⁹² See M. Goetz, 'Victims' Experiences of the International Criminal Court's Reparations Mandate in the Democratic Republic of the Congo', in C. Ferstman and M. Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, 2nd revised ed., Leiden: Nijhoff, 2020, p. 423.

²⁹³ ICC, *Prosecutor v. Lubanga Dyilo*, judgment on the appeals against Trial Chamber II's 'Decision setting the size of the reparations award for which Thomas Lubanga Dyilo is liable', ICC-01/04-01/06 A7 A8, 18 July 2019, para. 37.

²⁹⁴ M. Goetz, *supra* note 292, p. 436.

²⁹⁵ ICC, *Prosecutor v. Katanga*, order for reparations pursuant to article 75 of the Statute, Trial Chamber II, ICC-01/04-01/07, 24 March 2017, para. 152.

²⁹⁶ Ibid., paras 148–152.

²⁹⁷ ICC, *Prosecutor v. Al Mahdi*, reparations order, Trial Chamber VIII, ICC-01/12-01/15, 17 August 2017, paras 25–26.

²⁹⁸ Ibid., para. 93.

not convicted of any other kind of property loss or damage, nor did the Chamber make any factual findings in that regard'.²⁹⁹

Against this background, it can be argued that the prosecutor's selection of the crimes to be prosecuted and the extensive discretionary power accorded to judges in determining victims' participatory rights exclude numerous victims from the scope of the ICC's reparation regime, which unfortunately undermines their healing process. It has been argued and shown that participation in ICC proceedings may contribute to the victims' healing process and rehabilitation in several ways. As noted by Jamie O'Connell, victims of atrocities may 'find meaning in being heard, in having a witness who affirms that [their abuse] did happen, that it was terrible, [and] that it was not their fault'.³⁰⁰ For victims, participation may amount to 'truth-telling' and, as such, may prove crucial in validating their traumatic experience and allowing them to heal.³⁰¹ According to Naomi Roht-Arriaza, victims gain a 'sense of control, an ability to lessen their isolation and be reintegrated into their community, and the possibility of finding meaning through participation in the process'.³⁰² This claim is echoed by Carlos Nino:

What contributes to re-establishing [the victims'] self-respect is the fact that their suffering is listened to in the trials with respect and sympathy, the true story receives official sanction, the nature of the atrocities are publicly and openly discussed, and their perpetrators acts' [*sic*] are officially condemned.³⁰³

In view of the above, it should be noted that although it is theoretically possible for victims to individually participate in the court proceedings, this would be totally impractical as the high number of victims and the enormity of the crimes perpetrated would lead to long trials that may last decades and decades.³⁰⁴ To avoid this, it is therefore understandable that victims at the ICC are often represented by common collective legal representatives.

Unfortunately, due to the high level of selectivity as regards eligibility for participatory status at each stage of the ICC proceedings, the stories of the majority of the victims are omitted in the construction or establishment of a holistic version of the truth, thus leading to only a partial acknowledgement of the actual harm suffered by the victims.

In light of the importance of victims' participation in the healing process, the practice of the court gives little to no space for the individual. This practice shows that, while the ICC RPE do consider the individual when it comes to legal representation and reparation awards,³⁰⁵ the

²⁹⁹ Ibid., para. 100.

³⁰⁰ J. O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?', (2005) 46(2) *Harvard International Law Journal* 330.

³⁰¹ See J. L. Herman, *Trauma and Recovery*, New York: Basic Books, 1992, p. 181.

³⁰² N. Roht-Arriaza, *Impunity and Human Rights in International Law and Practice*, Oxford: Oxford University Press, 1995, p. 19.

³⁰³ Cited by E. Haslam, *supra* note 247, p. 316.

³⁰⁴ See C. van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', (2011) 44 *Case Western Reserve Journal of International Law* 479–486.

³⁰⁵ See rule 90 of the ICC RPE.

court has made extensive use of the possibility of collective legal representation and collective reparations,³⁰⁶ which is understandably the only viable solution in the context of mass victimisation. For that reason, on several occasions the court has declared the right to choose one's own legal counsel, as provided for in rule 90(1) of the ICC RPE, not to be absolute, as it is subject to paragraphs 2 and 3 of the same rule,³⁰⁷ and a collective legal representative (or representatives) can be appointed for groups of victims without even considering the victims' views on a collective legal representative.

For instance, in the *Thomas Lubanga* case all participating victims were divided into two groups, represented by two teams (V01 and V02) of external counsel,³⁰⁸ and only three out of 129 participating victims were allowed to testify during the trial.³⁰⁹ In the *Bemba* case, three out of 5,299 participating victims presented their views and concerns to the court and only two legal representatives³¹⁰ represented all other victims.³¹¹ As these examples illustrate, the individual views and concerns of all those granted participatory status are far from being heard; a situation aggravated by the huge number of victims assigned to only a small number of legal representatives, who are understandably unable to convey all individual views and concerns to the court.

In sum, even if it is practically impossible to give the opportunity to all victims to present their views and concerns, the ICC's practice of regarding victims as a homogeneous group capable of being represented collectively not only overlooks the fact that victims are individuals with their own specific stories and experiences of loss and harm, but also dilutes the important goal of victim participation in the proceedings, which is to give a voice to victims.³¹² Allocating a common legal representative to victims prevents the voice of each victim from being heard and thus falls short of contributing to the victims' healing process.

³⁰⁶ See D. Suprun, 'Legal Representation of Victims before the ICC: Developments, Challenges and Perspectives', (2016) 16 *International Criminal Law Review* 972–994.

³⁰⁷ ICC, *Prosecutor v. Katanga and Chui*, order on the organisation of common legal representation of victims, ICC-01/04-01/07, 22 July 2009, para. 11; ICC, *Prosecutor v. Banda Abakaer Nourain and Jerbo Jamus*, decision on common legal representation, ICC-02/05-03/09, 25 May 2011, paras 12–14; ICC, *Prosecutor v. Al Mahdi*, decision on victim participation at trial and on common legal representation of victims, ICC-01/12-01/15, 8 June 2016, para. 36; ICC, *Prosecutor v. Bemba Gombo*, fifth decision on victims' issues concerning common legal representation of victims, ICC-01/05-01/08, 16 December 2008, para. 7; ICC, *Prosecutor v. Ongwen*, decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15, 27 November 2015, para. 17; *Prosecutor v. Lubanga Dyilo*, decision on victims' participation, *supra* note 277, para. 123; *Prosecutor v. Ruto and Sang*, decision on victims' representation and participation, ICC-01/09-01/11, 3 October 2012, para. 24.

³⁰⁸ ICC, *Prosecutor v. Lubanga Dyilo*, judgment pursuant to article 74 of the Statute, Trial Chamber I, ICC-01/04-01/06, 14 March 2012, para. 20.

³⁰⁹ *Ibid.*, para. 21.

³¹⁰ After the death of one of the legal representatives in January 2014, the chamber authorised the registry to assign all victims to one common legal representative.

³¹¹ ICC, *Prosecutor v. Bemba Gombo*, judgment pursuant to article 74 of the Statute, Trial Chamber III, ICC-01/05-01/08, 21 March 2016, paras 23–24.

³¹² L. Catani, 'Victims at the International Criminal Court: Lessons Learned from the *Lubanga* Case', (2012) 10 *Journal of International Criminal Justice* 919.

2.2.2.2.2. Victims' interests and rights of the accused: a quest to find a balance

As mentioned earlier, fulfilling the four criteria under rule 85(a) does not necessarily entail unlimited victim participation. Participation in the proceedings is only granted subject to the conditions set forth in article 68(3) of the ICC Statute. This gives full discretionary power to judges to deny participation whenever the victims' participation is prejudicial to the rights of the accused. Victims can only participate to the extent they are allowed to by the court. In other words, when and how victims have the opportunity to present their views and concerns is entirely subjected to the discretionary power of each chamber in a particular case. Article 68(3) of the ICC Statute reads:

Where the personal *interests of the victims* are affected, this Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the *rights of the accused* and a fair and impartial trial.³¹³

As can be inferred from this provision, victims of crimes falling within the ICC's jurisdiction do not have an actual right that they can claim. They are only offered an opportunity when the chamber deems it appropriate. Emphasising the fact that victims do not have an actual right to claim, Liesbeth Zegveld notes that, when talking about victims' participation, the ICC Statute 'speaks of interests instead of rights'.³¹⁴ According to Zegveld, 'the use of the word rights is reserved for the rights of the accused'³¹⁵ and thus 'victims cannot invoke any rights under the Statute as the Statute does not afford them any rights'.³¹⁶ Similarly, Zappalà remarks that 'in international criminal procedure there is widespread recognition of the primacy of the rights of the accused over any other conflicting interest'.³¹⁷

In light of the above comments, it can be argued that prioritising the rights of the accused over those of the victims reflects, and can be attributed to, the characteristics inherent to international criminal trials, which focus primarily on the accountability of the accused rather than on the plight of victims of 'unimaginable atrocities', to quote the preamble of the Rome Statute. Fletcher maintains that 'justice for victims' rhetoric is employed as one of the primary moral justifications of the ICC project.³¹⁸ She emphasises that:

³¹³ Emphasis added.

³¹⁴ L. Zegveld, 'Victims as a Third Party: Empowerment of Victims?', (2019) 19 *International Criminal Law Review* 331.

³¹⁵ Ibid.

³¹⁶ Ibid. She also notes, however, that 'the only provision referring to "rights of victims" is Rule 97(3) ICC RPE stipulating: "In all cases, the Court shall respect the rights of victims and the convicted person"'. Ibid.

³¹⁷ S. Zappalà, 'The rights of victims v. the rights of the accused', (2010) 8(1) *Journal of International Criminal Justice* 144.

³¹⁸ Quoted by A. Balta, et al. 'Between Idealism and Realism: A Comparative Analysis of the Reparations Regimes of the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia', (2021) 45(1) *International Journal of Comparative and Applied Criminal Justice*, 23

victims of atrocity crimes are central to the ICJ. They provide the moral urgency to mobilize political will and resources to punish perpetrators and to provide redress to victims.³¹⁹

To a great extent, article 68(3) of the ICC Statute also reflects the balance between punitive and restorative justice as well as a compromise between delegates from common law jurisdictions, who opposed victim participation, and those from civil law jurisdictions, who advocated for more extensive participation than is currently permitted. As noted by Christopher Keith Hall, provisions on victims' participation stem from

a delicate balance between the views of those who wished victims and witnesses to be able to play a very active role similar to that of a *partie civile* and those who were concerned that the court might be overwhelmed by a large number of victims, possibly limiting the effectiveness of the prosecution or defense.³²⁰

Thus, in order to overcome the crippling effect a large number of participating victims would have on the due process rights of the accused, article 68(3) allows victims to present their views and concerns when their personal interests are affected at stages determined by the chamber, when it deems it appropriate, and in a manner that is not prejudicial to, or inconsistent with, the rights of the accused. Victims do not have a right to claim; they only participate in the proceedings when they are invited to do so by the court.

Other factors that limit the role of victims in international criminal proceedings and thus reflect the retributive nature of the ICC's approach are, firstly, that neither victims nor their legal representatives are able to initiate a case and, secondly, that even when granted participation they always have to make an application to the chamber whenever they want to question a witness or the accused.³²¹ Moreover, unlike the prosecutor and defence lawyers, victims or their legal representatives only have full access to public files. Access to confidential information is subject to the court's discretion and granted if the confidential filings are of material relevance to the personal interests of participating victims and if such access does not breach protective measures.³²² In light of these limitations, it can be argued that victims' participation is limited to ensure the ICC's retributive goal. As one participant in the ICC Statute negotiations put it, 'it was considered absolutely necessary to devise a realistic system that would give satisfaction to those who had suffered harm without jeopardizing the ability of the Court to proceed against those who had committed the crimes'.³²³

³¹⁹ L. E. Fletcher, *supra* note 271, p. 324.

³²⁰ C. K. Hall, 'The First Five Sessions of the UN Preparatory Commission for the International Criminal Court', (2000) 94 *American Journal of International Law* 783.

³²¹ See rule 90 of the ICC RPE.

³²² ICC, *Prosecutor v. Lubanga Dyilo*, decision on victims' participation, *supra* note 277, para. 106.

³²³ See A. Silvia Fernandez de Gurmendi, 'Definition of victims and general principle', in L. Roy et al. (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, NY: Transnational Publishers, 2001, p. 429.

2.2.2.2.3. Victims' accessory role in the determination of reparations

Although one purpose of participating in ICC criminal proceedings might be to pursue reparations claims, the issues of reparations and participation are completely separate. Reparation orders are intrinsically linked to a criminal conviction, and reparation claims are dealt with after the criminal proceedings and only in relation to those crimes for which an accused is convicted. According to article 75(3) of the ICC Statute, 'before making an order under this article, the court *may* invite and shall take into account of representations from or on behalf of the convicted person, victims, other interested persons or interested States'. Given the wording of this provision, especially the use of '*may*', judges have full discretionary power to decide whether victims or their representatives should participate in the proceedings leading to the determination of reparations due to the victims. Not only is it up to the court to decide whether victims should participate in the reparations' determination, but it is also possible for the court to issue a reparation order without hearing the views of the victims.

Accordingly, allowing ICC judges to decide on reparations in the absence of the victims or their representatives is another indication that they are merely accessory objects in the proceedings with no procedural capacity. Surprisingly, while limiting the participation of victims in the proceedings leading to the conviction of the accused might be understood as a way to safeguard the rights of the accused as provided in article 68(3) of the ICC Statute, the possibility to exclude victims from participating in the determination of reparations does not seem to have any justification. It weakens the claimed victim-centred approach of the ICC and thus renders its victims' rights framework largely symbolic and substantively empty.

In addition to the fact that the judges dealing with reparation issues are not obliged to hear the victims' views and concerns before issuing their reparation orders, they also have the power to issue a collective reparation order on their own motion. Under rule 97 of the ICC RPE, the chamber may order reparation 'on a collective basis' and where appropriate 'a collective award' can be made. Strangely, collective reparations can even be awarded *despite* explicit demands for individual reparations by the victims, or with no regard for their views and concerns. This happened in the case of *Thomas Lubanga*,³²⁴ where, despite the explicit demands for individual reparations by the victims,³²⁵ the Appeals Chamber endorsed the Trial Chamber's reparation order, which only awarded collective reparations.³²⁶ The Trial Chamber's decision to award collective reparations instead of the individual reparations

³²⁴ ICC, *Prosecutor v. Lubanga Dyilo*, judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012, ICC-01/04-01/06, 3 March 2015.

³²⁵ ICC, *Prosecutor v. Lubanga Dyilo*, observations on the sentence and reparations by Victims a/0001/06, a/0003/06, et al., ICC-01/04-01/06, 18 April 2012, para., p. 15. In a submission by group V01, the legal representative for the victims stated that twelve of the fourteen victims wanted compensation. In a submission by group V02, similar wishes were expressed. See ICC, *Prosecutor v. Lubanga Dyilo*, observations of the V02 group of victims on sentencing and reparations, ICC-01/04-01/06, 18 April 2012, p. 16.

³²⁶ ICC, *Prosecutor v. Lubanga Dyilo*, decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06, 7 August 2012, para. 274.

requested by the victims disappointed the victims' legal representatives, who immediately lodged an appeal under article 82(4) of the Statute.³²⁷ The Appeals Chamber deemed it unnecessary to assess the merits of individual requests for reparation, since 'when only collective reparations are awarded ... a Trial Chamber is not required to rule on the merits of the individual requests for reparations'.³²⁸

For the Chamber therefore, not ruling on the merits of individual applications excludes any assessment of the harm and consequently overlooks the specific features of individual victims' claims. However, it should be recognised that the collective approach of the court in the *Thomas Lubanga* case was in reality mostly motivated by the court's intention to include as many victims as possible, as it realised that only a limited number of victims – relative to the considerable number of people affected by Lubanga's crimes – had applied for reparation.³²⁹

In contrast, in the *Katanga*³³⁰ and *Al Mahdi*³³¹ cases, a combination of individual reparations in the form of compensation and collective reparations was provided by the court. While in the *Al Mahdi* case the court indicated that individual reparations should be prioritised in the implementation of the reparation order,³³² in the *Katanga* case,³³³ Trial Chamber II emphasised that

the order for reparations would, for the most part, be missing its mark – delivery of justice to and reparation of the harm done to the victims as a result of the crimes committed by Mr Katanga – were it to disregard their almost unanimous preference, by awarding only collective reparations.³³⁴

The combination of individual and collective reparations in both the *Katanga* and the *Al Mahdi* cases stems from the need to balance the advantages and disadvantages of these forms of reparations when confronted with mass violations of human rights. As pointed out by the TFFV, individual reparations have the advantage of responding 'more adequately to the specific experiences of each victim in terms of the harm suffered as a result of the crimes that

³²⁷ ICC, *Prosecutor v. Lubanga Dyilo*, appeal against Trial Chamber I's decision establishing the principles and procedures to be applied to reparation of 7 August 2012, V01 team of legal representatives, ICC-01/04-01/06, 3 September 2012; ICC, *Prosecutor v. Lubanga Dyilo*, appeal against Trial Chamber I's decision establishing the principles and procedures to be applied to reparations of 7 August 2012, Office of Public Counsel for Victims/V02 team of legal representatives, ICC-01/04-01/06, 24 August 2012.

³²⁸ ICC, *Prosecutor v. Lubanga Dyilo*, judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012, ICC-01/04-01/06, 3 March 2015, para. 152.

³²⁹ ICC, *Prosecutor v. Lubanga Dyilo*, decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06, 7 August 2012, para. 219.

³³⁰ ICC, *Prosecutor v. Katanga*, order for reparations pursuant to article 75 of the Statute, ICC-01/04-01/07, 24 March 2017, paras 300 and 304.

³³¹ ICC, *Prosecutor v. Al Mahdi*, reparations order, ICC-01/12-01/15, 17 August 2017, paras 67, 80 and 90.

³³² *Ibid.*, para. 140.

³³³ ICC, *Prosecutor v. Katanga*, order for reparations, *supra* note 330, para. 298.

³³⁴ *Ibid.*, para. 339.

have occurred'.³³⁵ But they also have the intrinsic disadvantage of being necessarily selective, with the risk of creating stigmatisation due to the preferential treatment of victims who receive reparations.³³⁶ Similarly, although collective reparations – if awarded to all victims – have the potential to re-establish social solidarity, to simplify the implementation of reparation orders and to maximise the use of the limited resources available, they nevertheless do not exclude the possibility of tensions within a group, as evidenced in the *Thomas Lubanga* case. In their observations on the sentence and reparations, the legal representative of the V01 group in this case noted the difficulties related to issuing collective reparations to child soldiers, because they do not form a community. The legal representative submitted that

whilst from an objective standpoint, this community did suffer from the enlistment of its youth in the militia and the use of its children in hostilities, it also accepted this behaviour for the most part and supported the leaders who engaged in it. Many even collaborated. An award for reparations to the *Hema* community as a whole would therefore not be reasonable and might be perceived as unjust by other communities.³³⁷

Given their connection to the UPC, providing reparations to child soldiers – or Hema child victims, who were involved in or closely associated with killings, torture, pillaging and sexual violence that affected not only the Hema community but also other communities such as the Lendu, Ngiti and Alur – was seen by those excluded from reparations as inconsistent with the sense of justice that they expected from the court.³³⁸

As stated earlier, the ICC's reparation jurisprudence to date shows that ICC judges have shaped the forms of reparations by balancing the demands of the victims participating in the court proceedings, the high number of potential actual victims and the lack of resources to address the actual harm resulting from the mass violations of human rights.

Ultimately, the limitations associated with victims' legal standing within the ICC's reparation regime can be attributed to the competing interests between the rights of the accused and the interests of the victims due to the combination of retributive and restorative

³³⁵ ICC, *Prosecutor v. Lubanga Dyilo*, public redacted version of ICC-01/04-01/06-2803-Conf-Exp–Trust Fund for Victims' First Report on Reparations, ICC-01/04-01/06, 1 September 2011, para. 18. According to Lisa Magarrell, 'individual measures are important because international human rights standards are generally expressed in individual terms. Reparation to individuals therefore underscores the value of each human being and their place as rights-holders'. See L. Magarrell, 'Reparations in Theory and Practice', International Center for Transitional Justice, 2007, p. 5, available at <https://www.ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf>, accessed on 10 February 2020.

³³⁶ ICC, *Prosecutor v. Lubanga Dyilo*, public redacted version of ICC-01/04-01/06-2803, *supra* note 335, para. 19.

³³⁷ ICC, *Prosecutor v. Lubanga Dyilo*, observations on the sentence and reparations by Victims a/0001/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09 and a/1622/10, ICC-01/04-01/06, 18 April 2012, para. 16.

³³⁸ M. Goetz, *supra* note 292, pp. 423–423.

justice³³⁹ in one single setting.³⁴⁰ The magnitude and enormity of the harm resulting from mass violations of human rights, the sheer number of victims of such violations and the lack of resources are other causes that explain the limited legal standing of victims within international criminal justice. In practical terms, even though the ICC's reparation regime was inspired by the human rights principles discussed in the first section, the practice at the ICC stands as a strong reminder that these human rights principles were simply not designed to respond to the context of mass atrocities with an extremely large number of victims.

2.3. Conclusion

Drawing on a critical analysis of the development of victims' right to reparations in international criminal law, this chapter has detailed how international human rights law influenced and informed the drafters of the Rome Statute. By contrast with the UN *ad hoc* criminal tribunals, the ICC Statute introduced a number of innovative provisions on victims' participation and reparation. However, even though the ICC framework entrusts the ICC judges with the opportunity and responsibility to afford justice to those who have suffered from heinous crimes, the relevant dispositions and case law show that fully enforcing victims' right to reparations, as expressly guaranteed by global and regional human rights instruments and as interpreted by international human rights courts and monitoring bodies, remains a challenging – if not impossible – task in international criminal justice.

Ultimately, the international criminal tribunals and courts' jurisprudence acknowledged the necessity of addressing the harm suffered by the victims of international crimes, and overwhelmingly revealed that in cases involving mass atrocities – such as those which took place in Rwanda – undoing the harm suffered by the victims in ways that bring the parties to the *status quo ante* generally falls outside the range of possibilities. This is mainly due to the particular characteristics of the harm caused by international crimes such as genocide, crimes against humanity and war crimes. The enormity of the harm caused by such crimes, the high number of victims affected and the lack of resources to respond effectively to the victims' needs limit the ability of courts to address legal claims for reparations by the victims.

³³⁹ Victim participation is a key aspect of typical restorative justice processes. See K. S. van Wormer and L. Walker (eds), *Restorative Justice Today: Practical Applications*, London: Sage, 2013, pp. xv–xx.

³⁴⁰ See C. De Vos et al. (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge: Cambridge University Press, 2015, pp. 317–325.

CHAPTER THREE

GENOCIDE PERPETRATORS' ACCOUNTABILITY AND TRUTH-SEEKING IN RWANDA

*'Each genocide is unique. This uniqueness manifests itself in the differences of experiences of genocide survivors, the levels of social mobilization of aggressors, the public or secretive nature of the aggression, and the historical context from which the violence emerged.'*³⁴¹

On the road towards healing the wounds of the past and building reconciliation among Rwandans, Rwanda – like many other countries emerging from conflicts associated with mass human rights violations – was first confronted with two crucial issues or challenges that needed to be addressed: discovering the truth about past violations of human rights and attaining some form of accountability.

It should be recalled here that the genocide against the Tutsi was distinguished by the overwhelming number of Tutsi and moderate Hutu brutally massacred in a very short period of time (just one hundred days). The genocide against the Tutsi was notably characterised by the participation of individuals from all walks of life: ordinary citizens as well as religious, military and government leaders. Another peculiar aspect of the genocide against the Tutsi was its artisanal and decentralised character, in the sense that it was mainly executed by means of traditional weapons such as machetes, knives and handmade studded clubs and was organised at all levels of the administration.

As a result, in post-genocide Rwanda, victims and perpetrators were forced to live side by side as neighbours. Post-genocide Rwanda was also characterised by mass arrests and extensive detentions without charge³⁴² in a virtually non-existent judicial system. The judicial infrastructure had largely collapsed and legal professionals were either dead, had fled or faced genocide accusations.³⁴³ Moreover, Rwanda lacked the domestic legal framework to investigate, prosecute and punish the perpetrators of the international crimes that had been committed. Louis Joinet, UN Special Rapporteur on the impunity of perpetrators of violations of human rights (civil and political), described the situation in the following terms:

³⁴¹ M. A. Drumbl, 'Punishment, post genocide: From guilt to shame to "civis" in Rwanda', (2000) 75 *New York Law Review* 1224.

³⁴² Human Rights Watch, 'Law and Reality: Progress in Judicial Reform in Rwanda', 2008, p. 12; C. Tertsakian, *Le Chateau: The Lives of Prisoners in Rwanda*, London: Arves Books, 2008, p. 34.

³⁴³ Out of a total of 800 judges and lawyers that had staffed the courts in Rwanda before the genocide against the Tutsi in April 1994, only forty remained in the country. See United States Institute of Peace, 'Rwanda: Accountability for War Crimes and Genocide: A Report on a United States Institute of Peace Conference', 1 January 1995, p. 14, available at <https://www.usip.org/publications/1995/01/rwanda-accountability-war-crimes-and-genocide>, accessed on 10 March 2020.

The Special Rapporteur would like to draw attention to a number of particularly alarming situations for which he must admit he has no solutions to propose, though such situations – albeit largely for technical reasons – help to perpetuate impunity. How is it possible to combat impunity and ensure a victim's right to justice when the number of people imprisoned on suspicion of serious human rights violations is so large that it is technically impossible to try them in fair hearings within a reasonable period of time? Is it worth mentioning the case of Rwanda, where ... over 90,000 people, most of them facing charges of genocide, are in prison while the judicial system, considerably disrupted by events, is unable as yet to cope with the situation? It is also vain to imagine that an international criminal tribunal offers a solution. Such courts by their nature can try only a small number of people each year – whence the importance in conducting prosecutions of setting priorities, and trying first, wherever possible, those perpetrators of crimes under international law who were at the top of the hierarchy.³⁴⁴

As will be discussed later, all these exceptional features and the legacy of the genocide against the Tutsi shaped the way the government of Rwanda addressed and dealt with its past atrocities.

The genocide against the Tutsi took place at a time when Rwanda was neither legally nor institutionally prepared to promptly and effectively investigate and prosecute the serious human rights violations that had been perpetrated. In particular, international crimes such as genocide, crimes against humanity and war crimes were not provided for and punished as such in Rwanda. Although Rwanda had been a signatory to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide³⁴⁵ since 12 February 1975 and acceded to the 1949 Geneva Conventions and their Additional Protocols on 5 May 1964 and 19 November 1984 respectively, by 1994 these international conventions had not been domestically incorporated into national legislation and could thus not be enforced by domestic courts.

Confronted with the domestic legal landscape's inability to accommodate the prosecution and repression of international crimes – resulting from the mass violations of human rights – and the judicial system's inability to prosecute and punish the alleged perpetrators in a timely and effective manner, the government of Rwanda embarked on discussions with both national and international experts regarding a viable and coherent solution to the problems faced by Rwanda.

³⁴⁴ UN Sub-Commission on the Promotion and Protection of Human Rights, 'Question of the impunity of perpetrators of human rights violations (civil and political)', revised final report prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119, E/CN.4/Sub.2/1997/20, rev. 1, 2 October 1997, para. 48. See also UN Commission on Human Rights, 'Question of the violation of human rights and fundamental freedoms in any part of the world, with particular reference to colonial and other dependent countries and territories', report on the situation of human rights in Rwanda submitted by Mr René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, E/CN.4/1997/61, 20 January 1997, para. 69.

³⁴⁵ Convention for the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, GA res. 260 A (III) of 9 December 1948, entered into force 12 January 1951.

From 1 to 5 November 1995, an international conference on 'Genocide, Impunity, and Accountability',³⁴⁶ (hereinafter the Kigali international conference on genocide) took place in Kigali. The conference, which was organised by the Rwandan government and attended by 106 individuals from inside and outside Rwanda,³⁴⁷ sought to explore the various dimensions of accountability for genocide. It had two main objectives: to define clear strategies for trying the large number of people involved in the genocide and to analyse alternative forms of justice to the classical judicial system.³⁴⁸ At this conference, South African experts proposed a Truth and Reconciliation Commission, accompanied by some form of amnesty, but Rwanda's then president, Pasteur Bizimungu, categorically ruled out any possibility of amnesty and called for innovative forms of justice.³⁴⁹ The government of Rwanda excluded any recourse to amnesty because it believed that previous amnesties³⁵⁰ had led to the culture of impunity and to the normalisation of brutality against the Tutsi community which ultimately led to the genocide. This argument is undoubtedly a powerful one, as it can indeed be argued that not setting things right reinforced the rationalisations of, and justifications for, the violence and made further wrongdoing likely. The reason Rwanda rejected the South African proposal was out of fear that granting amnesty in the name of national reconciliation would only perpetuate the culture of impunity and favour new violence.³⁵¹

Whereas for South Africa selective prosecutions (i.e. accountability) of those who committed egregious crimes or of those who did not step forward to ask for amnesty, meant, above all, an official acknowledgement of what had happened, in Rwanda the widespread individualised prosecutions (i.e. maximal individual accountability) principally meant ending the impunity for the crimes committed against the Tutsi. To overcome the culture of

³⁴⁶ Office of the President, 'Recommendations of the Conference Held in Kigali from 1 to 5 November 1995, on "Genocide, Impunity, and Accountability": Dialogue for a National and International Response', Kigali, 1995. See also C. Braeckman, *Terreur africaine*, Paris: Fayard, 1996, pp. 323–337; W. A. Schabas, 'Justice, democracy, and impunity in post-genocide Rwanda: Searching for solutions to impossible problems', (1996) 7 *Criminal Law Forum* 529.

³⁴⁷ See Office of the President, 'Recommendations of the Conference Held in Kigali', *supra* note 346, pp. 33–45 (Annex: List of participants).

³⁴⁸ *Ibid.*, p. 8.

³⁴⁹ W. A. Schabas, 'Genocide Trials and Gacaca Courts', (2005) 3 *Journal of International Criminal Justice* 6.

³⁵⁰ The first recorded killings of Tutsi date back to 1959, when Hutu opposed to the Tutsi monarchy and social superiority massacred more than 20,000 Tutsi. The Tutsi persecution worsened following independence in 1962, and the first amnesty law was passed in May 1963. See law on general amnesty for political infractions committed between 1 October 1959 and 1 July 1962. (*Journal Officiel*, 1963, p. 299). In Kibilira from 11 to 13 October 1990, Tutsi civilians were attacked by army and militia units, resulting in the death of some 400 civilians. Five hundred homes were set on fire and 10,000 Tutsi 'subjects' were rounded up, imprisoned and tortured. See A. Wallis, *Silent Accomplice: The Untold Story of France's Role in the Rwandan Genocide*, London: I. B. Tauris, 2006, p. 58. In 1991, from mid-January to mid-March, several hundred more people, known as the Bigogwe (a regional group of north-western rural Tutsi), were murdered. See D. Dorsey, *Historical Dictionary of Rwanda*, Lanham, MD: Scarecrow Press, 1994, p. 179, and A. Twagilimana, *Historical Dictionary of Rwanda*, Lanham, MD: Scarecrow Press, 2007, p. 9. In March 1992, there was a large-scale massacre of the Tutsi in Gisenyi, Ruhengeri and Byumba, which is sometimes considered a dress rehearsal for the genocide. See A. Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, New York: Human Rights Watch, 1999, p. 70. 'Two more landmarks were the massacres at Kibuye in August 1992 and at Gisenyi in February 1993' (D. Krosiak, *The French Betrayal of Rwanda*, Bloomington: Indiana University Press, 2008, p. 38). See also A. Brannigan and N. A. Jones, 'Genocide and the Legal Process in Rwanda: From Genocide Amnesty to the New Rule of Law', (2009) 19 *International Criminal Justice Review* 195–197.

³⁵¹ United States Institute of Peace, *Rwanda: Accountability for War Crimes and Genocide*, *supra* note 343, p. 15.

impunity, individual accountability was deemed to be the necessary and appropriate solution.³⁵² In order to deter similar crimes in future, the government of Rwanda thus opted for full or maximal accountability of those responsible for criminal actions, instead of a general amnesty as proposed at the conference. According to William Schabas, at the end of the conference, the participants notably recommended that

new mechanisms be created to deal with the genocide cases, including specialized chambers of the existing courts, a classification scheme to separate the main organizers of the genocide from criminals with lesser degrees of responsibility, and a unique approach aimed at encouraging offenders to confess in exchange for substantially reduced sentences.³⁵³

In furtherance of these recommendations, in 1996 the transitional government of Rwanda promulgated the first genocide law in the country's history, which organised the prosecution of the crime of genocide and other related crimes committed in Rwanda in 1994 (hereinafter the 1996 Genocide Organic Law).³⁵⁴ The 1996 Genocide Organic Law was promulgated to meet the need to bring hundreds of thousands of suspected perpetrators of genocide to justice and to attend to the needs of the victims. As will be discussed in this chapter, the key features of the 1996 Genocide Organic Law, reflecting the main recommendations of the Kigali international conference on genocide,³⁵⁵ are the establishment of Specialised Chambers within the conventional ordinary and military courts (hereinafter Specialised Chambers) to try both genocide and crimes against humanity; the categorisation of the genocide perpetrators; the substantial reduction of penalties in return for confessions and guilty pleas; and the participation of victims in criminal proceedings as *parties civiles*.

Following the promulgation of the 1996 Genocide Organic Law, investigations and prosecutions of those responsible for the genocide against the Tutsi started before the Specialised Chambers in September 1996. But, a few years later, due to their incapacity to deal with the massive number of individuals accused of genocide – estimated at that time to be as many as 130,000 individuals³⁵⁶ – in a reasonable time, the Specialised Chambers were formally abolished by Organic Law No. 40/2000 of 26 January 2001.³⁵⁷ This law partially repealed the 1996 Genocide Organic Law and introduced the Gacaca courts system, which entrusted the responsibility to investigate, prosecute and punish to the members of the Rwandan community where the crimes were committed.

Against this background, this chapter seeks to critically examine the accountability mechanisms for genocide perpetrators put in place in Rwanda and their role in attending to the genocide victims' need for the truth about the human rights violations they suffered. With respect to these objectives, this chapter is subdivided into two sections. The first section

³⁵² Ibid.

³⁵³ W. A. Schabas, 2005, *supra* note 349, p. 6.

³⁵⁴ Organic Law No. 08/96 of 30 August 1996, *supra* note 39. Like other laws adopted after 1994, this organic law was published in the three official Rwandan languages, namely, Kinyarwanda, French and English.

³⁵⁵ See Office of the President, 'Recommendations of the Conference Held in Kigali', *supra* note 346.

³⁵⁶ See M. A. Drumbl, 'Rule of law amid lawlessness: Counseling the accused in Rwanda's domestic genocide trials', (1998) 29 *Columbia Human Rights Law Review* 549.

³⁵⁷ Organic Law No. 40/2000 of 26 January 2001, *supra* note 40.

discusses how Rwanda reshaped its existing legal framework to meet its international obligation to investigate, prosecute and punish the individuals responsible for the genocide against the Tutsi. The second section examines the Rwandan community-based justice system known as Gacaca and its contribution to holding perpetrators to account on the one hand and to truth-seeking or truth-telling on the other.

3.1. The prosecution of genocide perpetrators before the Specialised Chambers in Rwanda

Criminal accountability is one of the most important measures for serving justice to victims and a key feature of the right of victims to reparations. Holding perpetrators to account leads to the disclosure of the truth and brings the facts of the past atrocities to public awareness, thus giving some satisfaction to victims. As rightly observed by Stanley Cohen, for both society at large and individuals 'coming to terms with the past is to know (and admit to knowing) exactly what happened'.³⁵⁸

In a similar vein, Yael Danieli says that 'victims and their offspring who have been wronged ... find it considerably more difficult to begin the healing process if the responsible individuals cannot be identified and punished for their crimes'.³⁵⁹ She also emphasises that the investigation of crimes, the identification and bringing to trial of those responsible, the trial itself and the punishment of those convicted – all within the framework of reparative justice – are critical to the healing of individual victims, of their families and of societies and nations.³⁶⁰

Determined to hold accountable all individuals who participated in the genocide against the Tutsi and to thus eradicate the culture of impunity which led to the genocide, the government of Rwanda had to reshape its existing domestic legal framework to adapt it to the need to investigate, prosecute and punish the perpetrators of the genocide against the Tutsi, thereby simultaneously – implicitly – fulfilling its obligation to provide an effective remedy to victims.

As discussed below, the 1996 Genocide Organic Law – grounded on the principle of dual incrimination – established Specialised Chambers within the then existing civilian and military courts to handle the growing backlog of genocide-related cases. Avoiding any form of collective blame, genocide perpetrators were classified into four categories according to their degree of criminal participation in the genocide against the Tutsi, and a system of plea-bargaining was introduced for the first time in the Rwandan criminal system.

³⁵⁸ S. Cohen, *States of Denial: Knowing about Atrocities and Suffering*, Cambridge: Blackwell, 2001, p. 222.

³⁵⁹ Y. Danieli, 'Massive Trauma and the Healing Role of Reparative Justice: An Update', in C. Ferstman, M. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Leiden: Nijhoff, 2020, p. 42.

³⁶⁰ Ibid.

3.1.1. The principle of dual incrimination as an alternative solution to the lack of enabling legislation for the Genocide Convention

As mentioned earlier, at the time of the genocide against the Tutsi in April 1994, Rwanda had ratified the Genocide Convention³⁶¹ but, contrary to the requirements of article V of the Convention, the country had no domestic legislation giving effect to it. As the Genocide Convention is not a self-executing treaty, article V requires states to enact enabling domestic legislation³⁶² – a requirement that Rwanda failed to fulfil, for reasons that remain unknown.

Even though the Constitution of Rwanda regarded – and still does – ratified international treaties as part of domestic law on the condition that they are subsequently published in the *Official Gazette of the Republic of Rwanda*, domestic enabling legislation was necessary to give effect to the provisions of the Genocide Convention and, in particular, to provide penalties for the acts of genocide as described in articles II and III of the convention.

Faced with the legal vacuum left by the lack of implementing legislation as required by article V of the Genocide Convention, the Rwandan legislature turned to the 1977 Rwandan Penal Code and came to the view that the criminal acts enumerated in articles II and III of the Genocide Convention were covered by the then Rwandan Penal Code.³⁶³ On this premise, article 1 of the 1996 Genocide Organic Law provided that

the purpose of this ... is the organization of criminal proceedings against persons who are accused of having since 1 October 1990, committed acts set out and sanctioned under the Penal Code and which constitute:

- a) either the crime of genocide or crimes against humanity as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, in the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and its additional protocols, as well as in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968, the three of which were ratified by Rwanda; or
- b) Offences set out in the Penal Code which the Public Prosecution Department alleges or the defendant admits were committed in connection with the events surrounding the genocide and crimes against humanity.³⁶⁴

³⁶¹ Ratified by Presidential Decree No. 08/75 of 12 February 1975, *Journal Officiel*, 1975, p. 230.

³⁶² See P. Quayle, 'Unimaginable Evil: The Legislative Limitations of the Genocide Convention', (2005) 5 *International Criminal Law Review* 371; W. A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed., Cambridge: Cambridge University Press, 2009, p. 405; M. Milanovic, 'State Responsibility for Genocide', (2006) 17 *European Journal of International Law* 553–604; J. Webb, 'Genocide Treaty – Ethnic Cleansing – Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia', (1993) 23 *Georgia Journal of International and Comparative Law* 337 et seq.

³⁶³ See the preamble and article 1 of the 1996 Genocide Organic Law. The Penal Code did not expressly punish genocide or crimes against humanity, and the courts based their decisions on the legal provisions for ordinary crimes committed with genocidal intent.

³⁶⁴ 1996 Genocide Organic Law, article 1.

From the above-mentioned article, it appears that the prior ratification of the Genocide Convention and customary international law were regarded as sufficient legal grounds for the Rwandan Transitional National Assembly to pass the 1996 Genocide Organic Law, grounded on the principle of dual incrimination – a principle that the law itself established. Based on the simultaneous application of contemporary Rwandan criminal law and of international law, the principle of dual incrimination consisted, first, in establishing a specific offence under the 1977 Penal Code and, second, in verifying whether that offence simultaneously constituted a crime of genocide and/or a crime against humanity under international law.³⁶⁵ In practice, while prosecuting and/or trying crimes allegedly committed as part of the genocide and/or crimes against humanity in 1994, judges of the Specialised Chambers were legally requested to rely on domestic law (the 1977 Penal Code), the Genocide Convention, the four Geneva Conventions of 1949 and their Additional Protocols, and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26 November 1968.³⁶⁶

Since these international treaties, ratified by Rwanda prior to the genocide against the Tutsi, do not provide for penalties for any of the international crimes committed during the genocide against the Tutsi, prosecutions and punishment were based on the 1977 Penal Code, which at the time of the commission of such crimes prohibited and punished the underlying criminal acts of genocide, such as murder,³⁶⁷ rape³⁶⁸ and assault.³⁶⁹

Accordingly, for an individual found guilty of murder, rape or assault as a crime of genocide, the applicable penalty would be that prescribed by the 1977 Rwandan Penal Code. According to Jastine C. Barrett, Daniel de Beer, who was involved in drafting the 1996 Genocide Organic Law, 'affirmed that dual incrimination required elements of both crimes to be made out, and that it was therefore necessary to establish the specific intent to destroy the Tutsi group for a finding of genocide'.³⁷⁰

However, it is difficult to determine whether the 1996 Genocide Organic Law effectively required prosecutors to establish a specific intent to destroy the Tutsi group since, based on various judgments reported by *Avocats sans Frontières* (ASF),³⁷¹ the *mens rea* seems to have been 'collectively' assumed for all acts committed against the Tutsi. The mere conviction of the Specialised Chambers' judges that a criminal act (i.e. *actus reus*) such as killing, assault, destruction or pillage of the Tutsi's property, had been committed against a member of the Tutsi ethnic group was sufficient for them to issue a guilty verdict for genocide. The failure to establish the *mens rea* in individual cases or the failure to apply the dual incrimination

³⁶⁵ Ibid.

³⁶⁶ S. Rugege and A. M. Karimunda, 'Domestic Prosecution of International Crimes: The Case of Rwanda', in G. Werle et al. (eds), *Africa and the International Criminal Court*, The Hague: Asser Press, 2014, pp. 86–87.

³⁶⁷ See Decret-Loi no. 21/77 Code Penal du 18 Aout 1977 (1977 Rwandan Penal Code), articles 311 to 317.

³⁶⁸ Ibid., articles 360 and 361.

³⁶⁹ Ibid., articles 318 to 324.

³⁷⁰ C. B. Jastine, *Child Perpetrators on Trial: Insights from Post-Genocide Rwanda*, Cambridge: Cambridge University Press, 2019, p. 112.

³⁷¹ *Avocats sans Frontières* (ASF), *Recueil de Jurisprudence Contentieux du Genocide, Tome I, Janvier 2002; Tome II, Juin 2002*. See also ASF, *Tome IV, Tome V, Tome VII* (no date).

principle, as explained by Daniel de Beer cited above, thus probably has its roots in the fact that none of the judges were, at the time of the trials, trained in international criminal law.

As reported by René Degni-Ségui, the Special Rapporteur of the Commission on Human Rights, ‘practically none of these judges are jurists; of the 89 judges appointed in May 1996, only 20 or so, or less than one fourth, had received adequate legal training; over 75 per cent of the judges were trained on the job and, what is more, to hear cases of genocide, which is a serious and complex offence that carries the death penalty’.³⁷²

It should be noted that, in contrast to de Beer’s interpretation of the dual incrimination principle of the 1996 Genocide Organic Law, Madeline Morris – who was also involved in drafting the law –

considered there to be no legal basis in Rwandan law in force at the time of the genocide to try individuals for the crime of genocide: the Genocide Law simply introduced special procedures and courts for crimes already codified under the Penal Code at the time of their commission. Thus there was no requirement to show specific intent.³⁷³

Despite the above divergence in the interpretation of the dual incrimination principle of the 1996 Genocide Organic Law, it is worth noting that the combination of prior ratification of relevant international conventions by Rwanda and of punishment provisions as provided by the 1977 Penal Code was primarily motivated by the fear that ‘prosecuting the crime of genocide on the basis of the Penal Code would mean that perpetrators of genocide could only be charged with murder, rape, assault, destruction of properties etc., as domestic crimes. Most of these crimes were subjected to ten years ‘prescription’.³⁷⁴ The principle of dual incrimination that resulted from the combination of the international conventions ratified by Rwanda and the 1997 Penal Code implicitly extended the definitions of the crime of genocide and of crimes against humanity to include all acts punished by the 1997 Penal Code³⁷⁵ committed in relation to the genocide against the Tutsi. This implicit extension turned all ordinary crimes from the 1997 Penal Code that were committed against the Tutsi, or in relation to the genocide against the Tutsi, into crimes to which statutory limitations would not apply.³⁷⁶ The ordinary crimes that suddenly became imprescriptible ones include murder, rape, assault, burglary and destruction or pillage of property. Specifically, ordinary crimes contained in the 1977 Penal Code which usually enjoyed a statutory limitation period of one

³⁷² UN Commission on Human Rights, ‘Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights’, E/CN.4/1997/61, 20 January 1997, *supra* note 344, para. 69.

³⁷³ *Ibid.*

³⁷⁴ S. Rugege and A. M. Karimunda, ‘Domestic Prosecution of International Crimes: The Case of Rwanda’, in G. Werle et al. (eds), *supra* note 366, p. 87.

³⁷⁵ For a detailed discussion of the crimes under the Penal Code in the jurisprudence of the Specialised Chambers under Organic Law No. 08/96, see ASF, *Vade-Mecum: Le Crime de Génocide et Les Crimes Contre L’humanité devant Les Juridictions Ordinaires du Rwanda*, Kigali and Brussels: ASF Publications, 2004, p. 109 et seq. See also P. C. Bornkamm, *supra* note 21, pp. 242–246.

³⁷⁶ See UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted and opened for signature, ratification and accession by General Assembly resolution 2391 (XXIII) of 26 November 1968.

year for petty offences (*contravention*),³⁷⁷ five years for misdemeanours (*délit*)³⁷⁸ and ten years for felony (*crime*)³⁷⁹ were implicitly given the status of non-subjection to statutory limitations, similar to that of international crimes.³⁸⁰

Furthermore, the combination of previously ratified conventions and the 1977 Penal Code was mostly concerned with the need to respect the principle of legality (i.e. non-retroactivity of criminal law) enshrined in the 1991 Constitution of Rwanda and in the ICCPR, ratified by Rwanda in 1975.³⁸¹ The legislator of the 1996 Genocide Organic Law believed that prior ratification of the above-mentioned international conventions by Rwanda complied with the '*nullum crimen sine lege*' principle whereas sanctioning with penalties provided by the 1977 Rwandan Penal Code for similar acts respected the '*nulla poena sine lege*' principle.³⁸² According to Fierens,

the 1977 Rwandan Penal Code incriminated acts equivalent to genocide or crimes against humanity, but under different appellations. Thus, it was put forward that punishing such acts with the sentences provided for in the code would suffice to counter retroactivity.

Hence, it is evident that the 1996 Genocide Organic Law did not create new crimes or new penalties for acts committed between 1 October 1990 and 31 December 1994 'given that Rwanda has ratified these three Conventions ... but without having provided penalties for these crimes ... the prosecutions must be based on the Penal Code'.³⁸³ But while these domestic efforts to comply with the principle of legality may be worthy of praise, it is not clear that they were entirely necessary. The principle of legality is not absolute. It should be recalled here that article 15(2) of the ICCPR stipulates that 'nothing ... shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations'. From article 15(2) of the ICCPR, it appears that even if the 1996 Genocide Organic Law would have led to a domestic criminalisation *ex post facto*, this would have been an acceptable price to pay to achieve justice and restore the rule of law.³⁸⁴

³⁷⁷ See the 1977 Rwandan Penal Code, article 18: '*L'infraction que les lois punissent à titre principal d'une peine d'emprisonnement n'excédant pas deux mois et d'une amende n'excédant pas deux mille francs ou de l'une de ces peines, est une contravention.*'

³⁷⁸ Ibid., article 19: '*L'infraction que les lois punissent à titre principal d'une peine d'emprisonnement supérieure à deux mois et n'excédant pas cinq ans et d'une amende supérieure à deux mille francs, ou de l'une de ces deux peines, est un délit.*'

³⁷⁹ Ibid., article 20: '*L'infraction que les lois punissent à titre principal de la peine de mort ou d'une peine d'emprisonnement supérieure à cinq ans, est un crime.*'

³⁸⁰ Ibid., article 111: '*L'action publique résultant d'une infraction se prescrit: 1. Par dix années révolues pour les crimes; 2. Par trois années révolues pour les délits; 3. Par une année révolue pour les contraventions.*'

³⁸¹ Article 12 of the Constitution of the Republic of Rwanda of 10 June 1991, *Journal Officiel*, 1991, p. 615 and article 15(1) of the International Covenant on Civil and Political Rights, ratified by Decree Law No. 8/75 of 12 February 1975.

³⁸² J. Fierens, 'Gacaca Courts: Between Fantasy and Reality', (2005) 3(4) *Journal of International Criminal Justice* 907.

³⁸³ See the 1996 Genocide Organic Law, preamble.

³⁸⁴ S. G. Marc and P. Antony, 'Genocide, Crimes against Humanity and War Crimes: A Victimological Perspective on International Criminal Justice', in R. Letschert et al., *Victimological Approaches to International Crimes: Africa*, Cambridge: Intersentia, 2011, p. 15.

Interestingly, in its very first case, the ICTR Trial Chamber considered the prior accession of Rwanda to the Genocide Convention as sufficient proof that the punishment of the crime of genocide already existed under Rwandan law in 1994:

The Chamber notes that Rwanda acceded, by legislative decree, to the Convention on Genocide on 12 February 1975. Thus, punishment of the crime of genocide did exist in Rwanda in 1994, at the time of the acts alleged in the Indictment, and the perpetrator was liable to be brought before the competent courts of Rwanda to answer for this crime.³⁸⁵

Although one may sympathise with the Trial Chamber's conclusion, it can be observed that, in the absence of implementing legislation providing for the punishment of acts of genocide in Rwanda, punishing such acts committed in 1994 would have been difficult without consideration of the penalties enshrined in the 1977 Penal Code for similar acts.

In sum, Rwanda lacked the domestic legal framework to investigate, prosecute and punish the individuals responsible for the genocide against the Tutsi. However, the transitional government of Rwanda had the will, and then found the way, to overcome all legal and institutional challenges that would have otherwise prevented it from meeting its international obligations to investigate, prosecute and punish the perpetrators of international crimes. The 1996 Genocide Organic Law provided the legal and institutional framework through which the crimes committed during the genocide against the Tutsi were investigated for what they really were, namely, international crimes, and the perpetrators prosecuted and tried. The 1996 Genocide Organic Law not only constituted the first step towards the enforcement of the victims' right to an effective remedy and the domestication of the Genocide Convention in Rwanda, but it also served as the enabling legislation for the establishment of the Gacaca system – a system through which the majority of genocide perpetrators were tried, as discussed later in the second section of this chapter.

3.1.2. The mandate of the Specialised Chambers and its impact on the government of Rwanda's obligation to investigate, prosecute and punish

As mentioned in the introduction to this chapter, in the aftermath of the genocide against the Tutsi the entire Rwandan justice system had collapsed and lacked sufficient human and infrastructure resources due to the destruction of the whole judicial apparatus.³⁸⁶ In 1994, the total number of judges and prosecutors had dramatically fallen to 256 (244 judges and twelve prosecutors),³⁸⁷ compared with seventy prosecutors and 758 judges before 1994.³⁸⁸ When it

³⁸⁵ ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, judgment of 2 September 1998, para. 496.

³⁸⁶ Commission of Inquiry: 'Report of the International Commission of Inquiry into Human Rights Violations in Rwanda', 1993; O.-L. Bouvier, 'Magistrature: Sous la dictature de l'exécutif', (1993) *Dialogue* 4–24. See also P. Sullo, *Beyond Genocide: Transitional Justice and Gacaca Courts in Rwanda: The Search for Truth, Justice and Reconciliation*, The Hague: Asser Press, 2018, pp. 58–60; P. Clark, 'Hybridity, Holism and Traditional Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda', (2007) 39(4) *George Washington International Law Review* 777.

³⁸⁷ National Service of Gacaca Courts (NSGC), 'Gacaca courts in Rwanda', June 2012, p. 16.

³⁸⁸ See H. Nyseth Brehm, C. Uggen and J.-D. Gasanabo, 'Genocide, Justice, and Rwanda's Gacaca Courts', (2014) 30(3) *Journal of Contemporary Criminal Justice* 335.

was established in 1997, the Bar consisted of only thirty-five lawyers and eighteen interns.³⁸⁹ Most judges, prosecutors and lawyers who were not killed had fled the country or were detained for their alleged participation in the genocide against the Tutsi. The detention of more than 120,000 individuals awaiting trial (i.e. almost 1.7 per cent of the entire Rwandan population, estimated at 7,142,755 as of August 1991)³⁹⁰ with no formal charge of any crime³⁹¹ attracted harsh criticisms of the new government.³⁹²

To preserve the integrity of the judiciary and enable economical use of material and human resources, rather than create an independent specialised tribunal, which would have stretched the limited material and human resources of the justice system at that time, the 1996 Genocide Organic Law accommodated the Specialised Chambers within the existing tribunal of primary instance and military courts³⁹³ to investigate, prosecute and punish the perpetrators of the genocide against the Tutsi.

As the need to speed up the genocide trials was self-evident, in order to try as many genocide cases as possible each of the thirteen Specialised Chambers was allowed to have as many benches as it deemed necessary. The bench of each Specialised Chamber was composed of at least three magistrates,³⁹⁴ a composition which – considering the extremely low number of judicial staff – still managed to avoid a single-judge bench, which was considered not reliable as it could have run the dual risk of corruption and authoritarianism. Despite the pressing need to speed up the genocide trials, the judges of the Specialised Chambers had to deal with the cases related to the genocide against the Tutsi concurrently with other ordinary cases within the jurisdiction of the tribunal of primary instance and military courts assigned to them by their respective presidents.

Whereas the *ratione materiae* jurisdiction of the Specialised Chambers was limited to acts committed in Rwanda between 1 October 1990 and 31 December 1994 that qualified as genocide, war crimes and/or crimes against humanity as set out and sanctioned under the 1977 Penal Code, their *ratione temporis* jurisdiction was much wider than that of the ICTR.³⁹⁵ Unlike the temporal jurisdiction of the ICTR, which covered the period from 1 January 1994 to 31 December 1994,³⁹⁶ the extension of the Specialised Chambers' *ratione temporis* jurisdiction from 1 October 1990 seems to have been decided in order to allow the chambers to address all crimes connected to the ill treatment of members of the Tutsi ethnic group that had been perpetrated since the invasion of the Tutsi-led rebel movement RPF on 1 October 1990.

³⁸⁹ S. Rugege and A. M. Karimunda, *supra* note 366, p. 85.

³⁹⁰ Country Information and Policy Unit (UK Home Office), 'Rwanda Assessment', April 2001.

³⁹¹ NSGC, *supra* note 387, p. 14.

³⁹² Amnesty International, 'Rwanda: The troubled course of justice', AI Index: AFR 47/10/00, April 2000, available at <https://www.amnesty.org/download/Documents/132000/afr470102000en.pdf>, accessed on 10 September 2020.

³⁹³ 1996 Genocide Organic Law, article 19.

³⁹⁴ *Ibid.*, article 21.

³⁹⁵ It covered the period from the launch of the civil war by the rebel group the Rwandan Patriotic Front (RPF) on 1 October 1990 until the end of December 1994, that is, the end of the period of civil war.

³⁹⁶ ICTR Statute, article 7.

Both the ICTR³⁹⁷ and the Specialised Chambers had jurisdiction over all criminal acts committed by all participants in the conflict. However, the crimes allegedly committed by the RPF were not prosecuted either by the Specialised Chambers or the ICTR, despite the fact that they were labelled as crimes against humanity and war crimes by several UN reports.³⁹⁸ Unlike the transitional justice process in South Africa, which included human rights violations committed by both the former and new regimes, in Rwanda only crimes committed by members and supporters of the former regime were prosecuted.³⁹⁹ Rwandan officials treated (and still treat) any charges of RPF massacres as shameful attempts to equate that behaviour with the genocide.⁴⁰⁰ In fact, calls for accountability of alleged RPF crimes are often equated with genocide denial, minimising genocide or double genocide theory.⁴⁰¹ Government officials often explain that the vengeful killings that were committed by the RPF soldiers who saw fellow Tutsi massacred were tried by the Rwandan military courts as ordinary crimes because of their supposedly isolated nature.⁴⁰²

The genocide trials conducted under the 1996 Genocide Organic Law began before Specialised Chambers of the ordinary Rwandan courts on 27 December 1996 with the trial of Egide Gatanazi, a former head of Nyagakombe Cell in the Kibungo prefecture. On 3 January 1997, Gatanazi was found guilty and sentenced to capital punishment by the Specialised Chamber of Kibungo primary instance tribunal.⁴⁰³ He was publicly executed on 24 April 1998⁴⁰⁴ after the Court of Appeal of Kigali dismissed his appeal and confirmed the earlier judgment.⁴⁰⁵

³⁹⁷ Ibid., articles 1, 2, 3 and 4.

³⁹⁸ See for instance, UN Commission on Human Rights, 'Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights', E/CN.4/1995/70, 11 November 1994, p. 40; United Nations Security Council, final report of the Commission of Experts established pursuant to Security Council resolution 935 (1994), S/1994/1405, 9 December 1994, paras 181–182.

³⁹⁹ See S. Vandeginste, 2003, *supra* note 235, p. 252; Human Rights Watch, *Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts*, New York: Human Rights Watch, 2011, p. 5, available at https://www.hrw.org/sites/default/files/reports/rwanda0511webwcover_0.pdf, accessed on 27 October 2020.

⁴⁰⁰ See President Paul Kagame, 'Preface', in P. Clark and Z. D. Kaufman (eds), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, New York: Columbia University Press, 2009, p. xxiii; OAU, 'The OAU and Rwanda: Background Information', document presented to IPEP, November 1999, paras 35–39; International Panel of Eminent Personalities (IPEP), 'Report on the 1994 genocide in Rwanda and surrounding events (selected sections)', (2001) 40(1) *International Legal Materials* 217–218. See also L. T. Waldorf, 'Mass justice for mass atrocity: Transitional justice and illiberal peace-building in Rwanda', PhD thesis, NUI Galway, November 2013, pp. 110–111.

⁴⁰¹ S. Scott, 'The Limits of a Genocide Lens: Violence against Rwandans in the 1990s', (2019) *Journal of Genocide Research* 505.

⁴⁰² See 'Letter to ICTR Chief Prosecutor Hassan Jallow in Response to His Letter on the Prosecution of RPF Crimes', available at <https://www.hrw.org/news/2009/08/14/letter-ict-chief-prosecutor-hassan-jallow-response-his-letter-prosecution-rpf>, accessed on 17 February 2020. See also Alison Des Forges, *supra* note 21, pp. 16–17.

⁴⁰³ See NSGC, *supra* note 387, p. 25.

⁴⁰⁴ P. R. Bartrop, *A Biographical Encyclopedia of Contemporary Genocide: Portraits of Evil and Good*, Santa Barbara, CA: ABC-CLIO, 2015, p. 163.

⁴⁰⁵ Court of Appeal of Kigali, *The Prosecutor v. Gatanazi*, 4 April 1997, available at https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=DA55466D9CD77D64C125708500420715&action=openDocument&xp_countrySelected=RW&xp_topicSelected=GVAL-992BU6&from=state&SessionID=DZNAPGENAA, accessed on 21 October 2019.

It is notable that at the start of the genocide trials before the Specialised Chambers the penalties against the perpetrators tended to be more severe. They were, however, gradually reduced. For instance, the statistics published by Human Rights Watch⁴⁰⁶ and the UN show that out of 322 individuals tried by the Specialised Chambers by the end of December 1997, 34.3 per cent (i.e. 111 individuals) were sentenced to the death penalty, 33.8 per cent (i.e. 109 individuals) to life imprisonment and 25.1 per cent (i.e. 81 individuals) to prison terms less than life imprisonment; 6.9 per cent (i.e. 19 individuals) were acquitted.⁴⁰⁷ In a similar vein, but with some minor differences, *RCN Justice et Démocratie* reported that in the first year of genocide trials, 36 per cent of the accused were sentenced to the death penalty, 34 per cent to life imprisonment and 25 per cent to prison sentences other than life imprisonment, while 5.6 per cent were acquitted.⁴⁰⁸ Another set of figures from *Avocats sans Frontières* (ASF) shows that between 1999 and 2006 (i.e. before the abolition of the death penalty in 2007) around 16 per cent of sentences issued were death sentences and 27 per cent were life imprisonment.

The severity of the penalties issued by the Specialised Chambers and their progressive decline can partially be explained by the highly volatile and contentious socio-political environment that existed in Rwanda and which gradually diffused through the trials. The Specialised Chambers were criticised for being seemingly unprofessional. They were accused of corruption,⁴⁰⁹ of being influenced by significant external pressure,⁴¹⁰ of due process violations,⁴¹¹ of lacking legal competence,⁴¹² of detaining numerous suspects without any form of judicial review⁴¹³ and ultimately of being victor's justice.⁴¹⁴

3.1.3. The categorisation of genocide suspects and its legal implications

In addition to the dual incrimination principle, the 1996 Genocide Organic Law placed the genocide perpetrators into categories. Recognising that the acts of genocide committed in Rwanda spanned a wide range of offences, including planning, executing, inciting, killing,

⁴⁰⁶ See also B. Hola and H. Nyseth Brehm, 'Punishing Genocide: A Comparative Empirical Analysis of Sentencing Laws and Practices at the International Criminal Tribunal for Rwanda (ICTR), Rwandan Domestic Courts, and Gacaca Courts,' (2016) 10(3) *Genocide Studies and Prevention: An International Journal* 72–75.

⁴⁰⁷ Human Rights Watch, 'Justice and Responsibility', 1999, available at <https://www.hrw.org/reports/1999/rwanda/Geno15-8-05.htm>, accessed on 18 February 2020. See also UN Commission on Human Rights, 'Human Rights Field Operation in Rwanda: Report of the United Nations High Commissioner for Human Rights', 19 February 1998, E/CN.4/1998/61, para. 36, available at <https://www.refworld.org/docid/3ae6b0e84.html>, accessed on 18 February 2020.

⁴⁰⁸ Cited in N. Jones, *The Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha*, Hoboken: Taylor & Francis, 2009, p. 88.

⁴⁰⁹ Amnesty International, 'Gacaca: A Question of Justice', 17 December 2002, AFR 47/007/2002, p. 16, available at <https://www.refworld.org/docid/3f1524bc4.html>, accessed on 18 February 2020.

⁴¹⁰ Ibid.

⁴¹¹ M. A. Drumbl, 'Pluralizing international criminal justice', (2005) 103(6) *Michigan Law Review* 1313.

⁴¹² D. Mukantaganzwa, *Gacaca Jurisdictions: Genesis, Organization, Functioning, Achievements and Future Prospects*, Kigali: National Service of Gacaca Jurisdictions, 2004.

⁴¹³ S. Vandeginste, 'Justice, reconciliation and reparation after genocide and crimes against humanity: The proposed establishment of popular Gacaca tribunals in Rwanda', paper presented at the All-Africa Conference on African Principles of Conflict Resolution and Reconciliation, Addis Ababa, 8–12 November 1999, p. 10.

⁴¹⁴ J. Sarkin, 'Promoting justice, truth and reconciliation in transitional societies: Evaluating Rwanda's approach in the new millennium of using community based Gacaca tribunals to deal with the past', (2000) 2 *International Law Forum* 10.

raping, looting and destruction of property, and carried different levels of severity, the legislator of the 1996 Genocide Organic Law avoided any form of collective liability and classified genocide perpetrators into four categories (reduced to three by the 2004 Gacaca Organic Law) in accordance with their degree of participation⁴¹⁵ and on the basis of the gravity of the offences they had committed. The category of each genocide perpetrator was determined not only by the acts of the individual but also by the title or position that he or she held at the moment of the commission of the criminal acts.⁴¹⁶ The rationale for placing genocide suspects into different categories was an implicit recognition that, even though many individuals were involved in the genocide against the Tutsi, and to some extent shared the same intent, they nevertheless played different roles of varying severity and therefore should not incur the same penalty. The genocide perpetrators' categorisation thus indicated the seriousness of the crime committed and the appropriate punishment.⁴¹⁷

When choosing how to categorise alleged perpetrators, the government of Rwanda decided that crimes against the person such as rape, murder and similar serious crimes should be prosecuted, whereas other crimes, such as burning houses and destroying cattle (which, as ordinary crimes, were sanctioned with imprisonment penalties according to the 1977 Penal Code), had to be addressed by non-detention mechanisms, i.e. restitution and/or compensation. Therefore, while individuals responsible for crimes against persons (killing or serious assault) were classified into the first, second or third category depending on their degree of criminal responsibility, individuals who committed property-related offences were placed into the fourth category. Specifically, the first category included those who allegedly committed genocide, war crimes and/or crimes against humanity or incited others to commit such crimes in their capacity as high-ranking officials in religious or state institutions (i.e. the planners, organisers, instigators, supervisors). It also covered the notorious murderers⁴¹⁸ as well as those who allegedly committed rape and sexual offences.⁴¹⁹ The suspects placed in the second category were perpetrators and accomplices who committed intentional homicide or caused bodily harm with the intent to kill.⁴²⁰ The third category comprised perpetrators who inflicted serious harm on victims without the intent to kill.⁴²¹ The fourth category included acts against property.⁴²² Henceforth, while the convicts from the first and second categories were liable to be sentenced to death and life imprisonment respectively, those from the third category were liable to the penalties corresponding to their criminal responsibility under the 1977 Penal Code. Offenders in the fourth category were only liable for civil reparation.

One of the most important features of the categorisation in terms of reparations due to the victims is that collective civil liability for the harm caused countrywide imposed on the

⁴¹⁵ 1996 Genocide Organic Law, article 1.

⁴¹⁶ *Ibid.*, article 2.

⁴¹⁷ *Ibid.*

⁴¹⁸ Those genocide perpetrators who distinguished themselves by the zealotry or excessive wickedness with which they took part in the genocide against the Tutsi.

⁴¹⁹ 1996 Genocide Organic Law, article 2.

⁴²⁰ *Ibid.*

⁴²¹ *Ibid.*

⁴²² *Ibid.*

perpetrators of the first category. As explained in detail in chapter four, with the 1996 Genocide Organic Law the genocide victims – including victims of crimes whose direct perpetrators were not identified – could seek reparation from any of the genocide perpetrators in the first category,⁴²³ as they were held jointly and severally liable for all damages caused in the country by their criminal acts.

Apart from the categorisation of genocide perpetrators, the 1996 Genocide Organic Law introduced the confession and guilty plea procedure.⁴²⁴ As discussed in the following subsection, this procedure helped to obtain evidence and to enable many victims of the genocide against the Tutsi to find out the whereabouts of their family members and belongings. Unfortunately, it also served the selfish interests of certain perpetrators and, as detailed in the following subsection, compromised certain guarantees of fair trial and due process, such as the presumption of innocence, the right to remain silent and the privilege against self-incrimination provided and protected by both the Constitution of Rwanda⁴²⁵ and the ICCPR⁴²⁶ as well as many other international⁴²⁷ and regional⁴²⁸ legal instruments that have force of law in Rwanda.

3.1.4. The effects of the confession and guilty plea procedure on the realisation of victims' rights

Apart from their explicit retributive purpose, the criminal trials conducted under the 1996 Genocide Organic Law aspired to promote reconciliation, deter future violence, express victims' outrage, establish peace and, most importantly, eradicate the culture of impunity. The procedure of plea-bargaining was purposely established to speed up genocide proceedings, facilitate national reconciliation and establish the truth by encouraging people to acknowledge their wrongdoings and to repent.⁴²⁹

Similar to the Anglo-Saxon plea-bargaining system, the confession and guilty plea procedure was primarily introduced in an attempt to overcome the major problem of collecting evidence and information on the commission of the genocide against the Tutsi. As perpetrators knew more about the details of what happened than the victims who were hiding at the time, the legislator of the 1996 Genocide Organic Law offered a reduced penalty – as an incentive – to anyone who confessed and pleaded guilty to his/her crimes.

Since most of the victims – if not all—were forced into hiding and could not directly witness the criminal acts relating to genocide, the reduction of penalties in exchange for confessions and expressions of remorse was deemed to be a necessary price to pay to collect evidence and establish the truth concerning the genocide against the Tutsi.

⁴²³ Ibid., article 30.

⁴²⁴ Ibid., articles 4 to 16.

⁴²⁵ See article 29.

⁴²⁶ See article 14.

⁴²⁷ See article 40 of the UNCRC.

⁴²⁸ See article 7 of the African Charter.

⁴²⁹ Ibid., articles 4 to 13.

Therefore, in exchange for a complete confession, including a detailed description of the acts committed, the names of all accomplices and apologies to the victims, genocide perpetrators in the second, third and fourth categories enjoyed a substantial reduction in their sentence if they pleaded guilty. The perpetrators from these categories could receive the alternative punishment of community service rather than extended prison sentences if they offered a truthful confession of their involvement in the genocide against the Tutsi, followed by repentance and apologies to victims and to the Rwandan community.⁴³⁰ The reduced penalties were afforded to all genocide perpetrators except those placed in the first category. Under the 1996 Genocide Organic Law, these were still eligible for the confession and guilty plea procedure but could not benefit from any reduction of penalty.⁴³¹ However, they started to benefit from penalty reduction following the adoption of the Gacaca Organic Law in 2001.

The goal of the confession and guilty plea procedure was threefold. Not only did it aim at accelerating genocide trials and thus at resolving the overwhelming problem of numerous detainees being kept in pre-trial detention without charge in overcrowded prisons, it also sought to mitigate the logistical difficulties of prosecutions on a larger scale, in particular with respect to gathering evidence of the involvement of lower-ranking perpetrators. As noted by Pietro Sullo, while there existed written evidence, such as lists of arms distributions, documents on militia training, newspaper articles and scripts of radio broadcasts, against the planners and masterminds of the genocide against the Tutsi, evidence against the lower-ranking officials was poor and close to non-existent.⁴³²

In practice, the confession and guilty plea procedure arguably had a double-edged effect. On the one side, it allowed some of the victims to learn the whereabouts of their family members and belongings, and thus satisfied their right to the truth, a component of the right to an effective remedy. Through the confession and guilty plea procedure, genocide victims were able to discover how, where and when their family members were killed as well as the places where their bodies were dumped, thereby allowing them to give their relatives a decent burial.

Since the admissibility of a confession and guilty plea required the confessor to give all the details of the commission of the crime, a form entitled ‘Record of Confession, Guilty Plea, Repentance and Apology’ was made available to those willing to confess. It included fields for the identity of the confessor, the details of the crimes confessed (i.e. the nature of the act, the weapons used and the time and place of the crime) and the names of the victims, accomplices and any witnesses.⁴³³ Most importantly, a blank space was left for handwritten explanations of the events, apologies and an account of how the concerned confessor or perpetrator was prepared to live with the survivors.⁴³⁴ According to Emil Towner, this form ‘was the official document by which perpetrators admitted guilt, took responsibility for the atrocities they committed, and placed the horrific details of the 1994 genocide on the public

⁴³⁰ Ibid.

⁴³¹ Ibid., article 5.

⁴³² P. Sullo, *supra* note 386, p. 106.

record'.⁴³⁵ In the same vein, emphasising the role of apologies, Robert R. Weyeneth wrote that

in stimulating debate about history and its significance, acknowledgment of wrong-doing puts the issue on record, formally and publicly. In this way, the apology becomes a part of the story ... As public statements about history, apologies offer a perch for viewing the past, and that perspective becomes part of the historical record for subsequent generations.⁴³⁶

It is worth noting that formal apologies by perpetrators to their victims and subsequent forgiveness from the victims were seen by the legislator as a necessary means to gain peace of mind for the survivors and to reintegrate perpetrators back into the society they had betrayed.

In light of the above, it can be contended that the confession and guilty plea procedure contributed to revealing the truth about what happened during the genocide against the Tutsi. Although this truth did not bring the dead back to life, or undo the harm suffered, it did end the silence about them.

On the other side, and as already mentioned, the confession and guilty plea procedure served the selfish interests of certain perpetrators, who took advantage of the reduction of penalties and of other benefits (immediate provisional release and case hearing priority) associated with it. Some genocide suspects confessed to minor crimes in order to benefit from mitigated sentences, which could mean an immediate release due to the time already spent in pre-trial detention.⁴³⁷ Others – through what Waldorf calls 'an amoral economy of guilt'⁴³⁸ – were paid to falsely implicate third parties in their confessions or to confess to crimes committed by others in what was known as '*kugura umusozi*' ('buying the hill')⁴³⁹ so that the real perpetrators could not be prosecuted.

It is also worth noting that incentives to confess and plead guilty were mostly detrimental to those wrongly accused of genocide and detained for crimes they had not committed. In practice, when it came to prioritising the cases to be tried, the accused who did not express an interest in confessing or in pleading guilty were given less consideration. While awaiting their trials, they had to stay longer in prison than those who confessed and pleaded guilty. Therefore, since those who expressed an interest in pleading guilty were given priority and, if detained, accorded provisional release awaiting trial, some innocent individuals confessed to crimes they had not committed in the hope of gaining provisional release or of being

⁴³³ E. Towner, 'Documenting Genocide: The "Record of Confession, Guilty Plea, Repentance and Apology" in Rwanda's Gacaca Trials', (2013) 22(4) *Technical Communication Quarterly* 291–292.

⁴³⁴ Ibid.

⁴³⁵ Ibid., pp. 297–298.

⁴³⁶ R. R. Weyeneth, 'The Power of Apology and the Process of Historical Reconciliation', (2001) 23(3) *The Public Historian* 32–33.

⁴³⁷ PRI, 'The guilty plea procedure, cornerstone of the Rwandan justice system', Gacaca Research Report no. 4, January 2003, pp. 9–12.

⁴³⁸ L. T. Waldorf, *supra* note 400, p. 182.

⁴³⁹ A term used to describe the situation in which one person was paid to confess to the crimes committed by others in the cell or village.

promptly tried. One example of this was Bihoyiki, who, during the trial of his case, withdrew his previous confession and guilty plea by declaring that he had lied about having killed two people (who were actually alive) with a wooden stick because the confession was the only option for him to be released from the prison in which he had already spent twelve years.⁴⁴⁰ Since the confession could be withdrawn at any time before being reiterated in court, when withdrawn the confession became inadmissible as evidence against the suspect in any subsequent proceedings⁴⁴¹ but could lead to a prosecution for obstruction of justice, as happened in the *Bihoyiki* case.⁴⁴²

Against this background, it is evident that the confession and guilty plea procedure disregarded certain minimum guarantees of a fair trial, such as the presumption of innocence, the right to remain silent and the privilege against self-incrimination, because in certain cases the prospect of lighter sentences and the possibility of provisional release awaiting trial compelled perpetrators or falsely accused individuals to make partial and/or false confessions. Specifically, the way the confession and guilty plea procedure was regulated appears to be in contradiction with article 14(3)(g) of the ICCPR that requires (as a minimum guarantee in the determination of any criminal charge) that every person is entitled ‘not to be compelled to testify against himself or to confess guilt’.

According to the HRC, the wording of article 14(3)(g) ‘must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt’.⁴⁴³ In this context, the greater reduction of penalties and prioritisation of the cases of perpetrators who confessed and pleaded guilty as well as the guarantee of provisional release awaiting trial, combined with the long period of detention in deplorably unsanitary conditions, exerted intolerable pressure on the prisoners and compelled some of them, including innocent ones, to make confessions and guilty pleas, as illustrated in the *Bihoyiki* case.

Moreover, the incentives to confess and plead guilty also appear to go against the presumption of innocence as enshrined in the Constitution of Rwanda⁴⁴⁴ and in international and regional treaties such as the ICCPR⁴⁴⁵ and the African Charter.⁴⁴⁶ It created a presumption of guilt, which absolved the court from requesting that the prosecutor provide evidence against the accused and allowed it to simply determine the penalty. In practice, when the confession was unchallenged by the prosecutor or not withdrawn by the suspect and subsequently admitted by the court, it was converted into a guilty plea and, after hearing the suspect, the court proceeded to sentencing without further verification.

⁴⁴⁰ D. B. Ingelaere, *Inside Rwanda's Gacaca Courts: Seeking Justice after Genocide*, Madison, WI: University of Wisconsin Press, 2016, pp. 63–64.

⁴⁴¹ 1996 Genocide Organic Law, articles 5–6.

⁴⁴² D. B. Ingelaere, 2016, *supra* note 440, p. 64.

⁴⁴³ HRC, *Kelly v. Jamaica* (Communication 253/1987), decision of 8 April 1991, paragraph 5.5.

⁴⁴⁴ See article 12 of the 1991 Rwandan Constitution and article 29(2^o) of the 2003 constitution, revised in 2015.

⁴⁴⁵ See article 14(2) of the ICCPR.

⁴⁴⁶ See article 7(1)(b) of the African Charter.

An accepted confession meant a drastically reduced penalty, often to half of the full penalty usually provided for the criminal acts that had been confessed. A greater reduction in punishment was offered to perpetrators who confessed and pleaded guilty prior to the indictment (i.e. before being put on the list of suspects) than to perpetrators who did so only after being indicted. Guilty pleas prior to indictment were believed to be more sincere and to a certain extent helped the justice system to get information on crimes that would have otherwise gone unpunished or remained unknown. In contrast, post-indictment confessions were perceived as less genuine, as they were merely confirming what was already known and were therefore less worthy of consideration in the reduction of the penalty. According to available statistics, approximately 20,000 genocide detainees (around sixteen per cent of all genocide detainees) had confessed by early 2000,⁴⁴⁷ while by June 2012 the convictions based on confessions and guilty pleas by the accused made up 225,012 out of 1,681,648 genocide cases resulting in convictions (i.e. thirteen per cent).⁴⁴⁸

As will be explained later in chapter seven, the genocide victims I interviewed expressed dissatisfaction with the reduction of the penalties. Most of them consider the reduction of the penalties associated with the confession and guilty plea procedure to be lenient penalties and a disguised amnesty. For them, the penalties were not severe enough relative to the nature of the crimes committed and the harm caused to them.

As of early 2000, 2,406 genocide accused (almost 2.7 per cent of all detained suspects) had been tried by the Specialised Chambers.⁴⁴⁹ By 2001, only 6,000 out of 120,000 detainees (i.e. five per cent) had been tried by the Specialised Chambers.⁴⁵⁰ It thus rapidly became clear that the Specialised Chambers would take more than a century just to prosecute those who were detained. At this working speed, the majority of the genocide cases would not be heard during the lifetime of either the suspects or the victims. To avoid this, the government of Rwanda decided to seek other alternative mechanisms to speed up trials and reduce the prison population. Therefore, since the legal framework in place could not respond to the standards of prompt justice, i.e. justice delivered within a reasonable time, the 1996 Genocide Organic Law was partially replaced by a more flexible system known as Gacaca.

As explained in the following section, the Gacaca courts system, unlike the Specialised Chambers, gave the victims of the genocide against the Tutsi the opportunity to confront the perpetrators in public and provided a platform where members of the same community could speak out about the crimes that had been committed, share their stories with the victims and assist in determining the penalties for the perpetrators.

Even though the great speed at which Gacaca courts operated was to some extent at odds with the serenity required for the exercise of justice, unlike the Specialised Chambers the Gacaca system allowed the community to confront its own past and develop a collective account of

⁴⁴⁷ W. A. Schabas, 2005, *supra* note 349 at 887.

⁴⁴⁸ A. L. M. de Brouwer and E. Ruvebana, *supra* note 41, p. 950.

⁴⁴⁹ W. A. Schabas, 2005, *supra* note 349 at 888.

⁴⁵⁰ See A. L. M. de Brouwer and E. Ruvebana, *supra* note 41, p. 939.

what really happened. Most importantly, it permitted the community to recognise the suffering of the victims of the genocide against the Tutsi.

3.2. Gacaca courts, the miracle solution to the genocide caseload

Like the 1996 Organic Law, the idea of the Gacaca system also emerged from the 1995 Kigali international conference on genocide, but was only recommended for dealing with cases not involving crimes against the person.⁴⁵¹ The idea of the Gacaca system was subsequently re-examined in various meetings at Urugwiro⁴⁵² and endorsed later by a commission of fifteen members established on 17 October 1998 by the then president Pasteur Bizimungu.⁴⁵³

Due to the poorly perceived performance of the Specialised Chambers, it was concluded that the classic judicial system was ill suited to manage the cases of the detained suspects, those of newly incarcerated suspects and those of many other suspects who were still at large. The Gacaca system was therefore adopted in 2001 as an alternative solution to the perceived incapacity of the Specialised Chambers to effectively speed up the trials of the detainees suspected of having committed the genocide and other related crimes.⁴⁵⁴ As of 2001, the number of detainees was estimated at 106,000 genocide suspects, detained in prisons with an official capacity of 30,000 individuals.⁴⁵⁵

The main objectives of the Gacaca courts were to expedite trials by holding hearings in the community where the crimes were committed and where the perpetrators, survivors and witnesses live; to reveal the truth about the genocide against the Tutsi by compiling a list of perpetrators, victims and damages in every single region; and to strengthen reconciliation and unity among Rwandans through public acknowledgement of guilt and innocence.⁴⁵⁶ The 2001 Gacaca Organic Law's preamble described the Gacaca courts' purpose as being to eradicate for good the culture of impunity, achieve justice and reconciliation, accelerate the trial process, punish the perpetrators, disclose the truth and reconstruct Rwandan society.⁴⁵⁷ In the interview he agreed to give me, Johnston Busingye, the current minister of justice, confirmed that

contrary to what many people think that the Gacaca system was mainly established because of insufficient judges or prosecutors, the Gacaca system was established in order to deal with issues that cannot be achieved through classic courtrooms, such as unity, reconciliation, accountability, ending impunity, truth, participation and ownership of Rwandans as well as

⁴⁵¹ See Office of the President, 'Recommendations of the Conference Held in Kigali, *supra* note 346, p. 23.

⁴⁵² Urugwiro is the office of the President of Rwanda.

⁴⁵³ P. Sullo, *supra* note 386, p. 132.

⁴⁵⁴ See A. Corey and S. F. Joireman, 'Retributive justice: The Gacaca courts in Rwanda', (2004) 103(410) *African Affairs* 73–89; A. L. M. de Brouwer and E. Ruvebana, *supra* note 41.

⁴⁵⁵ See United States Department of State, 'Country Report on Human Rights Practices: Rwanda (2001)', 4 March 2002, available at <https://www.refworld.org/docid/3c84d99a0.html>, accessed on 27 October 2020.

⁴⁵⁶ NSGC, *supra* note 387, p. 33.

⁴⁵⁷ See the preamble of the 2001 Gacaca organic law.

speed. The courtroom system would not have addressed the problems that Gacaca addressed.⁴⁵⁸

The 2001 Gacaca Organic Law created two parallel systems to try suspects of genocide: not only did it create the Gacaca courts but it also abolished the Specialised Chambers and replaced them with 'ordinary courts'.⁴⁵⁹ The latter were entrusted with jurisdiction to hear and try cases involving individuals whose criminal liability placed them in the first category⁴⁶⁰ and followed the rules provided for by the 1996 Genocide Organic Law. Only cases involving individuals whose criminal liability placed them in the second, third and fourth categories (later reduced to the second and third categories by the 2004 Gacaca Organic Law) were entrusted to Gacaca courts,⁴⁶¹ organised according to a pyramidal hierarchy based around four of the country's administrative levels, namely cells, sectors, districts, provinces or the City of Kigali.⁴⁶²

In practice, at the lowest level of the pyramid, the Gacaca courts of the cell had jurisdiction over the accused in the fourth category,⁴⁶³ the Gacaca courts of the sector over those in the third category⁴⁶⁴ and the Gacaca courts of the district over those in the second category.⁴⁶⁵ The Gacaca courts at the highest level of the pyramid had jurisdiction over appeals against the decisions of the Gacaca courts of the district.⁴⁶⁶ Unlike the Specialised Chambers, which were run by trained judges and located in the city centres – meaning they were geographically remote from most ordinary citizens – the Gacaca court system was managed by and worked with the people⁴⁶⁷ and originated in the traditional system of conflict resolution of the same name. According to the Norwegian Helsinki Committee,⁴⁶⁸ the Gacaca court was like a mixture of truth commission and judicial authority.⁴⁶⁹ As noted by Bert Ingelaere, the name 'Gacaca jurisdictions' suggests that the source of inspiration was the traditional Rwandan conflict resolution mechanism of the same name (Gacaca), which has the same competence as other classical courts.⁴⁷⁰

A close assessment of how the Gacaca courts operated reveals that the population of a cell (or members of the same cell) – forming the general assembly – acted as judicial police

⁴⁵⁸ Interview with Johnston Busingye, minister of justice and attorney general of the Republic of Rwanda, held on 14 February 2019 in the minister's office in Kimihurura.

⁴⁵⁹ 2001 Gacaca organic law, article 96.

⁴⁶⁰ The first category included planners, organisers, instigators and supervisors of the genocide and the leaders of public and private institutions who committed the genocide, as well as rapists. See *ibid.*, article 2(2).

⁴⁶¹ *Ibid.*, article 2(1).

⁴⁶² *Ibid.*, article 3.

⁴⁶³ *Ibid.*, article 39.

⁴⁶⁴ *Ibid.*, article 40.

⁴⁶⁵ *Ibid.*, article 41.

⁴⁶⁶ *Ibid.*, article 42.

⁴⁶⁷ See P. Rutayisire, *Evaluation of Gacaca Process: Achieved Results per Objective*, Kigali: National Service of Gacaca Courts and National University of Rwanda, 2012, p. 34.

⁴⁶⁸ The Norwegian Helsinki Committee is a non-governmental organisation working to ensure that human rights are respected in practice. They do this through monitoring, reporting, teaching and democracy support.

⁴⁶⁹ Norwegian Helsinki Committee, *Prosecuting Genocide in Rwanda: The Gacaca System and the International Criminal Tribunal for Rwanda*, Report II/2002, p. 22.

⁴⁷⁰ B. Ingelaere, 'From model to practice: Researching and representing Rwanda's "modernized" Gacaca courts', (2012) 32(4) *Critique of Anthropology* 391.

officers and public prosecution officers during the pre-trial phase,⁴⁷¹ and as judges and prosecutors during the trial phase. Legally speaking, these features put in jeopardy the subjective and objective tests of impartiality for the judges of the Gacaca courts. Since the Gacaca courts exercised extended competence, similar to that of ordinary criminal tribunals, they should have complied with article 14(1) of the ICCPR, which provides that ‘in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’.

It should be recalled here that the HRC defines a ‘tribunal’ as ‘a body, regardless of its denomination, that is established by law, is independent of the executive and the legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature’.⁴⁷² The HRC emphasises further that ‘article 14, paragraph 1, second sentence, guarantees access to such tribunals to all who have criminal charges brought against them. This right cannot be limited, and any criminal conviction by a body not constituting a tribunal is incompatible with this provision’.⁴⁷³ Therefore, since the Gacaca courts were established to determine the criminal charges against genocide suspects, to sentence the perpetrators with lengthy prison sentences and to summon witnesses to testify, trials by Gacaca courts fall within the ambit of article 14 of the ICCPR. As will be further explained in the next section, by entrusting non-trained lawyers with the functions of judicial police officers, public prosecution officers, prosecutors and judges, the Gacaca system stands in stark opposition to the requirements of article 14(1).

According to Human Rights Watch, government officials argued that traditional fair trial rights were unnecessary; firstly because the Gacaca courts operated within the communities that witnessed the events of 1994 and knew what really happened, and secondly because the justice delivered by Gacaca courts was put under the scrutiny of the entire population.⁴⁷⁴ The officials thus deemed that extensive public participation led to transparency and much greater public oversight than in the system in which ordinary courts operate. Accordingly, it was argued that the local community’s participation in the trials would be sufficient to guarantee a fair trial because the community members could speak out if a witness lied and could question witnesses, while the exclusion of lawyers from the Gacaca proceedings would strengthen the community’s sense of ownership.⁴⁷⁵

Despite the fact that the Gacaca system does not respect certain human rights standards,⁴⁷⁶ it can still be acknowledged that it was more victim-centred than the Specialised Chambers,

⁴⁷¹ This is in line with principle 22(b) of the UN Basic Principles and Guidelines.

⁴⁷² HRC, General Comment 32 on article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 23, August 2007, para. 18.

⁴⁷³ Ibid.

⁴⁷⁴ See Human Rights Watch, *Justice Compromised: The Legacy of Rwanda’s Community-Based Gacaca Courts*, *supra* note 399, p. 4.

⁴⁷⁵ See *ibid.*, p. 28.

⁴⁷⁶ See P. Sullo, *supra* note 386, pp. 213–219; P. Uvin, ‘The Gacaca tribunals in Rwanda’, in D. Bloomfield et al., *Reconciliation after Violent Conflict: A Handbook*, Stockholm: International Institute for Democracy and Electoral Assistance, 2003, pp. 116–121.

since it allowed the victims of the genocide against the Tutsi to confront the perpetrators in public and to play key roles in the investigation and prosecution of genocide perpetrators.

3.2.1. Citizens' participation and its effects on Gacaca proceedings

Citizen participation in the Gacaca proceedings was the cornerstone of the Gacaca system. Since everyone in Rwanda witnessed the genocide against the Tutsi, the community's involvement in establishing the truth and prosecuting the perpetrators was deemed important and necessary by the legislators in order to achieve reconciliation and justice. The legislators believed that if truth could be discovered, it would be through dialogue and not through the views of legal professionals imparted to the population.⁴⁷⁷

According to the 2001 Gacaca Organic Law's preamble, the rationale for the community's involvement in the proceedings was that crimes 'were publicly committed before the very eyes of the population, which thus must recount the facts, disclose the truth and participate in prosecuting and trying the alleged perpetrators'.⁴⁷⁸ The Gacaca courts' closeness to the community where the crimes were committed provided a sense of collaboration among the members of the community while searching for, and eventually reaching, the truth. Gacaca trials took place at the scene of the crimes and involved members of the community who were affected, including the accused and their families, victims and their families, bystanders and witnesses. The Gacaca system's proximity to the local community empowered the survivors of the genocide against the Tutsi to speak out and to challenge the statements of the perpetrators so the truth could finally be told.

The most important feature of the Gacaca participatory justice was (in the words of Mukantaganzwa) that it allowed the decisions to be 'taken by the population and accepted by all because they come from within themselves and help them to achieve reconciliation'.⁴⁷⁹ Similarly, Phil Clark claims that the popular participation in Gacaca was 'a valuable systemic expression of a Rwandan worldview of human identity as communally embedded and "truth", both legal and non-legal, as a negotiated outcome reached via communal discussion in public settings'.⁴⁸⁰

As will be further detailed in chapter seven, the Gacaca system provided a platform for the community to not only speak out and share stories about crimes that had been committed, but also to validate the stories that were told. It should not be overlooked, however, that by entrusting ordinary lay citizens with the responsibility to try their peers, the independence and impartiality guaranteed by the provisions of the Rwandan Constitution,⁴⁸¹ the African Charter,⁴⁸² the ICCPR⁴⁸³ and the UDHR⁴⁸⁴ were jeopardised. In stark contrast with

⁴⁷⁷ See P. Clark, 2010, *supra* note 41, p. 162.

⁴⁷⁸ Preamble of the 2001 Gacaca organic law.

⁴⁷⁹ D. Mukantaganzwa, cited in Emil Towner, *supra* note 433, p. 296.

⁴⁸⁰ P. Clark, 2010, *supra* note 41, pp. 164–165.

⁴⁸¹ See article 140 of the 2003 constitution.

⁴⁸² See articles 7(1) and 26 of the African Charter.

⁴⁸³ See articles 5 and 14(1) of the ICCPR.

⁴⁸⁴ See article 10 of the Universal Declaration of Human Rights, GA res. 217A (III), 1948.

international human rights standards that dictate that persons entrusted with judicial office must be individuals of integrity and ability with appropriate legal training or qualifications, a lack of prior legal experience was actually a condition of eligibility for serving as a Gacaca court judge.⁴⁸⁵ The lay judges of the Gacaca courts were not even required to be well educated (schooled), let alone to have legal training. A basic knowledge of reading and writing the national language (Kinyarwanda) was the only condition required in terms of skills. In addition, a judge had to be a person of 'integrity' and at least twenty-one years old. As demonstrated by a survey conducted by the *Coopération Technique Belge* (CTB), 92.7 per cent of the Gacaca judges were farmers and 15.4 per cent were illiterate.⁴⁸⁶ Therefore, as argued by Carsten Stahn,

such a far-reaching transformation of a country's legal system, allowing legally untrained members of a local community to impose formal criminal sanctions on persons suspected of having committed medium-level or even severe crimes, raises serious concerns relating to the right to be tried by a competent, independent, and impartial tribunal by means of procedures established by law.⁴⁸⁷

Likewise, Dadimos Haile emphasises that

the structure of the Gacaca process, the absence of any procedural and evidentiary rules, and the fact that the judges lack basic training, tenure or official standing makes the entire process particularly susceptible to mob pressure. ... However, it is precisely because mob pressure does not always work in favor of the truth that formal procedures and safeguards have been developed in criminal justice systems. ... It is also important to note that mob trials may be detrimental to victims and their relatives as they are to the accused.⁴⁸⁸

The lack of basic training thus put the Gacaca courts' competence, impartiality and independence (all essential constituents of the fundamental right to a fair trial) into jeopardy because it deprived the courts' lay judges of the necessary autonomy to discharge their responsibility. In turn, the lack of autonomy made them totally dependent on the relevant government office, and in particular on the lawyers of the National Service of Gacaca Courts (hereinafter NSGC).

This potential lack of independence on the part of the Gacaca judges further contravenes article 7(1)(a) of the African Charter. The African Commission has ruled that a lack of appropriate prior legal training and qualification in law is a violation of article 7(1)(a) of the

⁴⁸⁵ See 2001 Gacaca organic law, article 11.

⁴⁸⁶ CTB, report on improving the living conditions for the *Inyangamugayo*, November 2005.

⁴⁸⁷ C. Stahn, 'Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor', (2001) 95(4) *American Journal of International Law* 964.

⁴⁸⁸ H. Dadimos, 'Rwanda's Experiment in People's Courts (Gacaca) and the Tragedy of Unexamined Humanitarianism: A Normative/Ethical Perspective', discussion paper, University of Antwerp, IOB, January 2008, p. 26.

African Charter because the term 'competent' in article 7(1)(a) of the charter contains elements such as the 'expertise' of judges.⁴⁸⁹

The Rwandan government was not unaware of the issue and, in order to minimise the impact of the Gacaca court lay judges' lack of basic legal skills, the 138,505 lay judges elected in October 2001 were trained for six days by magistrates and law students on the basic principles of Gacaca law, management skills and ethics.⁴⁹⁰ After their training, they were given a Gacaca manual for judges prepared by the Supreme Court of Rwanda, which described procedural matters,⁴⁹¹ and in April 2005 the NSGC also issued a simplified instruction booklet to assist Gacaca judges with procedural matters.

Even though these efforts to strengthen the Gacaca court judges' capacity to discharge their responsibility are commendable, given the low level of education and literacy of the majority of the Gacaca court judges it would be naive to believe that this short training and a manual/booklets on the complex law of the Gacaca system mitigated their lack of prior legal experience, allowing them to meet the standard of legal skills and thus guaranteeing their impartiality when addressing the criminal acts and/or conduct resulting from the genocide against the Tutsi.

Overall, as mentioned above, all that should be recognised in terms of victims' interests is that by entrusting the members of the community with the responsibility for addressing genocide-related cases, the Gacaca system not only allowed the community to confront its own past and develop a common and collective account of what had really happened, but also to recognise the suffering of the victims of the genocide against the Tutsi.⁴⁹²

By contrast with the Specialised Chambers, ordinary courts and the ICTR, the Gacaca system gave the victims the opportunity to confront the perpetrators in public. Through Gacaca proceedings, many victims of the genocide against the Tutsi gained more information on the whereabouts of their family members and were able to find the bodies of their loved ones for proper burials. More precisely, the conduct of the Gacaca courts' proceedings allowed the victims of the genocide against the Tutsi to know how, when and where their loved ones were killed and who killed them, as discussed below.

3.2.2. The conduct of Gacaca court proceedings

To achieve the above-mentioned goals, the Gacaca courts' proceedings were organised into two different phases: the pre-trial phase and the trial phase. The pre-trial phase involved collecting information about the genocide against the Tutsi and was conducted at cell level.

⁴⁸⁹ Amnesty International, *Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association des membres de la Conférence épiscopale de l'Afrique de l'Est v. Sudan*, Communications 48/90, 50/91, 52/91 and 89/93, *compilation des décisions*, November 1999, pp. 358–59, paras 61 and 62.

⁴⁹⁰ Amnesty International, 'Gacaca: A Question of Justice', AI Index: AFR 47/007/2002, December 2002. See also African Rights, 'Gacaca Justice: A Shared Responsibility', Kigali, January 2003, pp. 4–12.

⁴⁹¹ Cour Suprême, *Département des Juridictions Gacaca: Manuel explicatif sur la loi organique portant création des juridictions Gacaca*, Kigali, October 2001.

⁴⁹² For details, see chapters seven and eight.

The trial phase for looted property was also conducted by Gacaca courts at cell level (at the first and last resort) whereas the trial phase for crimes against persons was conducted by the Gacaca courts at sector level, with the possibility to appeal at the Gacaca appeal courts of the same level.

As discussed in this subsection, during the pre-trial phase victims and other members of the cell collected information regarding both perpetrators and victims of genocide. Through a general assembly of all inhabitants of the cell aged at least eighteen, lists of the individuals suspected of having participated in the genocide against the Tutsi and of the victims and their damaged property were established.

The Gacaca pre-trial phase – focused on uncovering the truth – had the merit that it determined the factual circumstances of the violations that took place in every cell in the country and allowed for the identification of those responsible. Pre-trial responsibility was entrusted to members of the cell, including victims and suspects.

3.2.2.1. Compliance of the Gacaca pre-trial proceedings with international fair trial standards

While the right to an effective remedy under article 2(3) of the ICCPR requires states to carry out a prompt, thorough, impartial and independent investigation in order to determine the factual circumstances of the violation and to identify those responsible,⁴⁹³ investigations into the genocide against the Tutsi were conducted by ordinary citizens (including victims and potential perpetrators), who convened in general assemblies at cell level.

Under the exclusive jurisdiction of the Gacaca courts at cell level, the pre-trial pilot phase started on 18 June 2002 with seventy-nine cells, later expanding to 762 cells in November 2003.⁴⁹⁴ The exclusive jurisdiction of the Gacaca courts of the cell over the pre-trial proceedings was based on the assumption that only citizens of a particular cell (the smallest municipal administrative level in Rwanda's administrative structure, equivalent to around 200 people) could shed light on what happened in that particular cell, because the genocide against the Tutsi was carried out mostly in the open and in broad daylight by, or with the complicity of, the individuals living in the cell.

The pre-trial phase consisted of three steps: information collection (roughly equivalent, in legal terms, to the investigation phase); validation; and preparation of the indictment files and categorisation of suspects. To achieve its objectives, the pre-trial process was conducted in six public sessions during weekly general assembly meetings of the cell. The participants (mainly those who were living in the cell before or during the genocide) had the responsibility to provide testimonies on what they saw or heard of the genocide. As oral testimony was almost the only form of evidence in the Gacaca proceedings, any participant

⁴⁹³ HRC, General Comment 31, *supra* note 127, para. 15.

⁴⁹⁴ A. Meyerstein, 'Between Law and Culture: Rwanda's Gacaca and Postcolonial Legality', (2007) 32(2) *Law and Social Inquiry* 474.

could be asked questions by any member of the general assembly and had the legal obligation to answer all those questions, even if it could lead to self-incrimination. Refusal to answer those questions and to testify could lead to imprisonment. As provided for by article 32 of the 2001 Gacaca Organic Law, 'any person who omits or refuses to testify on what he/she has seen or on what he/she knows ... risks a prison sentence from 1 to 3 years' (later reduced to a minimum of three months and a maximum of one year).⁴⁹⁵ This obligation to testify also appeared in the preamble of the 2001 Gacaca Organic Law, which specified that 'the duty to testify is a moral obligation, nobody having the right to get out of it for whatever reason it may be'.⁴⁹⁶

These provisions and subsequent practices associated with them actually violate article 14(3)(g) of the ICCPR, which guarantees the right not to be compelled to testify against oneself or to confess guilt – a fair trial standard closely linked with the presumption of innocence, which ensures that the burden of proof is on the prosecutor. Such compelled testimony under article 32 of the 2001 Gacaca Organic Law not only violated the privilege against self-incrimination and the presumption of innocence but also discouraged individuals from participating in the Gacaca courts' sessions. In fact, even though attendance of Gacaca sessions was mandatory, there were no legal sanctions for non-attendance, by contrast with the risk of imprisonment in case of refusal to testify.

It is noteworthy that the initial information gathering sessions and most of the first and second sessions, dedicated to explaining the objectives of the Gacaca system, were well attended, but during the third to sixth sessions, which dealt with establishing the lists of those who were killed, drawing up the inventory of looted property and identifying those responsible, attendance gradually declined. The high attendance at the first two initial sessions, dedicated to the information gathering process, can be attributed to general curiosity about the Gacaca system, while the decline at the last four sessions can be explained by the fear of being denounced or invited to testify and/or by fear of repercussions.⁴⁹⁷ Most people preferred not to attend the Gacaca courts' sessions for one of these reasons, because for them it was better not to attend than to refuse to testify. Therefore, due to the reluctance of the population to participate in the general assemblies, the task of information gathering was later entrusted to the heads of the smallest government administrative entities in the cells, known as '*Nyumbakumi*' (ten households). In carrying out this duty, the '*Nyumbakumi*' started to play a role originally intended for the Gacaca judges during the general assemblies.⁴⁹⁸

After the information gathering sessions, the testimonies that had been collected were validated in the general assembly, presided over by the president of the Gacaca court of the cell. In strictly legal terms, this validation could be equated with the confirmation of charges. In theory, the validation sessions were intended to verify the information that had been

⁴⁹⁵ Article 32 of the 2001 Gacaca Organic Law. See also article 29 of the 2004 Gacaca Organic Law, which reduced the penalty to a minimum of three months and a maximum of one year.

⁴⁹⁶ 2001 Gacaca Organic Law, preamble.

⁴⁹⁷ See Human Rights Watch, 2011, *supra* note 399, p. 83; P. C. Bornkamm, *supra* note 21, p. 63.

⁴⁹⁸ A. Meyerstein, *supra* note 494, pp. 488–489.

collected (i.e. the accusations) with the defence testimony, before this information was confirmed, recorded and handed over to the Gacaca judges for categorisation. To meet this objective, the lay judges were supposed to read out all the information to the general assembly and allow the participants – including the accused if present – to confirm whether the information that had been gathered represented their views. Where necessary, modifications were made. However, Ariel Meyerstein has noted that, in practice, to meet the objective of validation, all that the lay judges of the Gacaca courts did during the validation sessions was to seek confirmation that all the statements gathered by the *Nyumbakumi* were accurate transcriptions, without any discussion as to whether the underlying allegations were in fact true.⁴⁹⁹ Furthermore, the suspects on the list were in reality not given the opportunity to present their defence, as such discussion was supposed to occur during the trial phase. Likewise, other research reveals that, in practice, for fear of being accused of complicity with a person listed as a suspect, the participants (i.e. residents of the cell) of the validation session meeting would in most cases only validate the information that had already been collected or add some more incriminating testimonies.⁵⁰⁰ Exculpatory testimonies were rare, and the few that were given were not even recorded as they were reserved for the trial phase.

The inconsistencies between the theory and practice of the validation proceeding were in fact confirmed by the NSGC, the supreme organ in charge of Gacaca courts. According to the NSGC, the major challenge faced during the validation phase was the tendency of prematurely generating debates that would be similar to hearings that were reserved for the trial phase.⁵⁰¹

Immediately after the validation process, the lay judges of the Gacaca courts at cell level proceeded to prepare the indictment files and categorise suspects on the basis of the validated information. Their categorisation was only a provisional decision taken in order to determine the competent court to hear the case. The final decision was taken by the trial court once the charges had been verified.

By 30 June 2006, 818,564 genocide cases had been identified at the end of the pre-trial phase, including 77,269 in the first category, 432,557 in the second and 308,738 in the third.⁵⁰² Based on these figures and as per the Gacaca Organic Law, 9.5 per cent of all cases were forwarded to the public prosecution office for trial before ordinary courts whereas 52.8 per cent were sent to the Gacaca courts at sector level and 37.7 per cent remained in the Gacaca courts at cell level, which continued to have exclusive jurisdiction over information gathering and categorisation for new cases.⁵⁰³

⁴⁹⁹ Ibid., p. 489.

⁵⁰⁰ L. Huyse and M. Salter (eds), *Traditional Justice and Reconciliation after Violent Conflict – Learning from African Experiences*, Stockholm: International Institute for Democracy and Electoral Assistance, 2008, p. 41. See also Human Rights Watch, 2011, *supra* note 399, p. 134.

⁵⁰¹ NSGC, *supra* note 387, p. 87.

⁵⁰² Ibid., pp. 87 to 89. See also N. Jones, *The Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha*, Abingdon: Routledge, 2010, p. 63.

⁵⁰³ 2004 Gacaca Organic Law, article 34.

As discussed below, contrary to the principle of the presumption of innocence, not only were the indictment files prepared during the pre-trial phase considered by the trial judges to be evidence of the culpability of the accused, but, furthermore, no provision in any of the Gacaca organic laws obliged the trial judges to inform the accused of the nature and cause of charges before trial. In most cases, the accused appeared at trial unaware of the accusation and evidence against them and without being given time to prepare their defence.

3.2.2.2. *The Gacaca trial proceedings and international fair trial standards*

The Gacaca trial phase proceedings started on 10 March 2005 under the regime of the 2004 Gacaca Organic Law. Despite the fact that the right to counsel was not expressly excluded in any of the Gacaca Organic Law provisions, defence lawyers were not allowed to assist the accused. The NSGC repeatedly made clear that such representation was not permitted.⁵⁰⁴ The government gave two main reasons for its decision to exclude defence lawyers from Gacaca proceedings: on the one hand, it argued that the high number of accused persons would have made it impossible for all of them to have lawyers without significantly delaying the trials, and on the other, it contended that lawyers could exercise undue influence on the non-professional Gacaca judges, who had a limited understanding of the law.⁵⁰⁵

Despite the exclusion of defence lawyers, at the trial phase the Gacaca courts operated like any other criminal court: they could issue summons to victims, witnesses or the accused, proceed with search and seizure, adopt temporary measures, issue arrest warrants and order provisional detention or release. The trial hearings were organised in a way that gave priority to the suspects who confessed and pleaded guilty, based on the following criteria:⁵⁰⁶

1. Individuals who confessed, pleaded guilty and have been provisionally released;
2. Individuals who confessed, pleaded guilty but had not been detained;
3. Individuals who were suffering from chronic diseases;
4. Individuals who were aged 14 years but not yet 18 years at the time they committed crimes;
5. The elderly of at least 70 years of age;
6. Suspects who were detained and had not yet confessed;
7. Suspects who were not detained and had not confessed.

As I argued earlier, prioritising the suspects who pleaded guilty – who in most cases had been provisionally released – undermined the right to a prompt trial for those who did not plead guilty,⁵⁰⁷ and who had to wait for their hearings in overcrowded, deplorably unsanitary conditions in the detention facilities. As illustrated by the *Bihoyiki* case that was discussed above, the terrible living conditions in the detention facilities pushed some suspects to make false confessions in order to benefit from provisional release and prompt trial.⁵⁰⁸ Summons to appear were issued to suspects at least seven days before the trial, a timeframe which violated the recognised rights of the accused – under international human rights law and ordinary

⁵⁰⁴ Human Rights Watch, 2011, *supra* note 399, p. 28.

⁵⁰⁵ *Ibid.*

⁵⁰⁶ NSGC, *Trial Procedure in Gacaca Courts*, January 2005, p. 2.

⁵⁰⁷ See articles 9(2)(2) and 14 of the ICCPR, especially paragraphs 3(a), (b) and (c) of the latter.

⁵⁰⁸ See *supra* subsection 3.1.4. See also D. B. Ingelaere, 2016, *supra* note 440, pp. 63–64.

Rwandan criminal law⁵⁰⁹ – to be informed of the accusations against him/her, to have sufficient time to prepare a defence and to be informed of the charge ‘promptly’. The indictment files were prepared during the pre-trial phase, most of the time in the absence of the suspects; a few heard of the charges against them through information provided by community members during the public information gathering phase. Many accused learned about the real nature of the charges against them on the day of their hearing from the reading of the summary of the indictment file by the presiding Gacaca court judge at the beginning of the hearing. As documented by Human Rights Watch, summons often did not contain enough information about the charges against the accused. In most cases, the field for ‘accusations’ was left blank, leaving the accused with no idea of the exact accusations against him or her. Where charges were specified, they usually consisted of general accusations such as ‘genocide’ or ‘murder’ with no other details of the specific incident or act that could have allowed the accused to prepare their defence in advance of his or her trial.⁵¹⁰ This situation compromised his or her ability to effectively prepare his or her defence, find defence witnesses and ensure his or her appearance at trial.

On the day of the hearing, the accused were always reminded of the benefit they could obtain from the confession and guilty plea procedure, and asked whether they wanted to have recourse to it. The accused who opted for this procedure were immediately invited to speak, while those who claimed their innocence were immediately requested to present their defence by the presiding judge, once he or she had read the summary of the indictment case file which – in terms of article 65(5)(a) of the 2004 Gacaca Organic Law – constituted the evidence of *the defendant’s guilt*.⁵¹¹ A plain reading of this disposition reveals that giving a reminder of the advantages of the confession and guilty plea procedure before informing the accused of the details of the indictment file contravened both the privilege against self-incrimination and the presumption of innocence, as protected under international human rights law.⁵¹² Moreover, regarding the information contained in the indictment files as evidence of the culpability of the accused shifted the burden of proof from the prosecution to the accused; this shift has consistently been deemed a violation of the right to a fair trial by human rights courts.⁵¹³ Without the assistance of a defence lawyer and in the absence of a public prosecutor, the burden of proof borne by the accused became even heavier, since they were

⁵⁰⁹ According to article 122 of Law No. 13/2004 of 17 May 2004 relating to the Code of Criminal Procedure, *Official Gazette of the Republic of Rwanda*, no. special of 30 July 2004, ‘a summon to appear in court is issued by a court clerk, upon request by public prosecution or a civil party. A summon should at least mention the accused, his or her names, domicile or residence, charges against him or her, a court before which to appear, place, day and hour of appearance’. Article 127 of the same law provides that ‘the time lapse between summon and appearance for an accused or the one who is liable for the damages caused by the offence is eight (8) days regardless of the day on which he or she received the summon and the day of appearance’. See also article 103 of law N° 027/2019 of 19/09/2019 relating to the criminal procedure, *Official Gazette of the Republic of Rwanda*, no. special of 8 November 2019.

⁵¹⁰ Human Rights Watch, 2011, *supra* note 399, p. 38.

⁵¹¹ 2004 Gacaca Organic Law, article 65(5)(a), emphasis added. See also 2001 Gacaca Organic Law, article 65(6).

⁵¹² See article 14(3)(g) of the ICCPR.

⁵¹³ See ECtHR, *Telfner v. Austria* (application no. 33501/96), judgment of 20 March 2001, para. 15, and ECtHR, *John Murray v. the United Kingdom* (application no. 18731/91), judgment of 8 February 1996, p. 54.

deprived of both the support of a legal professional and of the opportunity to confront their accusers during the pre-trial phase.

It should, however, be acknowledged that the risk of unfair trials resulting from these shortcomings was to a certain extent mitigated by a series of factors: the scrutiny by members of the community, the possibility for the accused to call witnesses, the judgment by majority rule among the nine lay judges (reduced to seven in 2007) on the Gacaca court bench and the possibility of appeal. While public scrutiny could be seen as potentially conducive to popular revenge, the reality showed that it served as a useful transparency tool. For a start, the Gacaca hearings were often held outside in open spaces and were thus highly visible, with no risk of justice being administered in secret.

Since there was a lack of material evidence, the Gacaca courts acquitted or convicted individuals mainly on the basis of testimonies provided by the victims and the population in general as well as of confessions and guilty pleas by genocide perpetrators. As emphasised by one observer, 'the encounter between the perpetrators and the victims in a community-based communication space created by the Gacaca tribunals seems to allow and facilitate expression of the goal of justice on the part of those convicted as well as on that of the victims ... It is important to facilitate apologies and reconciliation, which are the acts of reparation in a symbolic sense'.⁵¹⁴

3.2.2.3. Effects of the flexibility and adaptability of the Gacaca system framework

The performance of Gacaca courts in addressing an enormous backlog of genocide cases in a very short period of time can be attributed to the flexibility and adaptability of the Gacaca legal framework, which allowed continuous and constant amendments to be adopted in order to meet the government's need to speed up the trials of the genocide caseload.

The 2001 Gacaca Organic Law⁵¹⁵ was successively amended many times.⁵¹⁶ As Pietro Sullo explains, the difficulties in implementing the Gacaca system, coupled with the results acquired through the pilot phase, pushed the transitional government of Rwanda to repeal the 2001 Gacaca Organic Law and pass a new one, Organic Law No. 16/2004 (hereinafter the 2004 Gacaca Organic Law), before a single sentence had even been handed down.⁵¹⁷ The

⁵¹⁴ S. Gasibirege, *Résultats d'une enquête exploratoire sur les attitudes des membres des communautés locales et des prisonniers vis-à-vis de l'indemnisation des victimes des crimes de génocide et de crimes contre l'humanité*, Butare: National University of Rwanda, 2000, p. 10, cited in S. Vandeginste, 2003, *supra* note 235, p. 261.

⁵¹⁵ Organic Law No. 40/2000 of 26 January 2001 setting up 'Gacaca jurisdictions' and organising prosecutions for offences constituting the crime of genocide or crimes against humanity committed between 1 October 1990 and 31 December 1994, *Official Gazette of the Republic of Rwanda*, no. 6 of 15 March 2001.

⁵¹⁶ Organic Law No. 33/2001 of 22 June 2001 modifying and supplementing Organic Law No. 40/2000 of 26 January 2001, *Official Gazette of the Republic of Rwanda*, no. 14 of 15 July 2001.

⁵¹⁷ P. Sullo, *supra* note 386, p. 129.

2004 Gacaca Organic Law also repealed the 1996 Genocide Organic Law and became the cornerstone of the Gacaca system law until the closure of the Gacaca courts in June 2012.⁵¹⁸

Like the 2001 Gacaca Organic Law, the 2004 Gacaca Organic Law was amended three times – in 2006,⁵¹⁹ 2007⁵²⁰ and 2008⁵²¹ – in order to accommodate emerging realities in the execution of the Gacaca courts' mandate. Specifically, the first amendment of 2006 – which compared with the subsequent amendments appears minor but no less necessary – concerned the Gacaca courts' jurisdiction *ratione loci*, which had to be revised following a restructuring of Rwandan administrative entities. More substantively, the 2007 amendment reviewed the criteria for the categorisation of crimes, and a number of accused in the first category were transferred to the second category, thereby relieving ordinary courts of a backlog of genocide cases. Procedurally, this amendment also doubled the number of panels in the Gacaca courts of the sector and in the appellate courts in order to speed up the Gacaca trials and appeals. For the same reasons, the 2008 amendment shifted many first-category suspects/accused to the sector-level Gacaca courts.

Even though these amendments usefully served the need of expediting genocide trials, the results that were obtained were somewhat at odds with the serenity required for the exercise of justice. On the one hand, the 2007 amendment, which doubled the number of panels at the Gacaca courts, rendered the production of evidence difficult because victims and witnesses who wished to attend or testify at two or more parallel hearings scheduled on the same day could not attend all hearings simultaneously. Witnesses – the majority of whom were genocide victims/survivors – could not attend two trials at the same time. They could not be in two or more places at the same time. In practice, those Gacaca courts which had more than 150 files in 2007 – the time of the amendment – were allowed to create several judge panels (benches or seats) in order to speed up those cases. Following this, 1,803 extra seats were created within the existing 1,545 sector Gacaca courts and 412 extra seats within the existing 1,545 Gacaca courts of appeal.⁵²² Consequently, the seats forming part of the Gacaca court of a particular sector dealt with cases from that same sector in different parallel hearings at the same time.

On the other hand, the 2008 amendment resulted in a considerable number of cases concerning accused of the first category that had not been definitively judged being transferred from ordinary courts to Gacaca courts. About ninety per cent (at least 8,000 cases) of these transferred cases involved rape or sexual violence.⁵²³ Although this transfer

⁵¹⁸ Organic Law No. 04/2012/OL of 15 June 2012 terminating Gacaca courts and determining mechanisms for solving issues which were under their jurisdiction, *Official Gazette of the Republic of Rwanda*, no. special of 15 June 2012.

⁵¹⁹ Organic Law No. 28/2006 of 27 June 2006 modifying and complementing Organic Law No. 16/2004 of 19 June 2004, *Official Gazette of the Republic of Rwanda*, no. special of 12 July 2006.

⁵²⁰ Organic Law No. 10/2007 of 1 March 2007 modifying and complementing Organic Law No. 16/2004 of 19 June 2004, *Official Gazette of the Republic of Rwanda*, no. 5 of 1 March 2007.

⁵²¹ Organic Law No. 13/2008 of 19 May 2008 modifying and complementing Organic Law No. 16/2004 of 19 June 2004, *Official Gazette of the Republic of Rwanda*, no. 11 of 1 June 2008.

⁵²² NSGC, *supra* note 387, p. 96.

⁵²³ Human Rights Watch, 2011, *supra* note 399, p. 24.

substantially reduced the number of genocide-related cases pending before ordinary courts, it undermined the right to remedy of the victims of rape and sexual violence. With the transfer of rape and sexual violence offences to the Gacaca courts, the victims of such crimes were more reluctant⁵²⁴ to sue the offenders, for fear that their statements would not remain confidential and their identity would be known to the public, given that the judges were all members of their local communities and were sometimes even related to the accused. Similarly, even though all formal proceedings concerning rape and sexual violence crimes were tried *in camera*, the victims of such crimes felt that even in such behind-closed-door hearings, the confidentiality of their statements would not be effectively protected because on the day of Gacaca sessions, everyone in the community would still know that a given case involved rape or sexual violence. Since only sexual violence cases were held *in camera* and at a location known to the general public, the community members would see a woman and a man enter a room (with others) and therefore guess the nature of the case.⁵²⁵

To mitigate certain side effects of the transfer of rape and sexual violence cases and render the Gacaca proceedings related to such crimes more acceptable to the victims, the 2008 amendment introduced three important rules. It entrusted victims of rape and sexual violence with the right to request that a judge be disqualified from hearing the case; it allowed victims to send written statements of their allegations instead of appearing in court;⁵²⁶ and it accorded victims the right to be accompanied by a trauma counsellor and a relative or friend for the hearing, even if it took place behind closed doors. This last rule was perhaps the least effective one in practice as, due to the limited number of trauma counsellors around the country, some victims appeared on their own or with a relative or friend.⁵²⁷ The first rule, however, proved to be a real step forward in terms of victims' protection and welfare: unlike in ordinary cases, where a judge can only be disqualified if the victim demonstrates the judge's actual bias or conflict of interest, in rape and sexual violence cases connected to the genocide, the disqualification of a judge – upon request of the victims – was almost automatic before Gacaca courts.

Likewise, the second rule, which allowed victims to send written statements to the Gacaca court judges, provided some degree of relief to victims who were afraid of appearing at the hearings and of confronting the accused. Conversely, however, this rule compromised the right of the accused to directly confront his or her accuser in sexual violence cases, and to challenge the accuser's credibility. As has been highlighted throughout this chapter, in balancing the rights of the victims with the rights of the accused, the Gacaca system generally tended to favour the former over the latter – an approach that is in line with human rights, but contrary to that of international criminal law.

⁵²⁴ See U. Kaiteisi, 'Genocidal Gender and Sexual Violence: The Legacy of the ICTR, Rwanda's Ordinary Courts and Gacaca Courts', PhD thesis, Utrecht University, 18 December 2013, pp. 211–212.

⁵²⁵ Ibid., p. 212. See also Human Rights Watch, 2011, *supra* note 399, p. 115.

⁵²⁶ Ibid., p. 117.

⁵²⁷ Ibid., p. 116.

The Gacaca courts concluded their proceedings on 18 June 2012, that is, in only ten years. According to the then minister of justice, Gacaca courts cost about fifty-two million US\$.⁵²⁸ As the table below shows, by helping to tackle the enormous backlog of genocide cases in a very short period of time and at a relatively low cost, the Gacaca courts succeeded where conventional courts, whether national or international, had failed.

Table 1: Situation of trials in Gacaca courts (June 2012)

Category	Cases	%	Convictions	%	Acquittals	%	Conviction rate
1	60,552	3.10%	53,426	3.18%	7,126	11.77%	88.23%
2	557,528	28.47%	361,590	21.50%	195,938	35.14%	64.8%
3	1,320,554	67.43%	1,266,632	75.32%	53,922	4.08%	95.91%
Total	1,958,634		1,681,648		256,986		

Data: National Service of Gacaca Courts, Summary Report on Gacaca Courts' Activities, June 2012.

The above figures show the total numbers of genocide cases (not of genocide perpetrators) tried through the Gacaca system. As the table shows, the majority of cases – 67.43 per cent of all cases – were property-related crimes that fell into the third category, while cases related to crimes against individuals represented only 31.57 per cent; 3.10 per cent of these fell within the first category and 28.47 per cent within the second. According to records, by June 2012 – at the closure of Gacaca proceedings – a total of 1,958,634 cases involving 1,003,227 individuals (90 per cent male and 10 per cent female) had been tried through Gacaca courts.⁵²⁹ The total number of genocide cases that resulted in convictions is 1,681,648 (86 per cent), and 225,012 (13 per cent) were based on guilty pleas and confessions by the accused.⁵³⁰ The table also shows that the conviction rate was high for all categories of crimes: 95.91 per cent for property-related crimes in the third category, 88.23 per cent for crimes in the first category and 64.8 per cent for crimes in the second category. As shown in the table below, the conviction rate on appeal was also high: of 178,741 appeal cases,⁵³¹ 132,902 (74.35 per cent) led to final convictions and 45,839 (25.65 per cent) resulted in acquittals.⁵³²

⁵²⁸ According to President Kagame, the number of cases tried by the ICTR up until 2012 stood at sixty, costing US\$1.7 billion. See Kagame, P., 'President Kagame officially closes Gacaca Courts – Kigali, 18 June 2012', YouTube video, 26 June 2012, available at <https://www.youtube.com/watch?v=m6UVsxZX3cU&t=696s>, accessed on 10 November 2020.

⁵²⁹ NSGJ, 'Summary of the Report Presented at the Closing of Gacaca Courts Activities', Kigali, June 2012. See also H. Nyseth Brehm, C. Uggen and J.-D. Gasanabo, *supra* note 388, p. 339; A. L. M. de Brouwer and E. Ruwebana, *supra* note 41, p. 950.

⁵³⁰ *Ibid.*

⁵³¹ H. Nyseth Brehm, C. Uggen and J.-D. Gasanabo, *supra* note 388, p. 340.

⁵³² According to Smeulers, Hola and van den Berg, 'the total number of cases tried [by Gacaca courts] was over 1.958.634. Of those indicted, some 84 per cent were found guilty while 277.066 (14 per cent) were acquitted'. See A. Smeulers, B. Hola and T. van den Berg, 'Sixty-Five Years of International Criminal Justice: The Facts and Figures', (2013) 13 *International Criminal Law Review* 35.

Table 2: Situation of appeals in Gacaca courts of appeal (June 2012)⁵³³

Category	Appeals	%	Convictions	%	Acquittals	%
1	19,177	10.72%	16,688	12.56%	2,489	5.43%
2	134,394	75.19%	93,607	70.43%	40,787	88.98%
3	25,170 ⁵³⁴	14.08%	22,607	17.01%	2,563	5.59%
Total	178,741		132,902		45,839	

It is worth noting that what is not apparent from these figures – but was mentioned earlier and is elaborated further in chapter seven – is the fact that the participation of the population in the criminal proceedings allowed many survivors to learn the whereabouts of their family members and belongings. The Gacaca system also brought the perpetrators and survivors of the genocide against the Tutsi closer together, enabled people to speak out and ultimately permitted the truth about the genocide against the Tutsi to emerge.

3.3. Conclusion

As discussed earlier in chapter two and reiterated in this chapter, ensuring the accountability of perpetrators is a key feature of victims' right to reparation, which leads not only to the sanctioning of perpetrators but also the disclosure of the truth. It gives a sense of satisfaction to the victims, as it brings the facts of past atrocities to public awareness and thus officially acknowledges that crimes were committed and the victims were wronged. As emphasised by Mirajina Toma, 'the knowledge exists between the victim and the perpetrator. But unless it is acknowledged, then the victim is not recognised. His/her suffering is not recognised, and somehow the full truth is not there'.⁵³⁵

Due to the overall objective of this study, this chapter aimed to analyse the mechanisms put in place in order to prosecute those responsible for the genocide against the Tutsi in Rwanda. As discussed in this chapter, by contrast with (among others) South Africa and Sierra Leone,⁵³⁶ which opted for truth and reconciliation commissions, amnesties and selective accountability,⁵³⁷ the government of Rwanda opted for full or maximal individual accountability. As explained in this chapter, the main reason for rejecting amnesties was to avoid perpetuating a culture of impunity that had characterised the history of ethnic conflicts in Rwanda and which, to a certain extent, was responsible for the genocide against the Tutsi

⁵³³ Ibid.

⁵³⁴ Since cases related to looted property were not appealable, this figure reflects revisions of cases tried in *absentia*.

⁵³⁵ Cited in D. Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia*, Oxford: Oxford University Press, 2018, p. 120.

⁵³⁶ With respect to Sierra Leone, the Special Court for Sierra Leone (SCSL) was set up in 2002 following a request made by the government of Sierra Leone to the United Nations in 2000 for 'a special court' to address serious crimes against civilians and UN peacekeepers committed during the country's decade-long (1991–2002) civil war.

⁵³⁷ W. A. Schabas, 'The Rwandan Courts in Quest of Accountability: Genocide Trials and Gacaca Courts', (2005) 3 *Journal of International Criminal Justice* 881–884; A. L. M. de Brouwer and E. Ruwebana, *supra* note 41, p. 950.

in Rwanda in 1994. It was believed that another amnesty for crimes against the Tutsi community could plant the seeds for future conflict.

While maximal individual judicial accountability confirmed the mass participation of ordinary citizens, it also revealed that many individuals did not engage in the genocide against the Tutsi and thus diluted the stigma that had been attached to the Hutu community. Although, as I highlighted earlier, the conviction rates were very high, the individualisation of the offences provided the opportunity for those not involved in the genocide to prove their innocence and clear their names.

As discussed in this chapter, the prosecution and accountability of the perpetrators of the genocide against the Tutsi led to acknowledgement and confirmation of the harm that was suffered, and permitted the truth – in its multiple dimensions⁵³⁸ – about the genocide against the Tutsi to emerge. Most importantly, the accountability or punishment of the genocide perpetrators paved the way for healing the wounds of the past, as it restored the dignity and integrity of the victims. As explored in chapter seven, it also laid the ground for reconciliation and peaceful cohabitation of Rwandans.

As evidenced in this chapter, although certain aspects of the Gacaca system can rightly be criticised for not having upheld international and Rwandan constitutional standards of fair trial, it still must be recognised that it allowed the victims to come together and tell the stories of their own suffering and that of their family members. In their attempt to uncover the truth about the genocide against the Tutsi, the Gacaca courts involved all stakeholders of the crimes: victims, perpetrators and the community. With the Gacaca proceedings, not only were the victims empowered to speak out and confront their aggressors,⁵³⁹ but the affected population or community also had the opportunity to collectively shed light on the circumstances of the genocide against the Tutsi.

Based on the confessions of genocide perpetrators, the perpetrators, victims and community at large mutually agreed upon and validated the circumstances of the atrocities and thus developed a mutually shared understanding of the genocide against the Tutsi at community level. Most importantly, by pleading guilty and apologising for their actions, genocide perpetrators publicly acknowledged the wrongful nature of what they had done.

Overall, what can be learned from the Rwandan experience is that if a society seeks to come to terms with its past, some form of accountability – even if imperfect – must be pursued. At the very least, those who have committed gross and serious violations of human rights constituting international crimes should be individually tried and punished. Doing nothing

⁵³⁸ Report of the Truth and Reconciliation Commission of South Africa, vol. I, 2008, pp. 111–112. See also E. Stanley, 'Evaluating the Truth and Reconciliation Commission', (2001) 39(3) *Journal of Modern African Studies* 528.

⁵³⁹ See A. L. M. de Brouwer and E. Ruwebana, *supra* note 41; PRI, 'Monitoring and Research Report on the Gacaca: Testimonies and Evidence in the Gacaca Courts', Report, August 2008; Y. Danieli, 'Victims: Essential Voices at the Court', (2004) *Victims' Rights Working Group Bulletin*.

adds to the harm of the victims and perpetuates a culture of impunity, arguably leaving in place the seeds for future conflicts.

CHAPTER FOUR

GENOCIDE VICTIMS' ACCESS TO COURT AND PECUNIARY REPARATIONS IN RWANDA

*'It is clear that no one is going to return to the imprisoned dissident his youth; to the young woman who has been raped her innocence; to the person who has been tortured his or her integrity. Nobody is going to return the dead and the disappeared to their families. What can and must be publicly restored [are] the victims' names and their dignity, through a formal recognition of the injustice of what has occurred, and, wherever possible, material reparation ... Those who clamor for social reparation are not asking for vengeance. Nor are they blindly adding difficulties to a historical process that is already by no means easy. On the contrary, they are promoting the personal and social viability of a new society, truly democratic.'*⁵⁴⁰

As noted earlier in this study, the Rwandan response to the genocide against the Tutsi was based on the 1996 Genocide Organic Law and on the various Gacaca organic laws. These instruments created a parallel system, whereby some genocide perpetrators were prosecuted by ordinary courts and others by Gacaca courts.

In addition to retribution by way of prosecuting and punishing genocide perpetrators, the 1996 Genocide Organic Law was normatively rich in terms of reparation for material and moral harm suffered by the victims of the genocide against the Tutsi, whereas the Gacaca system progressively side-lined victims' rights to reparations by limiting them to looted property.

Having discussed the prosecution and punishment of the genocide perpetrators by the Specialised Chambers and Gacaca courts as a form of reparation in the previous chapter, this chapter discusses reparations in the form of compensation and/or restitution awarded to the victims of the genocide against the Tutsi. Specifically, this chapter aims to analyse whether and to what extent the victims of the genocide against the Tutsi have been given access to court to claim reparations for the harm they suffered. Since, at the time of writing, twenty-two individuals responsible for the genocide in Rwanda have been tried under the principle of 'universal jurisdiction' in ten different foreign countries,⁵⁴¹ some victims of the genocide against the Tutsi have instituted civil claims in these countries against the genocide suspects, and so the place accorded to these victims in certain domestic jurisdictions is also discussed in this chapter.

⁵⁴⁰ These are the words of Ignacio Martin-Baró, one of six Jesuit priests murdered by a government squad in El Salvador on 16 November 1989. See S. F. Lean, 'Is Truth Enough? Reparations and Reconciliation in Latin America', in J. Torpey, *supra* note 235, p. 169.

⁵⁴¹ Namely, Switzerland, Belgium, France, Sweden, Germany, Norway, the Netherlands, Finland, the United States and Canada. See T. Cruvellier and E. Rugiririza, 'Rwanda: The Most Judged Genocide in History', *JusticeInfo.net*, 4 April 2019, available at <https://www.justiceinfo.net/en/reconciliation/40846-rwanda-the-most-judged-genocide-in-history.html>, accessed on 11 March 2020.

To meet the above-mentioned aims, this chapter is divided into three sections. The first section analyses the ambitious and normatively rich victims' rights provisions of the 1996 Genocide Organic Law. As discussed in this section, this law authorised victims to seek reparation for both material and moral harm suffered through participation in criminal proceedings as civil parties before Specialised Chambers. Building on the first section, the second section discusses how the Gacaca system progressively side-lined the victims' rights to reparations by limiting them to looted property. Lastly, the third section examines reparation awards issued to Rwandan genocide victims in foreign domestic proceedings against persons involved in the genocide against the Tutsi in Rwanda.

4.1. The victims' locus standi under the Rwandan Genocide Organic Law

Unlike victims of ordinary crimes, whose reparation claims were regulated by article 258 of the Civil Code,⁵⁴² articles 16, 71 and 72 of the Code of Criminal Procedure⁵⁴³ and articles 135 to 139 of the Code of Judicial Organization and Competence,⁵⁴⁴ the 1996 Genocide Organic Law – adopted to deal with the consequences of the genocide against the Tutsi – provided a particular and specific reparation framework for victims of the genocide. As is further explained in the following subsections, the 1996 Genocide Organic Law authorised the victims of the genocide against the Tutsi to seek reparations for all sorts of harm suffered (matrimonial and extra-matrimonial losses) through participation as civil parties in criminal proceedings before the Specialised Chambers⁵⁴⁵ and even to initiate criminal proceedings.⁵⁴⁶ The law contained several dispositions aimed precisely at guaranteeing the right to an effective remedy of victims of the genocide against the Tutsi. First, it granted them free access to courts,⁵⁴⁷ which is not free for victims of ordinary crimes. Second, it entrusted the public prosecutor with the status of legal representative of all the victims who had no legal capacity.⁵⁴⁸ Third, it recognised the right to reparation of victims who had yet to be identified.⁵⁴⁹ Fourth, it established a joint civil liability on the part of all the masterminds of the genocide – placed in the first category – for all the harm caused all over the country.⁵⁵⁰ These four sets of dispositions and attached rights will be presented in the next subsections.

⁵⁴² See Decree of 30 July 1888 relating to contracts or conventional obligations, Civil Code Book III, in *Bulletin Officiel*, 1888, p. 109.

⁵⁴³ See law of 23 February 1963 on the Code of Criminal Procedure, modified by Decree Law No. 07/1982 of 7 January 1982, available at <https://www.refworld.org/docid/3ae6b5b84.html>, accessed on 26 February 2020.

⁵⁴⁴ Decree Law No. 09/80 of 7 July 1980 establishing the Code of Judicial Organization and Competence.

⁵⁴⁵ 1996 Genocide Organic Law, article 28.

⁵⁴⁶ *Ibid.*, article 29(2) and (4).

⁵⁴⁷ *Ibid.*, article 29(3) and (5).

⁵⁴⁸ *Ibid.*, article 27.

⁵⁴⁹ *Ibid.*, article 30(3).

⁵⁵⁰ *Ibid.*, article 30(1).

4.1.1. The victims' prerogative to initiate criminal proceedings and free access to court

As discussed in chapter two of this work,⁵⁵¹ a remedy is deemed available if the petitioner can pursue it without impediments or if he or she can make use of it in the circumstances of his or her case. In this sense, and according to the African Commission's constant case law,⁵⁵² a remedy is available if it is accessible both in theory and in practice,⁵⁵³ that is, if it is attainable or reachable by the petitioner.

In this respect, in order to remove all the impediments that could prevent genocide victims from accessing the Specialised Chambers to seek reparation, the 1996 Genocide Organic Law exempted genocide survivors from paying court fees.⁵⁵⁴ Although court fees are not generally considered impediments to accessibility to a court of law,⁵⁵⁵ subjecting the admissibility of the genocide victims' civil claims to the payment of court fees – as was (and still is) the case for victims of ordinary crimes – would have made the remedy inaccessible to the majority of the victims of the genocide against the Tutsi in Rwanda. They would not have been able to pay the court fees, since the genocide left many – if not all – victims without any means of subsistence and poorer than they were before the genocide. Their free access to court reflected the legislator's implicit recognition of the hindrance that court fees would have constituted in terms of accessibility due to the victims' lack of financial means.

Besides the exemption of court fees, the 1996 Genocide Organic Law gave the victims of the genocide against the Tutsi the capacity to constitute themselves *parties civiles* in the criminal proceedings. By contrast with the witness role played by the victims at the ICTR and to the participatory victims' status at the ICC, this civil party status gave them the prerogative to join the criminal proceedings or to request the initiation of such proceedings through the submission of a written petition to the public prosecutor setting out the grounds for the prosecution hearing.⁵⁵⁶ This prerogative arose from article 29(2) of the 1996 Genocide Organic Law which stipulated that

victims acting either individually or through legally constituted associations for the defence of victims, represented by their legal representative or by a special representative designated according to their status, may request the commencement of a public prosecution by submitting a written petition setting out the grounds for the prosecution to the public prosecutor of the competent jurisdiction. The status of the civil party shall be given to the petitioner.⁵⁵⁷

Equally important, to avoid any obstacle that the discretionary prosecutorial power of the public prosecutor could have had on the materialisation of the victims' right to an effective

⁵⁵¹ Chapter two, section 2.2.3.1.

⁵⁵² See e.g. *AfrComHPR, Anuak Justice Council v. Ethiopia* (Communication 299/05), 2006, para. 51.

⁵⁵³ *AfrComHPR, Dawda Jawara v. The Gambia* (Communications 147/95 and 149/96), 2000, para. 32.

⁵⁵⁴ 1996 Genocide Organic Law, article 29(3) and (5).

⁵⁵⁵ See for instance ECtHR, *Kijewska v. Poland* (application no. 73002/01), 6 September 2007, para. 47.

⁵⁵⁶ *Ibid.*, article 29(2).

⁵⁵⁷ *Ibid.*, article 28.

remedy, the 1996 Genocide Organic Law entrusted victims with the power to bypass the prosecutor's inaction and/or decision not to prosecute and to proceed with private prosecution directly before a competent court. Under the law, the victims could thus substitute themselves for the prosecutor, as long as they could prove their case. This was limited, however, as the power to request punishment remained within the exclusive jurisdiction of the public prosecutor. Victims could only request reparation.⁵⁵⁸ In case of private prosecution conducted by the victims, the public prosecutor could be summoned to explain the reasons for his or her decision not to prosecute or for his or her inaction.

The prerogative to bypass the prosecutor's inaction also encompassed the victims' right to file an appeal seeking reparation after the acquittal of the accused and/or the prosecutor's failure to appeal against the acquittal. It should be mentioned here that the exercise of this prosecutorial power by the victims remained very much theoretical, as no case was introduced by victims through this prerogative; a tentative explanation for this may be found in the fact that the burden of proof associated with this prerogative was very likely too heavy to bear.

4.1.2. The representation of genocide victims with no legal capacity

Article 2(3) of the ICCPR, which requires that state parties must ensure that individuals also have accessible and effective remedies to claim the rights contained in the covenant, emphasises that 'such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of persons, including in particular children'.⁵⁵⁹ As thousands of children (an estimated total of 75,000) and other genocide survivors with intellectual disabilities and people with mental health problems lost their legal representatives⁵⁶⁰ because of the genocide and could not access the court due to lack of legal capacity,⁵⁶¹ the legislator entrusted the public prosecutor with a direct legal obligation and prerogative of representation. The rationale for this prerogative was the legislator's need to not exclude those whose legal representatives had died from accessing the court. Without this prerogative on the part of the public prosecutor, the victims of the genocide against the Tutsi with no legal capacity would have been prevented from accessing the Specialised Chambers and thus from seeking reparation for the harm they suffered.

The public prosecutor's representation was triggered *proprio motu* or upon request every time the *prima facie* evidence or elements of a particular case demonstrated that an individual with no legal capacity had been the victim of the criminal conduct or act(s) undergoing trial. This happened, for instance, in the case of *Public Prosecutor v. César Hakizimana et al.* Under article 27 of the 1996 Genocide Organic Law, the public prosecutor

⁵⁵⁸ Ibid., article 29(4).

⁵⁵⁹ HRC, General Comment 31, *supra* note 127, para. 15.

⁵⁶⁰ At the time, under the Rwandan legal system, the age of legal capacity or majority was 21 (since 2016, it has been 18) and only individuals aged at least 21 could file claims before a court of law. Minors and individuals declared incapable by the law because of their mental deficiency had to act through their parents or legal guardians.

⁵⁶¹ 1996 Genocide Organic Law, article 27.

requested on behalf of Mukama, a minor with no parents or guardian, a reparation equivalent to €16,669 for the loss of his parents and relatives, for corporal harm and for looted property.⁵⁶² The prosecutor, acting *proprio motu*, filed a civil claim for the interests, and on behalf, of Mukama because the *prima facie* evidence demonstrated that there were sufficient reasons to believe that César Hakizimana had killed Mukama's parents and relatives and destroyed his parents' property. Without this prerogative for the prosecutor to act as a representative, no reparations would have been granted to Mukama, since he was not a party to the case and had no legal capacity to seek reparations before the Specialised Chambers.

4.1.3. The Specialised Chambers' prerogative to issue reparations to genocide victims not yet identified

Since many victims were killed far from their residences in the churches, schools and stadiums where they tried to find refuge or at the roadblocks established by the perpetrators, many victims could not be identified by their names. In light of this, in a similar approach to that adopted for survivors with no legal capacity, the legislature paid particular attention to the genocide victims who could not be easily identified at the time of the trials. To protect the interests of these victims, the 1996 Genocide Organic Law entrusted the judges of the Specialised Chambers with the prerogative of issuing reparations to the victims not yet identified each time it was evident to them that victims other than those present or represented in the hearings had been affected by the criminal conduct of the accused. With this prerogative, in contrast to the *non ultra petita* rule,⁵⁶³ in each case where the judges were convinced beyond reasonable doubt that unidentified individuals were victims of the criminal conduct or act(s) under trial, they had the legal obligation to issue reparation awards to such victims. With this power, the judges of the Specialised Chambers were therefore allowed to go beyond the limits set by the claims of the parties to the case (i.e. the prosecutor, the accused and civil parties present in court) and issue a decision that considered other potential civil parties who were not present or represented in the case and whose identity could not be determined at the time of the hearings.⁵⁶⁴ As provided for in article 30(3), such reparation awards were issued without prejudice to the rights of the civil parties present or represented at trial, upon request by the prosecutor. Article 30(3) reads:

Without prejudice to the rights of civil parties present or represented at trial, and at the request of the Public Prosecution Department, the court shall award damages to victims not yet identified.⁵⁶⁵

⁵⁶² *Prosecutor v. Hakizimana César et al.*, R.P. no. 054/97/CS/NTA/Gde, judgment of 28 June 2000, p. 8.

⁵⁶³ Under the Rwandan general legal system, the competence of the court is usually limited by the *non ultra petita* rule (*ne eat iudex ultra petita partium aut breviter ne ultra petita*), which requires the court to review a case only within the limits of the questions of law or fact which have been raised by the parties to a dispute. The *non ultra petita* rule flows from the principle of the free disposition of the parties, which requires judges, when reviewing a particular case, not to go beyond the parties' allegations and to only issue a decision within the limits of the conclusions of the parties to the case.

⁵⁶⁴ See for instance *Prosecutor v. Karamira Froduald*, R.P. 006/CS/KIG, judgment of 14 February 1997; *Prosecutor v. Hakizimana Augustin*, R.P. 209/CSK, judgment of 6 April 2001; *Prosecutor v. Ngomambili Faustin*, R.P. 10/CS/KIG, judgment of 27 February 1998.

⁵⁶⁵ 1996 Genocide Organic Law, article 30(3).

The reparation awards issued to victims not yet identified were supposed to be deposited in the Victims Compensation Fund (hereinafter VCF), whose creation and operation was supposed to be determined by a specific law;⁵⁶⁶ however, for unknown reasons, this law has not yet been adopted. Pending the creation of the VCF, these reparation awards were supposed to be deposited in an account at the National Bank of Rwanda opened by the minister responsible for social affairs. For reasons that are also unknown, no such account was ever opened.⁵⁶⁷ Unfortunately, therefore, and despite a number of decisions granting reparations to victims not yet identified, the failure to establish the VCF and to open a bank account where such reparation awards were supposed to be deposited rendered the reparation awards issued under 30(3) of the 1996 Genocide Organic Law ineffective.

4.1.4. The joint civil liability of the genocide's masterminds for the harm caused countrywide

To make sure that no harm was left unrepaired, the 1996 Genocide Organic Law introduced in the Rwandan legal system an ambitious form of civil liability for all the perpetrators placed in the first category for the harm caused countrywide. The 1996 Genocide Organic Law grounded the civil liability for criminal act(s) or conduct related to the genocide against the Tutsi in two different modes of liability. Taking into consideration the particular degree of criminal participation, as determined by the category of each perpetrator, the perpetrators placed in the first category were jointly held liable for the damages caused by their own particular criminal act(s) or conduct and for all damages caused in the country. In contrast, the perpetrators placed in the three other categories were only liable for the damages caused by their own criminal acts. These modes of civil liability can be found in article 30(1) and (2) of the 1996 Genocide Organic Law, which stipulated that

convicted persons whose acts place them within Category 1 under Article 2 shall be held jointly and severally liable for all damages caused in the country by their acts of criminal participation, regardless of where the offences were committed.⁵⁶⁸

Persons whose acts place them within Categories 2, 3, or 4 shall be held liable for damages for the criminal acts they have committed.⁵⁶⁹

Even though not expressly specified in the text of the law, the civil liability of perpetrators in the first category for all the damages caused across the country could be attributed to the role they played in the genocide against the Tutsi as planners, organisers and instigators, or to the seriousness of the criminal act(s) they committed. As with the classification of the perpetrators into different categories, the distinction in the modes of civil liability reflects an implicit recognition by the legislator that, even in the case of mass violations of human rights involving a plurality of perpetrators, the role of each and every perpetrator should be considered when determining the reparation of the harm caused by such violations.

⁵⁶⁶ Ibid., article 32.

⁵⁶⁷ IBUKA, 'Submission on the working document of the Justice, Reconciliation, Law and Order Sector Strategic Plan: July 2013 to June 2018', p. 4.

⁵⁶⁸ 1996 Genocide Organic Law, article 30(1).

⁵⁶⁹ Ibid., article 30(2).

In the 1996 Genocide Organic Law, the joint civil liability of the perpetrators placed in the first category for the harm caused in the whole country was a form of collective blame, justified by the idea that the harm that resulted from the genocide against the Tutsi was rendered possible by the perpetrator's initial criminal plan. In the legislator's eyes, they therefore had to bear the full responsibility for the damages caused in the entire country precisely because they had triggered the criminal – genocidal – plan. Also implicit in article 30(1) of the 1996 Genocide Organic Law was the creation of an automatic civil liability among all perpetrators placed in the first category and an implicit right for all genocide victims to file their civil claims against any of those perpetrators, without necessarily having to prove a causal link between the conduct or act(s) of the accused and the harm they suffered. Under the joint civil liability principle, the mere proof of being a survivor of the genocide against the Tutsi would be sufficient.

It should be noted here that, since the 1996 Genocide Organic Law did not specify how judges should determine the pecuniary share of each genocide perpetrator placed in the first category, the Specialised Chambers failed to give a consistent interpretation of article 30(1). In some cases, upon request of the public prosecutor, convicted perpetrators were ordered to pay a lump sum specifically determined by the judges.⁵⁷⁰ In other cases, in addition to issuing penal sanctions, the court merely held that the convicted was also liable for reparation *in solidum* with other perpetrators placed in the first category for the harm caused countrywide, without, however, specifying the exact amount each convicted individual was liable to pay.⁵⁷¹ In other cases still, despite a court's conviction of a perpetrator in the first category, no reference to the liability for the harm caused countrywide was made in the judgment.⁵⁷² Perhaps unsurprisingly, therefore, a close analysis of the reparation awards issued by the Specialised Chambers reveals inconsistencies in the allocation of compensation to victims not only across the various Specialised Chambers but also within the same Specialised Chamber. For instance, as observed by Stef Vandeginste, for the loss of a spouse the compensation ranged between RWF 250,000 and 8,000,000 (between €250 and €8,000), whereas for the loss of a child compensation ranged between RWF 250,000 and 11,000,000 (between €250 and €11,000).⁵⁷³

With all these inconsistencies, the Specialised Chambers may have missed the opportunity to give effect to the legislator's proactive move towards increased protection of victims of the genocide against the Tutsi for whom offenders had not been, or could not be, identified.

Furthermore, despite all the above-discussed innovations and prerogatives introduced in the Rwandan legal system by the 1996 Genocide Organic Law to help the victims of the genocide against the Tutsi materialise their rights to an effective remedy and adequate

⁵⁷⁰ See *Prosecutor v. Ngomambili Faustin*, R.P. 10/CS/KIG, judgment of 27 February 1998; *Prosecutor v. Karamira Froduald*, R.P. 006/CS/KIG, judgment of 14 February 1997.

⁵⁷¹ See *Prosecutor v. Rwanteli Védaste*, R.P. 003/97/CS, judgment of 8 October 1997; *Prosecutor v. Munyantarama Martin alias Pilato*, R.P.A. 010/97/R1/KIG, judgment of 20 April 1998, *Prosecutor v. Hakizimana Augustin*, R.P. 209/CSK/TPI, judgment of 6 April 2001.

⁵⁷² See *Prosecutor v. Ndikubwimana Laurent*, R.P. 07/I/97, judgment of 7 July 1997.

⁵⁷³ S. Vandeginste, 2003, *supra* note 235, p. 257.

reparations, very few genocide victims actually participated as civil parties before the Specialised Chambers. According to SURF and REDRESS,

from 1996 up to the establishment of Gacaca courts in 2001, survivors participated in approximately 2/3 of all criminal cases before specialized chambers in ordinary courts as '*partie civile*' or civil parties (claimants). Approximately 50% of survivors who lodged complaints for compensation against individual perpetrators were awarded compensation for material prejudice and/or moral grief.⁵⁷⁴

As affirmed by Stef Vandeginste, in half of the cases in which reparations were awarded to victims, forty-six per cent of the reparation awards were granted to civil parties who had personally lodged civil claims and four per cent to the public prosecutor's office under article 27 (representation of victims with no legal capacity) or article 30 (victims not yet identified or joint civil liability) of the 1996 Genocide Organic Law.⁵⁷⁵ By contrast, in half of the cases where no reparations were awarded, in eighteen per cent of the cases the court separated the civil claims from the criminal prosecutions while in thirty-two per cent of the cases no victim had lodged or participated in the criminal proceedings as civil parties.⁵⁷⁶

The separation of victims' civil claims from the criminal proceedings by the Rwandan courts can be attributed to the victims' failure to submit to the courts the relevant certificates such as birth certificates, identity cards and death certificates or to the government's failure to appear in cases where it was jointly sued by the victims for its civil liability.⁵⁷⁷ The relatively low number of civil claims can also be attributed to the lack of information about the proceedings, such as the names of the accused, the dates and places of the hearings, and the possibility of filing a civil claim, as well as the lack of the necessary legal documents, such as birth certificates attesting kinship with the victim(s) and/or the death certificates of the deceased victim(s). Furthermore, the long distance to the courts incurred transportation challenges, coupled with the fear of retaliation from the accused's family members and regular adjournments of hearings that usually led to a waste of time and money, could also explain the relatively low participation of the victims of the genocide against the Tutsi as civil parties in genocide proceedings before the Specialised Chambers.

By way of conclusion, it should be noted that the normatively rich and highly pro-victim approach of the 1996 Genocide Organic Law reflected the sympathy of the then new Rwandan government – dominated by former RPF members from the Tutsi community – with the cause of the genocide survivors, as well as its willingness and commitment to adopt policies to comfort them.⁵⁷⁸ However, the theoretical innovations of the law remained very much illusory in practice, because they lacked the requisite accessibility, effectiveness and adequateness, as discussed in chapter two. In particular, the lacuna of the law with respect to

⁵⁷⁴ SURF and REDRESS, 'No justice without reparation: Recommendations for reparation for survivors of the 1994 genocide', discussion paper, July 2012, p. 7, para. 13.

⁵⁷⁵ S. Vandeginste, 2003, *supra* note 235, p. 256.

⁵⁷⁶ *Ibid.*

⁵⁷⁷ *Ibid.*

⁵⁷⁸ See F. M. Ndahinda, 'Debating and Litigating Post-Genocide Reparations in the Rwandan Context', in C. Ferstman, M. Goetz and A. Stephens, *supra* note 359, p. 633.

means and methods to effectively enforce the reparation framework rendered the rights and prerogatives of the genocide victims *de facto* ineffective and empty of substance.

4.2. The impact of the Gacaca organic laws on the rights to an effective remedy and adequate reparations for the victims of the genocide against the Tutsi

While the 1996 Genocide Organic Law ultimately gave illusory hope to genocide victims, the Gacaca legal framework – although adopted precisely to uphold genocide victims’ rights – in reality drastically and negatively affected their rights to access court and to seek reparation for the harm they had suffered. By contrast with the substantive content of the right to an effective remedy and to the well-established principle of international law which provides that ‘reparation must, as far as possible wipe out all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed’,⁵⁷⁹ the Gacaca organic laws created both procedural and substantive obstacles to the materialisation of the rights accorded under both international law and, as detailed below, Rwandan law to victims whose human rights had been violated.

4.2.1. Dual standard in the treatment of the victims of the genocide against the Tutsi

Criminal acts committed during the genocide against the Tutsi were tried domestically in two parallel legal systems. As explained in chapter three, the ordinary courts that replaced the Specialised Chambers continued to apply the 1996 Genocide Organic Law to the genocide perpetrators placed in the first category, while the Gacaca courts, which tried perpetrators in the second and third categories, applied the 2004 Gacaca Organic Law, subsequently amended on three occasions.⁵⁸⁰

This parallel judicial system followed two different rules in terms of victims’ reparations and thus led to discrimination against the majority of genocide victims. Whereas the victims of the criminal acts falling within the jurisdiction of the Gacaca courts could only seek reparation for looted property, the victims of the criminal acts covered by the jurisdiction of ordinary courts could seek reparation for all sorts of harm suffered, whether moral, pecuniary or material.

Legally speaking, this parallel judicial system led to the violation of both domestic law, as contained in article 19 of the Constitution of Rwanda,⁵⁸¹ and international law, as enshrined in article 8 of the UDHR, article 2(3)(a) of the ICCPR, article 6 of the CERD, article 14(1) of the CAT and article 39 of the CRC, which all accord to every victim whose rights have been

⁵⁷⁹ PCIJ, *Factory at Chorzów* (merits), Ser. A, no. 17, 1928, p. 29, and PCIJ, *Factory at Chorzów* (jurisdiction), Ser. A, no. 9, 1927, p. 21.

⁵⁸⁰ See chapter three, section 3.2.

⁵⁸¹ Article 19 of the Constitution of the Republic of Rwanda reads: ‘No one shall be denied the right to appear before a competent judge to hear his/her case.’

violated an individual legal right to an effective remedy by the competent national tribunals. Likewise, principle 12 of the UN Basic Principles and Guidelines entitles victims to equal access to an effective judicial remedy, as provided for under international law, and requires that the state's international obligations to secure the rights to access justice and to fair and impartial proceedings be reflected in domestic laws.

The parallel judicial system also created unnecessary discrimination among the victims of the genocide against the Tutsi, because the victims of the crimes placed in the first category kept their *locus standi* in the criminal proceedings against the direct perpetrators whereas the victims of the crimes placed under the jurisdiction of the Gacaca courts partially⁵⁸² lost their previous *locus standi*. The victims of the crimes within the jurisdiction of Gacaca courts lost their right to seek reparation for moral and bodily harm because – in terms of reparations – Gacaca courts only had jurisdiction over looted property. Similarly, unlike the victims of ordinary crimes, who are able to claim reparation for all sorts of harm suffered, the victims of the genocide against the Tutsi, especially victims of criminal acts or conduct placed in the second and third categories – within the jurisdiction of Gacaca courts – lost this right with the introduction of the Gacaca system in 2001. To a certain extent, the parallel judicial system led to a dual standard in the treatment of victims of similar or related criminal conduct.

4.2.2. State immunity from civil actions

As discussed above, prior to the introduction of the Gacaca system, the victims of the genocide against the Tutsi could join the criminal proceedings as civil parties and seek reparation from the perpetrators *in solidum* with the government of Rwanda. The government was ordered in seven cases⁵⁸³ to pay compensation *in solidum* with the perpetrators because of the inherited responsibility of the former government in the preparation and execution of the genocide against the Tutsi. For instance, Froduald Karamira, a former deputy head of the ruling political party MRND, was tried and sentenced to death on 14 February 1997 by the Specialised Chamber of the Tribunal of First Instance of Kigali, which also ordered him to pay, in solidarity with the Rwandan government, RWF 137,650,000 (about €137,650)⁵⁸⁴ to seventy-five civil parties.⁵⁸⁵

Realising that there were many other cases in which the government of Rwanda risked being condemned *in solidum* with the genocide perpetrators, and that it might be difficult to enforce all those potential reparation awards, the then minister of justice⁵⁸⁶ instructed the courts to suspend all cases (pending trial) in which the government was summoned to appear and to stop the issuing of reparation awards against the government.

⁵⁸² Genocide victims kept the right to seek reparation for looted property. See 2004 Gacaca Organic Law, articles 94–95.

⁵⁸³ See S. Vandeginste, 2003, *supra* note 235, p. 257.

⁵⁸⁴ At the time of writing, the exchange rate is €1 to RWF 1,000.

⁵⁸⁵ Tribunal of First Instance of Kigali, *Ministère Public v. Karamira*, R.P. 006/KIG/CS, RMP433/SI2/ CT/KP, judgment of 14 February 1997, in *Avocats sans Frontières, Recueil de Jurisprudence: Contentieux du Génocide*, vol. I, Brussels: Avocats sans Frontières, 2003, pp. 75–97.

⁵⁸⁶ See S. Vandeginste, 2003, *supra* note 235, p. 257.

Regardless of the fact that this intrusion of the political into the judicial was unlawful and in breach of the fundamental principle of the separation of powers,⁵⁸⁷ the legislator – through the 2001 Gacaca Organic Law – still formally endorsed the government's immunity from civil actions brought by the victims of the genocide against the Tutsi. To justify granting this immunity to the government of Rwanda, the legislator claimed that the government's responsibilities were being met by its payments to the VCF and by its acknowledgement of the former government's role in the genocide.⁵⁸⁸ Article 91(2)–(4) of the 2001 Gacaca Organic Law provided that

any civil action lodged against the State before the ordinary jurisdictions or before 'Gacaca jurisdictions' shall be declared inadmissible on account of its having acknowledged its role in the genocide and that in compensation it pays each year a percentage of its annual budget to the Compensation Fund. This percentage is set by the financial law.

The provisions of the previous paragraph only apply to legal actions lodged after the enforcement of this Organic Law, to cases currently pending before jurisdictions and to court orders not yet executed for the heard case.

As for the court orders which have acquired the authority of the heard case, their enforcement will, as regards damages to be paid by the State, comply with the scale fixed by the law governing the Compensation Fund.⁵⁸⁹

As can be seen from this article, not only were the civil actions arising from the genocide against the Tutsi that were filed against the state declared inadmissible, but the reparation awards already issued by the courts against the government were also to be executed in accordance with the rates provided by the compensation law that had not yet been adopted. Both the executive and the legislative powers failed in their constitutional obligation to respect and abide by the decisions of the judiciary, further violating the constitutional principle of the separation of powers. Legally speaking, neither the executive power that initiated the draft of the Gacaca Organic Law nor the legislative power that passed that draft into the 2001 Gacaca Organic Law could modify the reparation awards already issued by the Specialised Chambers.

Although it is generally accepted that states may limit access to court and enjoy some discretion in providing reparation, the limitations provided under the Gacaca organic laws seem disproportionate, as they altogether impaired, rather than limited, the right to access court. Since no victim reparation fund – on the basis of which the legislator justified immunity – was created, the immunity granted to the government of Rwanda from civil actions of victims of the genocide against the Tutsi constituted an undue restriction, as it clearly did not meet the proportionality standard, and as nothing in the Gacaca Organic Law demonstrated that it was serving a legitimate aim. In other words, despite the government's acknowledgement of its inherited responsibility for the preparation and execution of the genocide against the Tutsi, the granted immunity was not proportionate because genocide victims/survivors received nothing in compensation.

⁵⁸⁷ See article 34 of the 1991 Rwandan Constitution and article 60 of the 2003 constitution.

⁵⁸⁸ See 2001 Gacaca Organic Law, article 91.

⁵⁸⁹ Ibid.

It is worth noting that, by referring to the government's acknowledgement and yearly contribution from its annual budget to the compensation fund, the legislator confused the VCF – which had not yet been established – with the survivors' assistance fund known as the FARG – an acronym for *Fonds de soutien et d'assistance aux rescapés du génocide* – whose aim, character and activities are of a humanitarian nature and intended to support the most vulnerable survivors.⁵⁹⁰ As explained later in chapter eight, the FARG is a philanthropic fund and does not necessarily entail any right which victims of the genocide against the Tutsi may lawfully claim.

In any event, and regardless of this legislative confusion, a state cannot implement development measures or provide humanitarian assistance as a substitute for redress for victims of torture or ill treatment. According to the CAT,

a crucial component of the right to redress is the clear acknowledgement by the responsible State party that the reparative measures provided or awarded to a victim are for violations of the Convention, by action or omission. The Committee is therefore of the view that a State party may not implement development measures or provide humanitarian assistance as a substitute for redress for victims of torture or ill-treatment. The failure of a State party to provide the individual victim of torture with redress may not be justified by invoking a State's level of development. The Committee reminds that change of government as well as successor states still have the obligations to guarantee access to the right of redress.

In light of the government's immunity from victims' reparation claims and in the absence of the promised VCF, the idea of individualised reparations seems to have been deliberately abandoned and replaced by administrative assistance through the FARG.

It is worth mentioning that, although the victims of genocidal acts placed in the first category, which fell under the jurisdiction of ordinary courts, kept their *locus standi* in the criminal proceedings against the perpetrators, the government's immunity discouraged them from participating in these proceedings for fear of the perpetrators' insolvency. While the previous *in solidum* principle allowed the victims to overcome the challenges related to the insolvency of the direct perpetrators by seeking the execution of their reparation awards not only from the offender but also from the government, the government's immunity meant that their reparation awards now had little to no chance of being enforced.

In conclusion, the government of Rwanda's immunity from civil actions initiated by genocide victims seems to conflict with its responsibility to provide reparations for human rights violations caused by government agents and/or by the government's failure to prevent violations by non-state actors. It also impeded the enjoyment of the victims' right to redress and prevented the effective materialisation of the government's international obligation to provide an effective remedy and adequate reparation to the victims of the genocide against the Tutsi.

⁵⁹⁰ Law No. 2/1998 of 22 January 1998, *supra* note 46.

4.2.3. The FARG's exclusive power to institute civil actions

After being deprived of their right to seek reparation from the government, the victims of the genocide against the Tutsi were also deprived of their right to seek reparations directly from the perpetrators by Law No. 69/2008 of 30 December 2008, relating to the establishment of the fund for support and assistance for the genocide survivors (hereinafter the 2008 FARG law).⁵⁹¹

In 2009, the legislator entrusted the FARG with the exclusive authority and legal status to file civil actions against perpetrators whose criminal acts or responsibility placed them into the first category and to collect reparations from them. This legislative decision was taken in complete contravention of article 19 of the Rwandan Constitution, article 2(3) of the ICCPR, article 8 of the UDHR, article 14 of the UNCAT, article 39 of the CRC and article 7 of the ACHPR, which all impose an obligation on the government of Rwanda to provide individuals with an enforceable right to reparation. The exclusive authority of the FARG to undertake civil action in place and 'on behalf' of the victims was regarded by the legislator as a way of raising funds.⁵⁹²

Accordingly, and unequivocally, article 4(2)(2^o) of the 2008 FARG law explicitly assigned to the FARG the responsibility for 'taking action and seeking indemnity against persons convicted of the Genocide against the Tutsi and other crimes against humanity that categorize them in the first category'. Article 20 further specified the FARG's exclusive prerogative to 'undertake civil action *on behalf* of the victims':

Only the Fund is entitled to undertake civil action on behalf of the victims of the Tutsi genocide, and other crimes against humanity, against persons convicted of crimes classifying them in the first category.⁵⁹³

Conversely, article 21 limited the role of victims to merely assisting the FARG; this assistance did not guarantee the victims' right to reparations:

Any Genocide against the Tutsi victim or any other interested party, upon request or at own initiative, may assist the fund during legal proceedings against genocide suspects that classify them in the first category claim damages. However, such assistance to the Fund shall not guarantee the survivor the right to damages for the assistance is gathered in the Fund in order to be distributed to the survivors as provided for by this law.⁵⁹⁴

In the course of its operative years, from 2009 to 2013, no single civil action under article 20 was initiated by the FARG. The 2008 FARG law was ultimately repealed in 2013 and replaced by a new law,⁵⁹⁵ which did not reiterate the FARG's exclusive civil status nor

⁵⁹¹ See Law No. 69/2008 of 30 December 2008, *supra* note 1, articles 4(2)(2), 20 and 21.

⁵⁹² *Ibid.*, article 22(2)(5^o).

⁵⁹³ Organic Law No. 69/2008 of 30 December 2008, *supra* note 1, article 20.

⁵⁹⁴ *Ibid.*, article 21.

⁵⁹⁵ Law No. 81/2013 of 11 September 2013 establishing the fund for support and assistance to the neediest survivors of the genocide against the Tutsi committed between 1 October 1990 and 31 December 1994 and

restore such status to the genocide victims. By entrusting the FARG with the exclusive power to seek reparation from genocide perpetrators tried by ordinary courts and by regarding such power as a mode of financing the FARG, the 2008 FARG law confused the FARG with the VCF, which was supposed to be established by a particular law on compensation that has yet to be promulgated.

4.2.4. The victims' compensation fund: an unfulfilled promise

The VCF was first envisaged in the 1996 Genocide Organic Law with the main mission of collecting the reparation awards issued to victims who had not yet been identified.⁵⁹⁶ The 2001 Gacaca Organic Law subsequently reaffirmed that the VCF was the only organ with the exclusive power to determine the modalities of granting compensation. A VCF draft law⁵⁹⁷ was developed but, for unknown reasons, has not yet been upgraded into a law. According to the draft law, the VCF was supposed to enforce the judgments rendered by ordinary courts and Gacaca courts,⁵⁹⁸ and these courts were supposed to forward to the VCF all copies of their rulings and judgments awarding reparation.⁵⁹⁹ Material and human losses as well as injuries were to be compensated by the VCF.⁶⁰⁰ Like the FARG, the VCF was supposed to be financed by annual contributions from the national budget at a fixed percentage determined by law, by voluntary contributions from foreign countries and donors, and by compensation to victims, donations, bequests and profits from community service works performed by the genocide perpetrators. The VCF draft law broadly defined the beneficiaries and relatives of victims up to the sixth degree (widow or widower, descendants, parents, brothers and sisters, aunts and uncles) who would have been entitled to compensation in cases where a direct family member had died.⁶⁰¹

The VCF was supposed to provide reparations for both moral and physical harm suffered as a result of the genocide against the Tutsi. By contrast with the 1996 Genocide Organic Law, which was silent on the pecuniary determination of the harm suffered, the VCF draft law expressly determined the modalities for payment of compensation to individual victims. For instance, the loss of a spouse was to be compensated by a payment of €3,000 and that of a child by a payment of €2,000. For victims with disabilities, the payment was determined on the basis of the degree of disability, as approved by a medical doctor, the person's age and the degree of kinship with the direct victim. Victims aged between eighteen and fifty-five with an eighty per cent disability rate would have received a compensation of €4,000

determining its mission, powers, organisation and functioning, *Official Gazette of the Republic of Rwanda*, no. 45 of 11 November 2013, article 21.

⁵⁹⁶ 1996 Genocide Organic Law, article 32. See also sections 4.1.4 and 4.2.4 of chapter four.

⁵⁹⁷ See *Projet de Loi No ... Du ... Portant Création, Organisation et Fonctionnement du Fonds D'indemnisation des Victimes des Infractions Constitutives du Crime de Génocide ou de Crimes Contre l'humanité commises entre le 1er Octobre 1990 et le 31 Décembre 1994* (hereinafter VCF draft law).

⁵⁹⁸ *Ibid.*, article 2.

⁵⁹⁹ 2001 Gacaca Organic Law, article 90.

⁶⁰⁰ VCF draft law, articles 16–19.

⁶⁰¹ *Ibid.*, articles 13–14.

whereas a spouse of a victim aged over fifty-five with a disability degree of forty-five to fifty per cent would have been entitled to €275.⁶⁰²

The idea of establishing the VCF was, however, abandoned in 2004 with the promulgation of the 2004 Gacaca Organic Law. According to SURF and REDRESS, the government of Rwanda estimated that such a fund could hamper its efforts to reconcile Rwandan society and believed it would generally be unrealistic to find resources to compensate all victims of the genocide against the Tutsi.⁶⁰³ Speaking at the time, Domitilla Mukantaganzwa, then executive secretary of the National Service for Gacaca Courts (NSGC), said that the country could not have afforded a reparations fund: ‘compensation in a legal sense, we think it’s impossible for us ... We cannot commit ourselves on something we are not sure to achieve’.⁶⁰⁴

In sum, the main reasons for abandoning the very idea of a VCF seem to have been the lack of sufficient financial resources to effectively enforce all potential reparation awards, coupled with the risk that financial compensation (mainly) to victims of the Tutsi ethnic group could have fostered resentment in the Hutu community and thus affect the unity and reconciliation among Rwandans.

As a result, and by contrast with the 1996 Genocide Organic Law and to the 2001 Gacaca Organic Law, the 2004 Gacaca Organic Law made no reference to any compensation fund. It instead provided that other forms of compensation would be determined by a specific law.⁶⁰⁵ However, before the adoption of any law on compensation, the 2004 Gacaca Organic Law was repealed by Organic Law No. 04/2012/OL of 15 June 2012, which terminated Gacaca courts and determined mechanisms for solving issues which were under their jurisdiction⁶⁰⁶ (hereinafter the Organic Law terminating the Gacaca courts). As shown below, this law exacerbated the vulnerability and uncertain status of the victims of the genocide against the Tutsi when it came to exercising and enforcing their rights to access courts and to reparations.

4.3. The genocide victims’ right to reparations in the post-Gacaca proceedings

In June 2012, the government of Rwanda decided to close all Gacaca courts. Mindful that new genocide cases or other pending issues – such as appeals or revisions of Gacaca judgments – might arise after the closure of the Gacaca proceedings, the legislator passed an organic law regulating how new genocide cases and other pending issues related to the

⁶⁰² See S. Vandeginste, 2003, *supra* note 235, pp. 262–263.

⁶⁰³ SURF and REDRESS, *supra* note 574, para. 28, p. 11.

⁶⁰⁴ Domitilla Mukantaganzwa, Executive Secretary, National Service for Gacaca Jurisdictions, interview of 6 June 2006, quoted by L. Waldorf, ‘Transitional Justice and DDR: The Case of Rwanda’, International Center for Transitional Justice, June 2009, p. 17.

⁶⁰⁵ 2004 Gacaca Organic Law, article 96.

⁶⁰⁶ Organic Law No. 04/2012/OL of 15 June 2012 terminating Gacaca courts and determining mechanisms for solving issues which were under their jurisdiction, *Official Gazette of the Republic of Rwanda*, no. special of 15 June 2012.

genocide against the Tutsi would be judicially addressed.⁶⁰⁷ The legislator decided among other things that all pending and new genocide cases would be transferred to the ordinary courts.⁶⁰⁸ It also put on hold the civil actions initiated by the victims.

4.3.1. The genocide victims' civil actions: an unfinished business

The Organic Law terminating the Gacaca courts, purposely adopted to solve all pending issues left unaddressed by the Gacaca courts or that might result from their closure, rather than providing genocide victims with clarification as to their right to reparation, created more confusion and disappointment for them.

Although article 3(2) of the Organic Law terminating the Gacaca courts explicitly envisioned that 'filing a civil case for damages resulting from the crime of genocide perpetrated against Tutsi and other crimes against humanity committed between October 1, 1990 and December 31, 1994 *shall be determined by a law*',⁶⁰⁹ no new legislation has been adopted with respect to reparations since the formal closure of the Gacaca courts in June 2012. In referring to 'a law', article 3(2) failed to specify whether the civil action for damages would be regulated by a new law or by the existing provisions on civil actions resulting from ordinary crimes, namely, articles 16, 71 and 72 of the Code of Criminal Procedure and articles 135 to 139 of the Code of Judicial Organization and Competence in combination with article 258 of Civil Code Book III. Whereas article 258 of Civil Code Book III obliges whoever causes harm to another to repair that harm,⁶¹⁰ articles 16, 71 and 72 of the Code of Criminal Procedure provide the procedure through which the victims can claim reparations and articles 135 to 139 of the Code of Judicial Organization and Competence determine the competent court to issue such reparations.

This uncertainty is arguably reinforced when article 3(2) of the Organic Law terminating the Gacaca courts is read together with article 96 of the 2004 Gacaca Organic Law, which also stipulated that 'other forms of compensation the victims receive *shall be determined by a particular law*', thus envisaging the adoption of a new law to regulate 'other forms of compensation'. However, since the Organic Law terminating the Gacaca courts does not expressly prescribe the adoption of a new law, it seems that nothing actually prevents victims of the genocide against the Tutsi from seeking reparation from ordinary courts, just like other victims of ordinary crimes would be entitled to do. This conclusion seems to find support in the implicit interpretation of the Intermediate Court of Ngoma, which, as a result of an ordinary civil action issued, by judgment of 24 April 2014, a reparation award of €1,438,000 to 719 victims of the genocide against the Tutsi, i.e. €2,000 each.⁶¹¹ This followed the

⁶⁰⁷ Ibid.

⁶⁰⁸ Ibid., articles 4, 5 and 7.

⁶⁰⁹ Ibid., article 3(2). Emphasis added.

⁶¹⁰ It provides that 'any act of man that causes damage to another obliges the one by whose fault it happened to repair'.

⁶¹¹ *Mujawamariya Jacqueline et al. v. Nzabonimana Etienne*, R.C 0114/12/TGI/NGOMA, 25 April 2014, pp. 90–124.

judgment of the Brussels *cour d'assises* of 29 June 2005 against Etienne Nzabonimana⁶¹² and the exequatur order issued by the High Court of Kigali on 19 June 2007.⁶¹³

In light of this, one may wonder why many other victims of the genocide against the Tutsi did not – or do not – make use of the ordinary legal framework to seek reparation for non-property-related harms that they suffered. This was one of the questions I asked to the seventy-two genocide survivors I interviewed in Rwanda between October 2018 and March 2019.⁶¹⁴ I asked them whether, since the closure of the Gacaca courts, they had sought reparation before ordinary courts. I received various answers, which I divided into three categories. First, thirty-one genocide survivors (43.1 per cent) answered that they had not.⁶¹⁵ They all said that the law does not allow them to do so, because ordinary courts do not deal with genocide survivors' claims. These survivors said that their claims were dealt with by the Gacaca courts and that, as these no longer exist, they were waiting for the victims' fund that the government had promised them. Second, twenty-three genocide survivors (31.9 per cent) were unsure whether ordinary courts have jurisdiction over genocide compensation claims and said that, even if they do have jurisdiction, most genocide perpetrators were insolvent. They added that, due to the perpetrators' insolvency, they had already had many problems attempting to obtain the execution of the reparation awards issued by the Gacaca courts for looted property and were unwilling to put themselves through the same difficulties all over again.⁶¹⁶ Third, the remaining eighteen genocide survivors (25 per cent) had no clear idea about compensation and merely said that they did not know whether it was possible. They reported that they had not heard about such a possibility and, to the best of their knowledge, had not heard of any genocide survivor claiming reparation before ordinary courts since the closure of the Gacaca proceedings.⁶¹⁷

Despite this confusion and uncertainty regarding the current legal framework for civil actions resulting from the genocide against the Tutsi, it is nevertheless interesting to note that, just like article 96 of the 2004 Gacaca Organic Law, article 3(2) of the 2012 Organic Law terminating the Gacaca courts is twofold in nature. On the one hand, it seems to implicitly recognise the genocide victims' right to remedy for other forms of harm suffered (rather than for looted property only). On the other, it implicitly deprives the victims of their status of civil party in criminal proceedings before ordinary courts and thus prevents any opportunity to seek reparation for non-material losses. This implicit deprivation violates both the Rwandan Constitution and the international treaties ratified by Rwanda.⁶¹⁸

⁶¹² *Prosecutor v. Nzabonimana Etienne and Ndashyikirwa Samuel alias Manzi Samuel*, cour d'assises de l'arrondissement administratif de Bruxelles-Capitale, 04961, 29 June 2005.

⁶¹³ R.C 00015/07/HC/KIG, 19 June 2007.

⁶¹⁴ More findings are discussed in chapters seven and eight.

⁶¹⁵ Interview conducted by the author in Rwanda, November 2018.

⁶¹⁶ Interview conducted by the author in Rwanda, February 2019.

⁶¹⁷ Interview conducted by the author in Rwanda, December 2018.

⁶¹⁸ See for instance the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, GA res. 39/46 of 10 December 1984, entry into force 26 June 1987, article 14(1); HRC, General Comment 31, *supra* note 127, para. 16.

In sum, the promise of a law on reparation for non-property-related harm suffered by the genocide victims constitutes an implicit recognition of their right to such reparation, but the failure to materialise this promise is nothing but an impediment to the genocide victims' full realisation of their rights to an effective remedy and adequate reparations.

4.3.2. Challenges in the execution of the reparation awards issued by the Gacaca courts

Besides the uncertainty regarding the victims' claims for reparations for other, non-property-related harm they had suffered, there is also a lack of appropriate mechanisms for executing the Gacaca courts' reparation awards. Out of more than 1.3 million (1,320,554) reparation awards issued for looted property by the Gacaca courts, 1,266,394 have been settled, as the offenders paid back the victims or sought and secured forgiveness from them. 54,160 cases, however, remain unsettled because the offenders died, fled, had no property that could be used to pay back the victims or were unwilling to execute the Gacaca decisions.⁶¹⁹

As provided by the Organic Law terminating the Gacaca courts, reparation awards issued by the Gacaca courts can be executed either by restitution of the property wherever possible, by financial or monetary compensation, or by carrying out equivalent work:⁶²⁰

Compensation shall be paid by the offender himself/herself or his/her property. However, if it is evident that the offender of looting and damaging is insolvent, he/she shall be subjected to Community Services as alternative penalty to imprisonment.⁶²¹

In the execution of the reparation awards for looted property, the victims may request the seizure and auction of the offenders' property if the offenders are unwilling to enforce the reparation awards. However, if the offender is insolvent, and thus incapable of complying with the reparation award, the law provides that he or she will be subjected to *Travaux d'Intérêt Général* (TIG) – or Community Services – as an alternative penalty to imprisonment. The presidential order that determined the modalities of implementation of TIG⁶²² further provides that TIG shall be executed by a person

who committed an offence of looting or damaging property during the period of genocide committed against the Tutsi and other crimes against humanity, committed between October 1, 1990 and December 31, 1994 when it is evident that he/she is insolvent.⁶²³

As an alternative mode of reparation where the perpetrators are insolvent, TIG infringes on the materialisation of the reparation awards issued by the Gacaca courts because neither the

⁶¹⁹ E. Kwibuka, 'Over 54,000 Gacaca cases of looted property are unsettled', *The New Times*, 20 April 2018, available at <https://survivors-fund.org.uk/news/gacaca-cases-of-looted-property-are-unsettled/>, accessed on 29 September 2020.

⁶²⁰ 2004 Gacaca Organic Law, article 95.

⁶²¹ *Ibid.*, article 12.

⁶²² Presidential Order No. 66/01 of 2 November 2012 determining the modalities of implementation of community service as an alternative penalty to imprisonment, *Official Gazette of the Republic of Rwanda*, no. 47 of 19 November 2012, article 1.

⁶²³ *Ibid.*, article 2.

Organic Law terminating the Gacaca courts nor the presidential order on TIG specifies how the victims of the genocide against the Tutsi will benefit from the activities carried out under TIG by the perpetrator. Furthermore, all activities under TIG are carried out to the benefit of the government,⁶²⁴ and no equivalent is provided by the government to the victims of the genocide against the Tutsi. Through TIG, insolvent offenders are legally released from their obligations to comply with the reparation awards even though the victims are not actually compensated. In this respect, the government benefits in cases where it has not been wronged, to the detriment of the victims of the genocide against the Tutsi.

This seems to be in contradiction with the UN Basic Principles and Guidelines on the right to remedy, according to which states are required to ‘establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations’. Under these Principles and Guidelines, states are also required to

enforce domestic judgments for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgments for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgments.⁶²⁵

To meet its obligation to establish national programmes for reparation and enforce domestic judgments for reparation, the Rwandan government needed to commit itself to provide the equivalent of the activities performed by the insolvent person to the victims who were supposed to be compensated by the reparation award(s). Despite the insolvency of most of the genocide offenders,⁶²⁶ in practice none of the reparation awards has been enforced through TIG. That is according to Johnston Busingye, Rwanda’s minister of justice, who says that TIG has so far been carried out only by those sentenced to it as an alternative penalty to imprisonment.⁶²⁷

In contrast to the domestic impediments to the genocide victims’ realisation of their right to reparations, foreign domestic courts seem to have been more open to the Rwandan genocide victims’ civil actions. However, as discussed in the following section, as with the reparation awards issued by Gacaca and ordinary courts in Rwanda, the reparation awards issued by foreign domestic courts encountered a number of challenges in their execution.

⁶²⁴ Ibid., article 6.

⁶²⁵ UN Basic Principles and Guidelines, principle 17.

⁶²⁶ 54,160 reported cases. See E. Kwibuka, *supra* note 619. It was further reported that an estimated 25,187 cases could still be settled, while 28,973 could not as the perpetrators involved in the cases had either died or fled the country, or else possessed no property that could be used to compensate their victims.

⁶²⁷ Interview by the author with Johnston Busingye, the minister of justice and attorney general of the Republic of Rwanda, held on 14 February 2019 in the minister’s office in Kimihurura.

4.4. Foreign domestic courts and the genocide against the Tutsi in Rwanda

As mentioned earlier, the genocide and other atrocities committed in Rwanda in 1994 have been subject to judicial proceedings at both the international and the national levels, in which different norms and procedures are applied. In addition to the ICTR, created under chapter VII of the UN Charter by the UN Security Council, and the Gacaca and ordinary courts in Rwanda, genocide perpetrators were also subject to the domestic legal frameworks of the USA, Canada and certain European countries. Specifically, in the twenty-seven years preceding the time of writing, twenty-five people responsible for the genocide against the Tutsi in Rwanda have been tried in ten countries,⁶²⁸ namely Switzerland, Belgium, France, Sweden, Germany, Norway, the Netherlands, Finland, the United States and Canada. The principle of universal jurisdiction over international crimes in Canada and most European legislations as well as the 1789 Alien Tort Claims Act and the 1991 Torture Victim Protection Act in the USA are the main legal instruments that permitted a small number of the victims of the genocide against the Tutsi to seek and obtain reparations in foreign countries. To succeed in their actions, those genocide victims had to fulfil a number of conditions and thus comply with the various domestic laws, as explained below.

4.4.1. Genocide victims' civil claims under the 1789 Alien Tort Claims Act and the 1991 Torture Victim Protection Act

The Alien Tort Claims Act of 1789 (hereinafter ATCA) and the Torture Victim Protection Act of 1991 (hereinafter TVPA) are the two main legal instruments that allowed the victims of the genocide against the Tutsi to seek reparation in the USA. The ATCA grants jurisdiction to US federal courts over any civil action brought by a foreign national for a tort in violation of international law or a treaty ratified by the USA. The TVPA also grants jurisdiction over individuals who have committed torture or extrajudicial killing under the actual or apparent authority of any foreign nation.⁶²⁹ On 9 April 1996, the United States District Court for the Southern District of New York was the first foreign domestic court to issue a judgment related to the genocide against the Tutsi under the ATCA.⁶³⁰ Acting under the ATCA, five Rwandan citizens⁶³¹ who were victims of the genocide against the Tutsi filed a tort action against Jean Bosco Barayagwiza, one of the leaders of the Rwandan Hutu political party known as the *Coalition pour la Défense de la République* (CDR) and owner and board member of the radio station RTLM, which encouraged the violence against the Tutsi by broadcasting messages of hate.⁶³² The five genocide victims alleged that Barayagwiza colluded with the officials of the then Rwandan government, and thus that his criminal conduct was also prosecutable under the TVPA. Since the victims' claim had no direct connection with the USA, the Rwandan victims had to fulfil at least three conditions to satisfy the admissibility requirements under the ATCA and TVPA. Besides the presence of

⁶²⁸ T. Cruvellier and E. Rugiriza, 'Rwanda: The Most Judged Genocide in History', *JusticeInfo.net*, 4 April 2019, available at <https://www.justiceinfo.net/en/reconciliation/40846-rwanda-the-most-judged-genocide-in-history.html>, accessed on 11 March 2020. See also RFI, 'Three Rwanda genocide suspects arrested in Belgium', 3 October 2020, available at <https://www.rfi.fr/en/wires/20201003-three-rwanda-genocide-suspects-arrested-belgium>, accessed on 19 November 2020.

the accused on US soil, the genocide victims had to prove that the accused acted under the colour of law or that his acts violated international law. They also had to demonstrate that they had exhausted domestic remedies in Rwanda or prove the inexistence of such remedies.

The tort claim against Barayagwiza – director of the Rwandan Ministry of Foreign Affairs during the period of the genocide – was filed in May 1994 (thus while the genocide was occurring) when he was attending a session of the United Nations in New York. The claim was based on his role in the genocide against the Tutsi, during which the plaintiffs' relatives were tortured and executed. The five genocide victims argued that Barayagwiza's actions were part of a genocidal effort coordinated with officials of the Rwandan government and that, consequently, he had acted in pursuit of genocide and under the 'colour of law'.⁶³³ Under the TVPA, private individuals are considered to have acted under the 'colour of law' if they act in conjunction with, or aided by, state officials, that is, if their allegedly wrongful act would otherwise be deemed a state action.

By contrast with many other domestic legal systems, where civil actions depend on the outcome of criminal proceedings against the accused, actions brought under the ATCA and TVPA are purely civil, that is torts by nature. Therefore, it is important to note that, although the ATCA and TVPA require a certain connection with genocide, war crimes or crimes against humanity, actions under these instruments are completely independent of prosecutions of the perpetrator. The ATCA and TVPA have actually created a sort of universal jurisdiction of the US courts over tort claims connected with violations of international law or treaties ratified by the USA. What the victims need to prove is a symbiotic relationship between a private actor and the government. As for the prior exhaustion of domestic remedies, the victims submitted that at that specific time the Rwandan judicial system was virtually inoperative and would be unable to deal with civil claims in the near future. Therefore, having found that the court had jurisdiction over the defendant and that the plaintiffs had established the causes of action alleged in the complaint under both the ATCA and TVPA, the New York District Court awarded them US\$105 million for the torture and execution of their relatives.⁶³⁴ Specifically, the court awarded US\$500,000 per relative for pain and suffering and punitive damages of US\$1,000,000 per relative who had been a victim of the genocide, in addition to the US\$5,000,000 for each plaintiff that had been requested.⁶³⁵

⁶²⁹ Torture Victim Protection Act, section 2(a).

⁶³⁰ United States District Court for the Southern District of New York, *Louise Mushikiwabo et al. v. Barayagwiza*, no. 94 CIV. 3627 (JSM), 9 April 1996. See also S. Vandeginste, 1999, *supra* note 413.

⁶³¹ Louise Mushikiwabo, Louis Rutare, Rangira Beatrice Gallimore, Julie Mukandinda Mugemanshuro and Faustin Semuhungu.

⁶³² *Louise Mushikiwabo et al. v. Barayagwiza*, memorandum opinion and order, p. 1, available at http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/US/Barayagwiza_Judgement_9-4-96.pdf, accessed on 2 November 2020.

⁶³³ *Ibid.*

⁶³⁴ *Ibid.*, paras 2–3. See also K. de Feyter, S. Parmentier, M. Bossuyt and P. Lemmens (eds), *supra* note 90, p. 330.

⁶³⁵ *Louise Mushikiwabo et al. v. Barayagwiza*, *supra* note 630, para. 3.

In the court order, Judge John Martin stated that Barayagwiza

engaged in conduct so inhuman that it is difficult to conceive of any civil remedy that can begin to compensate the plaintiffs for their loss or adequately express society's outrage at the defendant's actions ... This judge has seen no other case in which monetary damages were so inadequate to compensate the plaintiffs for the injuries caused by a defendant.⁶³⁶

The New York District Court reparation order was issued on 8 April 1996, just two weeks after Barayagwiza was arrested in Cameroon and transferred to Arusha, Tanzania, at the request of the ICTR.⁶³⁷ The order has, however, not yet been enforced and is unlikely to ever be because Barayagwiza died, insolvent, on 25 April 2010 in Benin, where he was serving a thirty-five-year prison sentence.⁶³⁸

4.4.2. Genocide victims' civil claims under the principle of universal jurisdiction in Europe and Canada

The principle of universal jurisdiction, together with UN Security Council resolution 978⁶³⁹ on state cooperation with the ICTR, is another legal instrument that allowed several national courts in Europe and Canada to exercise jurisdiction over civil claims by victims of the genocide against the Tutsi. Belgian,⁶⁴⁰ Swedish,⁶⁴¹ Dutch⁶⁴² and French⁶⁴³ courts accorded the victims the status of civil parties to criminal proceedings against the accused and, following the conviction of the offenders, granted them reparations for the harm they had suffered.

For instance, in the case of Joseph Mpambara, sentenced to life imprisonment by the Hague Court of Appeal,⁶⁴⁴ a sum of €680.67 was awarded in the form of reparation to each of the

⁶³⁶ Cited in S. Vandeginste, 2003, *supra* note 235, p. 267.

⁶³⁷ Ibid.

⁶³⁸ United Nations International Residual Mechanism for Criminal Tribunals, 'Death of Convict Jean Bosco Barayagwiza', available at <https://unictr.irmct.org/en/news/death-convict-jean-bosco-barayagwiza>, 25 April 2010, accessed on 11 March 2020.

⁶³⁹ UN Security Council resolution 978 urged 'States to arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda'.

⁶⁴⁰ Cour d'assises de l'arrondissement administratif de Bruxelles-Capitale, *Bernard Nuyahaga* case, 19 September 2007.

⁶⁴¹ *Claver Berinkindi* case; see C. Anderson, 'Swedish Court Sentences Man to Life in Prison for Role in Rwanda Genocide', *New York Times*, 16 May 2016, available at http://www.nytimes.com/2016/05/17/world/europe/sweden-rwanda-claver-berinkindi.html?_r=1, accessed on 10 March 2017.

⁶⁴² *Public Prosecutor v. Joseph Mpambara*, Court of Appeal, case ECLI: NL: GHSGR: 2001: BR0686, judgment of 7 July 2011, available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3AGHSGR%3A2011%3ABR0686>, accessed on 24 February 2021; *Public Prosecutor v. Yvonne Basebya*, District Court of The Hague, 09/748004-09 (LJN: BZ4292), judgment of 1 March 2013, available at <http://www.internationalcrimesdatabase.org/Case/971/Basebya/>, accessed on 2 November 2020.

⁶⁴³ *General Prosecutor v. Wenceslas Munyeshyaka*, Court of Cassation, Criminal Division, France, no. 96-82491, judgment of 6 January 1998, available at <http://www.internationalcrimesdatabase.org/Case/1074/Munyeshyaka/>, accessed on 2 November 2020.

two plaintiffs, on the basis of Dutch law.⁶⁴⁵ The two Rwandan genocide victims were awarded €14,241.24 for the costs incurred by them for legal assistance and for future costs that would be incurred for the execution of the sentence.⁶⁴⁶ When awarding reparation to the victims of the genocide against the Tutsi, the Dutch court also considered Rwandan laws to determine the basis of their civil claims. In the *Joseph Mpambara* case, the Hague Court of Appeal held that

In view of Article 3 of the Law on Conflicts of Unlawful Deeds, the court is of the opinion that with regard to the substantive assessment of the claims of the injured parties, the right of the State in which territory the unlawful act took place, namely Rwanda, is now also hearing on appeal on behalf of the accused and the aggrieved parties it has been informed that they have not reached agreement on the option of choosing applicable law under Article 3 of the above law.

Contrary to what the counsel argued at the hearing, in the opinion of the court of appeal a term of 30 years applies with regard to the prescription of the claims.

From documents submitted by the counsel of the injured parties, it appears that under Article 116 of the Criminal Code of Rwanda of 18 August 1977, civil claims arising from a criminal offense are barred on the basis of rules of civil law. Article 647 of the (Rwandan) Code des Contrats provides that civil claims are time-barred after a period of 30 years. The present claims, based on facts from 1994, are therefore not time-barred.⁶⁴⁷

In a similar vein, on 15 February 2017, the Svea Court of Appeal upheld the Stockholm District Court decision that sentenced Claver Berinkindi to life imprisonment for genocide and gross crimes under international law and awarded damages to fifteen Rwandan victims, ranging from three to ten million Rwandan francs (around €3,000 to €12,000).⁶⁴⁸ Compared with other reparation awards issued by foreign domestic courts, the Berinkindi order constitutes a very rare case in which genocide victims actually received monetary reparations from Berinkindi's property, estimated at roughly US\$148,000.⁶⁴⁹ The genocide victims' associations⁶⁵⁰ in France⁶⁵¹ and Belgium⁶⁵² also actively participated in the initiation of

⁶⁴⁴ *Prosecutor v. Joseph M.*, The Hague Court of Appeal, case no. 22-002613-09, judgment of 7 July 2011, available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3AGHSGR%3A2011%3ABR0686>, accessed on 2 November 2020.

⁶⁴⁵ *Public Prosecutor v. Joseph Mpambara*, *supra* note 642, paras 24, 24.1 and 24.3.

⁶⁴⁶ *Ibid.*, para. 24.4.

⁶⁴⁷ *Ibid.*, para. 24.1.

⁶⁴⁸ TRIAL International, 'Make Way for Justice #3: Universal Jurisdiction, Annual Review 2017', p. 47, available at https://trialinternational.org/wp-content/uploads/2017/03/UJAR-MEP_A4_012.pdf, accessed on 2 November 2020.

⁶⁴⁹ C. Anderson, 'Swedish Court Sentences Man to Life in Prison for Role in Rwanda Genocide', *New York Times*, 16 May 2016, available at http://www.nytimes.com/2016/05/17/world/europe/sweden-rwanda-claver-berinkindi.html?_r=1, accessed on 10 March 2017.

⁶⁵⁰ Collectif des Parties Civiles pour le Rwanda (CPCR), Fédération Internationale des Ligues des Droits de l'Homme (FIDH), SURVIE, Ligue Internationale contre le Racisme et l'Antisémitisme (LICRA).

⁶⁵¹ The trial of Pascal Simbikangwa was the first trial in France of a Rwandan citizen allegedly involved in the 1994 genocide in Rwanda. He was sentenced to twenty-five years' imprisonment. See Cour d'assises de Paris, Arrêt criminel, 13/0033, Pascal Senyamuhara Safari (alias Pascal Simbikangwa), 14 March 2014; Cour d'assises de Bobigny, 3 December 2016; Cour de cassation, 24 May 2018. The case against Octavien Ngenzi and Tito Barahira was the second trial linked to the genocide against the Tutsi to be held in France. Both defendants were sentenced to life imprisonment by the Paris Criminal Court on 6 July 2016. They appealed, and the Cour

criminal investigations and prosecutions of genocide perpetrators. However, although the majority of these cases were filed under the principle of universal jurisdiction and led to the conviction and sentencing of perpetrators, no reparation orders were issued because such requests were not connected to the criminal proceedings. The genocide victims preferred to seek reparation before civil courts on the basis of the decisions of criminal courts.

For instance, on 19 July 2005, the Brussels *cour d'assises* awarded €566,143.80⁶⁵³ to fifteen genocide victims based on its previous judgment of 29 June 2005⁶⁵⁴ sentencing two Rwandan citizens – Etienne Nzabonimana and Samuel Ndashyikirwa, alias Samuel Manzi – to twelve and ten years' imprisonment respectively for their role in the international crimes committed in Kibungo prefecture.

As most of the perpetrators sentenced by foreign courts had no assets in those countries that could be used in the execution of the judgments awarding reparations, some Rwandan genocide victims applied for a leave of enforcement, known as *exequatur*, before Rwandan courts. The *exequatur* is a procedure provided for under article 91 of the Organic Law determining the organisation, functioning and jurisdiction of courts,⁶⁵⁵ which entrusts the High Court of Rwanda with the jurisdiction to hear cases related to the execution in Rwanda of acts or judgments issued by foreign courts. A leave of enforcement order is issued by the High Court after it hears the applicant and is satisfied that a foreign judgment or act is authentic, respected the rights of the defence and does not contradict the public order and basic legal tenets of Rwandan public law. To give one example: on the basis of the above-mentioned judgment of the Brussels *cour d'assises* awarding reparations to fifteen genocide victims, the High Court of Rwanda granted a leave of enforcement order on 19 June 2007.⁶⁵⁶ Following this order, 791 genocide victims who were not able to seek reparation before Belgian courts filed civil claims against Etienne Nzabonimana before the Intermediate Court of Ngoma, which on 25 April 2014 granted them a reparation award of €1,438,000, which is €2,000 each.⁶⁵⁷

However – with the notable exception of the *Claver Berinkindi* judgment issued in Sweden – the reparation awards issued by foreign domestic courts have not yet been enforced and have little to no chance of being enforced due to the insolvency of the defendants. Still, foreign

d'assises de Paris upheld the life sentences; see Cour d'assises de Paris, *Public Prosecutor v. Octavien Ngenzi and Tito Barahira*, 6 July 2018.

⁶⁵² Assize Court of Brussels, *Public Prosecutor v. 'the Butare four'*, verdict of 8 June 2001. See also L. Reydam, 'Belgium's First Application of Universal Jurisdiction: The *Butare Four* Case', (2003) 1(2) *Journal of International Criminal Justice* 428–436.

⁶⁵³ Cour d'assises de l'arrondissement administratif de Bruxelles-Capitale, *Gasasira Janvier et al. v. Nzabonimana Etienne and Ndashyikirwa Samuel alias Manzi Samuel*, 04970, 19 July 2005, pp. 27–28.

⁶⁵⁴ Cour d'assises de l'arrondissement administratif de Bruxelles-Capitale, *Prosecutor v. Nzabonimana Etienne and Ndashyikirwa Samuel alias Manzi Samuel*, 04961, 29 June 2005.

⁶⁵⁵ Organic Law No. 51/2008 of 9 September 2008 determining the organisation, functioning and jurisdiction of courts, *Official Gazette of the Republic of Rwanda*, 47, no. special of 10 September 2008.

⁶⁵⁶ *Gasasira Janvier et al. v. Nzabonimana Etienne and Ndashyikirwa Samuel alias Manzi Samuel*, R.C 00015/07/HC/KIG, judgment of 19 June 2007.

⁶⁵⁷ *Mujawamariya Jacqueline et al. v. Nzabonimana Etienne*, R.C 0114/12/TGI/NGOMA, 25 April 2014, pp. 90–124.

domestic courts provided a forum for the victims of the genocide against the Tutsi in Rwanda, and their reparation orders acknowledged their victimhood and the effects of the harm inflicted on them.

4.5. Conclusion

The objective of this chapter was to assess whether the victims of the genocide against the Tutsi were given the opportunity to access competent and independent authorities capable of addressing their claims for compensation and/or restitution. As evidenced throughout the chapter, the first legal framework put in place under the 1996 Genocide Organic Law was more victim-centred than the subsequent legal framework introduced by the adoption of the Gacaca courts.

Some of the key victim-centred features that characterised the 1996 Genocide Organic Law are: the genocide victims' free access to court, with the option to initiate criminal proceedings against genocide suspects and to seek reparation from the government; legal representation by prosecutors of the interests of genocide survivors with no legal capacity; the consideration of the interests of not yet identified genocide victims; the joint civil liability of all genocide perpetrators whose criminal act(s) placed them in the first category for the harm caused across the country.

These features – which would have allowed the victims to materialise their rights – gave hope to genocide survivors. A few years later, their hopes became illusory. With the adoption of the Gacaca system, the genocide victims suddenly lost the opportunity to materialise their rights to an effective remedy and adequate reparations. They not only lost the innovative prerogatives that were accorded to them by the 1996 Genocide Organic Law but also the rights usually enjoyed by victims of ordinary crimes.

The absence of the promised law on compensation that would have provided the mechanisms and procedures allowing genocide victims to exercise and enforce their rights is a major impediment to realising their right to reparation. It also constitutes a significant hindrance to the enforcement of the reparation awards issued by the Specialised Chambers in Rwanda, foreign domestic courts and the ICTR.

Unlike maximal individual judicial accountability – discussed in the previous chapter – the Gacaca system marked the government's shift from individual legal /judicial reparations to collective and administrative reparations. This shift in position can be attributed to the government's realisation of the complexity of judicial reparations in cases of mass victimisation but also to the fact that a larger number of perpetrators were practically indigent and could not afford to pay pecuniary reparations to their victims.

As further discussed in the following chapter, the assistance provided by the FARG to the most vulnerable victims of the genocide against the Tutsi, which was fully financed by the government, is commendable. However, the assistance provided by the FARG cannot

replace the Rwandan government's obligation under international law to provide individuals with an enforceable right to reparations.

In sum, contrary to the well-recognised victims' right – both under international law and Rwandan law – to access court or judicial processes that can appropriately and commensurately address the harm suffered, this chapter has demonstrated that the victims of the genocide against the Tutsi have not been given access to the courts or to any other mechanism capable of granting reparation for the harm they suffered, other than property-related harm. Interestingly, while pecuniary reparation for non-property-related harm remains an unfinished business in dealing with the legacy of the genocide, the Rwandan government's efforts were put into 'non-legal pecuniary' reparation mechanisms, as detailed in the next chapter.

CHAPTER FIVE

THE MEASURES OF SATISFACTION, REHABILITATION AND GUARANTEE OF NON-REPETITION

Gross violations of human rights constituting international crimes, such as those that took place in Rwanda, give rise to myriad consequences.⁶⁵⁸ Addressing those consequences calls either for a combination of multiple measures or for a holistic approach involving both material and symbolic measures.⁶⁵⁹ While chapter three discussed measures concerned with prosecuting genocide perpetrators, truth-seeking and public disclosure, and chapter four discussed measures concerned with victims' compensation/restitution, this chapter focuses on various non-pecuniary programmes, projects and policies put in place by the government of Rwanda to deal with the legacy of the genocide against the Tutsi and assess their compatibility with the concept of reparation.

Accordingly, this chapter is divided into three sections. The first section deals with measures for memorialising the genocide against the Tutsi and providing satisfaction to the survivors (5.1.), the second deals with a series of major reforms intended to prevent the recurrence of the devastating ethnic conflicts that have occurred throughout Rwandan history (5.2.) and the third and final section deals with the affirmative actions by the government of Rwanda aimed at improving the socio-economic life of the survivors of the genocide against the Tutsi and assesses their rehabilitative effects (5.3.).

5.1. Government measures aimed at satisfaction of the victims of the genocide against the Tutsi

In the context of grave violations of human dignity, satisfaction as a form of reparation seeks to redress some general and long-term aspects of the harms caused to victims. Specifically, satisfaction aims to address the emotional and psychological needs of the victims. The UN Basic Principles and Guidelines⁶⁶⁰ set out a number of symbolic measures that states should consider in order to provide satisfaction to victims of mass violations of human rights. Satisfaction may consist of a range of symbolic measures that states should take in order to restore the dignity of those affected by the violations.⁶⁶¹ Such measures include

verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent

⁶⁵⁸ T. M. Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice', (2011) 47 *Stanford Journal of International Law* 284 and 355.

⁶⁵⁹ Ibid.

⁶⁶⁰ The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation are a non-binding instrument offering an authoritative interpretation of the scope and content of states' obligation to provide reparation.

⁶⁶¹ UN Basic Principles and Guidelines, principle 22.

the occurrence of further violations; the search for the whereabouts of the disappeared, for the identities of the children abducted, for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; [p]ublic apology, including acknowledgement of the facts and acceptance of responsibility; and [i]nclusion of an accurate account of the violations that occurred in international human rights and humanitarian law training and in educational material at all levels.⁶⁶²

According to this list, the measures of satisfaction have a public dimension and extend their reparative effects beyond individual victims and into the larger community these victims are part of.

The measures put in place in Rwanda include the prosecution of perpetrators, truth-seeking and public disclosure measures – as discussed in chapter three – as well as efforts to locate and rebury the bodies of victims, public apologies, commemorations and tributes to victims of the genocide against the Tutsi, as discussed below.

5.1.1. The exhumation of victims' bodies and their reburial at genocide memorial sites

During the genocide against the Tutsi, victims' dead bodies were usually thrown into mass graves, lakes or latrines, or left exposed at the site where they were killed.⁶⁶³ Leaving them in such places was undignified for the victims. To pay tribute and restore the victims' dignity, their bodies were exhumed and those identified were given a proper and dignified burial by surviving family members and friends.⁶⁶⁴ Those who could not be identified were buried in collective graves. In the years following the genocide against the Tutsi, mass reburial ceremonies – organised by survivors and relatives – were conducted across the country until the adoption of Law No. 56/2008 governing memorial sites,⁶⁶⁵ which prohibited both individual family burials of genocide victims and ceremonies. During this period, exhumed bodies were either given a collective burial in collective graves or, if they were identified, individual burial on the family's land, subject to the wishes of survivors and relatives.

From 2009, the survivors' prerogative to choose where the bodies of their family members would be buried was taken from them and assigned to local government administrative entities. The district authorities across the country were entrusted by Law No. 56/2008 of 10 September 2008, governing memorial sites, with the responsibility to search for and recover

⁶⁶² UN Basic Principles and Guidelines, principles 22(b), (c), (e) and (h).

⁶⁶³ See N. Eltringham, 'Display, concealment and "culture": The disposal of bodies in the 1994 Rwandan genocide', in J.-M. Dreyfus and E. Anstett (eds), *Human Remains and Mass Violence – Methodological Approaches*, Manchester: Manchester University Press, 2015, pp. 169 and 170.

⁶⁶⁴ R. Korman, 'Bury or display? The politics of exhumation in post-genocide Rwanda', in E. Anstett and J.-M. Dreyfus (eds), *Human Remains and Identification – Mass Violence, Genocide, and the 'Forensic Turn'*, Manchester: Manchester University Press, 2015, pp. 203–207.

⁶⁶⁵ Law No. 56/2008 of 10 September 2008 governing memorial sites and cemeteries of victims of the genocide against the Tutsi in Rwanda, *Official Gazette of the Republic of Rwanda*, no. 12 bis of 23 March 2009, articles 4 and 6. See also E. Lesley, 'Death on Display: Bodies and Bones in Cambodia and Rwanda', master's thesis, University of New Jersey, October 2013, p. 92.

the dead bodies of the victims and have them reburied at the memorial sites.⁶⁶⁶ Following the adoption of the law governing memorial sites, memorial sites and cemeteries for victims of the genocide against the Tutsi were placed in the public domain and thus became governmental property. Although genocide survivors were, and still are, able to give a proper and dignified burial to their family members – a right protected under international humanitarian law⁶⁶⁷ –, placing the memorial sites, and the dead bodies buried there, in the public domain limits the survivors' easy access to the bodies of their loved ones. This appropriation raises the twofold problem of managing the bodies of the genocide victims and of respecting survivors' rights regarding the bodies of their loved ones. While international human rights law instruments do not make any explicit reference to the treatment of dead bodies, international humanitarian law expressly requires states 'whenever circumstances permit, and particularly after an engagement,' to take all possible measures 'to search for the dead, prevent their being despoiled, and decently dispose of them'.⁶⁶⁸ Failure to respect this provision is neither a grave breach nor a war crime, and it is probable that respect for the provision in practice remains purely illusory. Still, international humanitarian law also imposes on belligerents an obligation to respect human remains and gravesites⁶⁶⁹ and requires that prisoners of war and civilian internees must be 'honorably buried',⁶⁷⁰ which seems to exclude the use of mass graves. What these provisions do not clarify is whether such obligations to the dead include a duty to hand over the returned dead bodies to the next of kin. To whom do dead victims of genocide belong?

Rwanda is not the sole example of state authorities appropriating victims' bodies and memorial sites,⁶⁷¹ and treating the dead as state patrimony in this way raises a series of issues, as detailed below.

The appropriation of memorial sites and the government's resistance to individual family burials⁶⁷² can be attributed to two different reasons: the impracticability of individual burials

⁶⁶⁶ Law No. 56/2008 of 10 September 2008, *supra* note 665, article 5. See also Law No. 15/2016 of 2 May 2016 governing ceremonies to commemorate the genocide against the Tutsi and organisation and management of memorial sites for the genocide against the Tutsi, *Official Gazette of the Republic of Rwanda*, no. 22 of 30 May 2016, article 17.

⁶⁶⁷ The obligation to search for the dead is only to be found in international humanitarian law, and non-compliance with it is neither a grave breach nor a war crime. See Geneva Convention (GC) I, article 15, GC II, article 18(1), and GC IV, article 16(2). International humanitarian law also imposes on belligerents an obligation to respect human remains and gravesites. Prisoners of war and civilian internees must be 'honorably buried' (GC III, articles 76 and 120, and GC IV, article 130), which seems to exclude the use of mass graves, and, in international conflicts, includes an obligation 'to facilitate the return of the remains' (Additional Protocol I, article 34(2)). Here too, non-compliance is neither a grave breach nor a war crime. See C. Fournet and N. Siller, 'We demand dignity for the victims' – Reflections on the Legal Qualification of the Indecent Disposal of Corpses', (2015) 15:5 *International Criminal Law Review* 896-925, at 900 and 910.

⁶⁶⁸ Article 8 of Additional Protocol (AP) II to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts of 8 June 1977.

⁶⁶⁹ GC I, article 15, GC II, article 18(1), and GC IV, article 16(2).

⁶⁷⁰ GC III, articles 76 and 120, and GC IV, article 130.

⁶⁷¹ In Cambodia, memorial sites are also government property. See C. Bennett, 'To live amongst the dead: an ethnographic exploration of mass graves in Cambodia', PhD Thesis, University of Kent, September 2015.

⁶⁷² Law No. 15/2016 of 2 May 2016, *supra* note 666, articles 16 to 18. See also GC III, article 120; GC IV, article 130.

and the need to preserve evidence of the genocide.⁶⁷³ On the one hand, burial in accordance with common Rwandan practice – individual burial on the family’s land or compound – seemed to be practically impossible, not only because the entire country would have become a genocide cemetery due to the overwhelming number of people killed, but also because some genocide survivors would not have been able to bury their loved ones for lack of space/land and financial/logistical means. On the other hand, the government feared that individual burials on the family land or compound would erase the traces of the genocide and that, as time went on, would have led to the evidence of the genocide against the Tutsi disappearing.

The government’s intention to safeguard the evidentiary nature of the bodies of those killed arises clearly from article 19 of Law No. 15/2016 on memorial sites,⁶⁷⁴ which provides that

bodies of victims of the Genocide against the Tutsi that were not laid to rest *for sustainable preservation of evidence* of the Genocide against the Tutsi must be well treated and kept safe in a memorial site for the Genocide against the Tutsi and be put in a respectable location. [Emphasis added]

To meet the explicit goal of preserving the evidence of genocide, the government of Rwanda initiated the mummification of dead bodies and established memorial sites where thousands of victims’ bodies are now preserved and displayed.⁶⁷⁵ These forms of funeral practices were unknown in Rwandan culture. With the creation of memorial sites and display of mummified bodies, the government of Rwanda seems to have embraced Hannah Arendt’s theory, according to which memory is made possible only through the ‘palpability of the tangible’.⁶⁷⁶ According to Arendt, ‘without memory and the reification that comes with it ... the spoken word, the passing thought would disappear without a trace’.⁶⁷⁷

The desire for tangibility and the fear that traces of the genocide could disappear are among the reasons why an overwhelming number of genocide victims’ bodies have been preserved and are now displayed in the schools and churches where they were found, or have been transferred to memorial sites open to the public. The memorial sites established across the country constitute a material manifestation of the past that constantly reflects the magnitude of the genocide against the Tutsi and educates people about the scale of death that occurred. The open nature of the memorial sites and the visibility of the dead bodies also counter negationist discourses.⁶⁷⁸

⁶⁷³ See R. Korman, *supra* note 664, p. 204.

⁶⁷⁴ Law No. 15/2016 of 2 May 2016, *supra* note 666.

⁶⁷⁵ *Ibid.*, article 2 (7°).

⁶⁷⁶ Cited in J. Viebach, ‘Of other times: Temporality, memory and trauma in post-genocide Rwanda’, (2009) *International Review of Victimology* 13.

⁶⁷⁷ *Ibid.*

⁶⁷⁸ P. Sabrina, ‘The Cost of Memorializing: Analyzing Armenian Genocide Memorials and Commemorations in the Republic of Armenia and in the Diaspora’, (2019) 7 *International Journal for History, Culture and Modernity* 55–86; H. Dumas and R. Korman, ‘Espaces de la mémoire du génocide des Tutsis au Rwanda’, (2011/2) 238 *Afrique contemporaine* 11–27.

The treatment of human remains and memorial sites as evidence of past atrocities is not unique to Rwanda. The same is the case in Cambodia, where in late 2001 Prime Minister Hun Sen issued the following instructions:

In order to preserve the remains as evidence of these historic crimes and as the basis for remembrance and education by the Cambodian people as a whole, especially future generations, of the painful and terrible history brought about by the Democratic Kampuchea regime ... the government issues the following directives:

All local authorities at the province and municipal level shall cooperate with relevant expert institutions in their areas to examine, restore and maintain all existing memorials, and to examine and research other remaining grave sites, so that all such places may be transformed into memorials.⁶⁷⁹

It is worth noting, however, that the Rwandan government's appropriation of the memorial sites did not totally exclude survivors from the memorialisation of the genocide against the Tutsi. Activities organised by the CNLG (*Commission Nationale de Lutte Contre le Génocide*) in collaboration with IBUKA (the umbrella organisation for survivors' associations) during the period of commemoration⁶⁸⁰ notably included burying victims' bodies, maintaining memorial sites and comforting and assisting survivors. To allow for the burial of the bodies, the exhumation of remains is carried out by the survivors under the supervision, and with the support, of local and/or central government agents from the CNLG.⁶⁸¹

Given the brutality of the deaths, the complete disregard for the victims' value as human beings and the way the bodies were treated post-mortem, survivors regard exhumation followed by a decent burial as an important component of satisfaction.⁶⁸² Exhumed bodies are washed before being placed in coffins, which are lowered into collective graves or stored on shelves in burial chambers at the memorial sites, where they are displayed as tangible evidence of the genocide against the Tutsi.⁶⁸³ For survivors, cleaning exhumed bodies is a symbolic way of restoring their loved ones' dignity and reversing the humiliation inflicted by the perpetrators.⁶⁸⁴

It is, however, unfortunate that the way the exhumations and cleaning of the dead bodies is carried out does not prioritise the identification of the bodies. In most cases, exhumed bodies are rendered anonymous as they are washed, and any personal possessions that could lead to

⁶⁷⁹ Royal Government of Cambodia, 'Circular concerning preservation of remains of the genocide committed during the regime of democratic Kampuchea (1975–1978), and preparation of Anlong Veng to become a region for historical tourism', Phnom Penh, 14 December 2001, unofficial translation, p. 1, available at https://www.eccc.gov.kh/sites/default/files/legal-documents/Circular_on_remains.pdf, accessed on 12 March 2020.

⁶⁸⁰ See *infra* section 5.1.2.

⁶⁸¹ Law No. 15/2016 of 2 May 2016, *supra* note 666, article 16.

⁶⁸² J. Viebach, *supra* note 676, pp. 10–11.

⁶⁸³ L. Major, 'Unearthing, untangling and re-articulating genocide corpses in Rwanda', (2015) 7(2) *Critical African Studies* 165–166.

⁶⁸⁴ J. Viebach, *supra* note 676, pp. 9–10.

their identification, such as clothes or identity cards, are separated from the remains.⁶⁸⁵ The belongings that could otherwise have facilitated the identification of the victims and their cleaned dead bodies are kept and displayed in separate burial or show rooms at the memorial sites. To mitigate this anonymity, most memorial sites display photographs of individuals killed during the genocide, as well as clothing and various personal items belonging to victims.

According to Rémi Korman, the individual identification of the victims of the genocide against the Tutsi has been the main point of disagreement between genocide survivors and the government of Rwanda. While the survivors' priority was to identify the bodies of every member of their family, the government preferred a collective identification of victims.⁶⁸⁶ As Korman observes,

for the state, the principal concern is the collective identification of victims. Victims are thus identified purely as victims of the genocide, and for the state this anonymity is a reflection of the identity of the crime itself. Genocide does not target individuals but rather a collective, and it is the latter which is identified as the victim.⁶⁸⁷

Korman emphasised that the debates over the individual or collective dimension of the dead bodies of the genocide victims were put into stark relief by the promulgation of the 2008 law governing memorial sites, which put the memorial sites into the public domain and requested that previously buried bodies be transferred to the genocide memorial sites.⁶⁸⁸

Exhumation and reburial of the bodies of victims of mass atrocities is not unique to Rwanda. Other well-documented cases of a large-scale search for human remains (with or without identification) include the Latin American dictatorships, Bosnia-Herzegovina and Spain.⁶⁸⁹ The exhibition of certain human remains and/or of entire bodies at memorial sites seems to be the only unique feature. The exhumation, reburial and exhibition of dead bodies indeed contrasts with the situation in Cambodia, where no exhaustive attempt to recover the bodies of victims of the Khmer Rouge has so far been undertaken, although, as noted by Élisabeth Anstett and Jean-Marc Dreyfus, some bones have been gathered at local memorials.⁶⁹⁰

It can be argued that, despite the government's appropriation of the memorial sites and its resistance to individual identification, burying dead bodies at the memorial sites 'giv[es] them a place amongst the community of the living, to *re-member* and remember them'.⁶⁹¹ Most importantly, as reported by the genocide survivors I interviewed,⁶⁹² visiting memorial sites gives a sense of peace and satisfaction to the survivors and makes them feel closer to

⁶⁸⁵ L. Major, *supra* note 683, p. 165.

⁶⁸⁶ R. Korman, *supra* note 664, pp. 206–207.

⁶⁸⁷ *Ibid.*, p. 207.

⁶⁸⁸ *Ibid.*

⁶⁸⁹ E. Anstett and J.-M. Dreyfus, 'Introduction: Why exhume? Why identify?', in E. Anstett and J.-M. Dreyfus (eds), *Human Remains and Identification*, *supra* note 664, p. 4.

⁶⁹⁰ *Ibid.*, p. 2.

⁶⁹¹ J. Viebach, *supra* note 676, p. 11. Emphasis added.

⁶⁹² See chapter six.

their loved ones. At the memorial sites, survivors pay their respects to their loved ones by laying flowers and praying. Most importantly, for the survivors who do not know where their family members killed in the genocide are buried, memorial sites give them a physical place where they can go and pay tribute to them.

In its efforts to preserve the memory of the genocide against the Tutsi for future generations, the government of Rwanda, via the CNLG, is currently also attempting to have four genocide memorial sites (namely, the Nyamata, Murambi, Bisesero and Gisozi sites) recognised as UNESCO World Heritage Sites.⁶⁹³

Rwanda's aim in doing so seems to be to upgrade these memorial sites to memorial museums, and thus turn them into lasting, prominent symbols of the international acknowledgement of the crimes committed against, and the harm suffered by, the victims of the genocide against the Tutsi. Recognising these memorial sites as UNESCO World Heritage Sites would rightly constitute an important validation of the history of the genocide against the Tutsi. It would also help to preserve the memory of the genocide victims, to educate future generations about the horrors of the genocide against the Tutsi in Rwanda and to convey the message that what happened should not be repeated in Rwanda or anywhere else on the planet.⁶⁹⁴

5.1.2. Commemorations and tributes to the victims of the genocide against the Tutsi

In order to honour the victims, restore their dignity and preserve the historical evidence of the genocide in which an estimated 800,000 to one million Tutsi and moderate Hutu were killed, a permanent annual commemoration period has been established and institutionalised in Rwanda.⁶⁹⁵ Genocide commemoration in Rwanda is regarded as

an occasion for honoring and restoring the dignity of the victims of the genocide against the Tutsi as well as performing other activities intended to address the consequences of the genocide against the Tutsi while ensuring that genocide never happens again.⁶⁹⁶

The commemoration period includes a week of mourning from 7 to 13 April each year and one hundred days of remembrance that starts at the same time as the week of mourning and ends on 3 July of each year.⁶⁹⁷ Remembrance walks, public talks, survivor testimonies and vigils throughout the country are some of the activities that take place during the hundred days of mourning. IBUKA, an umbrella association of victim-survivors' associations, is involved in genocide memorialisation and commemoration at both national and local levels.

⁶⁹³ CNLG, Registration of National Genocide Memorial Sites on the UNESCO World Heritage List, available at <https://www.cnl.gov.rw/index.php?id=132>, accessed on 2 November 2020. See also UNESCO, 'Expert workshop in Rwanda examines Memory Sites', 10 November 2016, available at <http://whc.unesco.org/en/news/1585>, accessed on 20 November 2020.

⁶⁹⁴ See *ibid.*

⁶⁹⁵ Law No. 15/2016 of 2 May 2016, *supra* note 666, which replaced Law No. 56/2008 of 10 September 2008, *supra* note 665.

⁶⁹⁶ *Ibid.*, article 2(5°).

⁶⁹⁷ *Ibid.*, article 3.

Due to a lack of sufficient resources, however, it has to partner with the CNLG, that is to say, with the government, to organise commemorations. Thus, due to this top-down approach, and just like for the memorialisation, the commemoration of the genocide against the Tutsi in Rwanda is highly politicised, institutionalised and controlled.⁶⁹⁸

With respect to memorialisation, and as explained above, the memorial sites for the genocide against the Tutsi have been put into the state's public domain,⁶⁹⁹ which means that the ownership and management of all the memorials were put in the government's hands. The CNLG, created in 2008, is the principal public body responsible for all matters related to the history and remembrance of the genocide, including monitoring the implementation of the law on genocide memorials.

Similarly, with respect to commemoration, the government of Rwanda – through the CNLG – plays a prominent role in shaping and cultivating a shared understanding and narrative of the past. It not only provides significant resources to organise, support and document the national commemoration activities but also determines how and who is to be remembered.⁷⁰⁰ For instance, every year the CNLG issues guidelines for the commemoration of the genocide against the Tutsi (hereinafter CNLG guidelines)⁷⁰¹ and provides training to those giving public talks during the commemoration events. In practice, each institution, government organisation, embassy, local and international non-government organisation and religious organisation is required to organise a venue and a day for the commemoration of the genocide against the Tutsi.⁷⁰² All these institutions are obliged to make video and audio recordings of the commemorative activities and submit them to the CNLG by the end of July that year.⁷⁰³ In preparation of the commemoration, all institutions are required to select three presenters for the public talks and communicate their names to the CNLG by no later than 10 February every year. The three selected presenters are subsequently trained⁷⁰⁴ and given the content of the public talk by the CNLG.⁷⁰⁵ All these practices associated with the preparation and conduct of the genocide commemoration in Rwanda are justified by the government's need to control how the genocide against the Tutsi is explained and how its story is told; these practices thus contribute to shaping a common narrative. The government's need to control the recollection of the past becomes more evident if one examines how the atrocities that took place in Rwanda in 1994 have been successively renamed over time. The 1994

⁶⁹⁸ See J. Viebach, *supra* note 676, pp. 5 and 6. See also J. E. Burnet, 'Whose Genocide? Whose Truth? Representations of Victim and Perpetrator in Rwanda', in A. L. Hinton and K. L. O'Neill (eds), *Genocide: Truth, Memory, and Representation*, Durham, NC: Duke University Press, 2009, pp. 80–110; J. Pottier, *Re-Imagining Rwanda: Conflict, Survival and Disinformation in the Late Twentieth Century*, Cambridge: Cambridge University Press, 2002; E. King, 'Memory Controversies in Post-Genocide Rwanda: Implications for Peacebuilding', (2010) 5(3) *Genocide Studies and Prevention* 293–309.

⁶⁹⁹ Law No. 15/2016 of 2 May 2016, *supra* note 666, article 11.

⁷⁰⁰ C. Vidal, 'La commémoration du génocide au Rwanda: Violence symbolique, mémorisation forcée et histoire officielle', (2004) *Cahiers d'études africaines*.

⁷⁰¹ CNLG, Guidelines for Commemoration of the Genocide against the Tutsi, Kigali, 25 January 2018.

⁷⁰² *Ibid.*, guideline A. See also Law No. 15/2016 of 2 May 2016, *supra* note 666, article 7.

⁷⁰³ *Ibid.*, guideline B.

⁷⁰⁴ *Ibid.*, guideline C(2).

⁷⁰⁵ *Ibid.*, guidelines 4 and 5.

atrocities were originally designated '*itsembabwoko n'itsembatsemba*',⁷⁰⁶ then '*jenoside*' – a phonetic 'Rwandanisation' of the English word 'genocide'⁷⁰⁷ – and now 'genocide against the Tutsi'.⁷⁰⁸

'*Itsembabwoko n'itsembatsemba*' was deemed to mean 'genocide and massacres'; '*itsembabwoko*' referring to the genocide of the Tutsi and '*itsembatsemba*' (mass killings or massacres) to the killings of moderate Hutu, including political leaders, due to their opposition to the genocide or their relationship with the Tutsi. This is also echoed in the first law establishing the above-analysed FARG, the national fund for victims in dire need. As evident from its title, when it was established by the government of Rwanda in 1998 the aim of the FARG was to assist the needy victims of the 'genocide and massacres'⁷⁰⁹ committed in Rwanda between 1 October 1990 and 31 December 1994.⁷¹⁰ Like the 1996 Genocide Organic Law, the 1998 FARG law distinguished between the killings of the Tutsi, classed as genocide/*itsembabwoko*, and the killings of moderate Hutu, classed as massacres/*itsembatsemba*. Interestingly, the 1998 FARG law defined a survivor in terms that made no reference to ethnicity:

A person who survived genocide and massacres committed in Rwanda between October 1, 1990, and December 31, 1994, consisting in acts meant to: i) exterminate persons and destroy their property because of their ethnic origin; ii) exterminate persons and destroy their property because of their opinion or of those of close relatives who were against genocide and massacres.⁷¹¹

For unknown reasons, in 2002 the terms '*itsembabwoko n'itsembatsemba*' were replaced by the word '*jenoside*', later modified to 'genocide against the Tutsi' in 2008.

According to H Dumas and R Korman, the variation in words used to refer to the 1994 atrocities in Rwanda identifies a problem that is both semantic and political. It is semantic because there is no word in *Kinyarwanda* to effectively describe what happened – the closest word being '*itsembabwoko n'itsembatsemba*' – nor to designate genocide.⁷¹² It is political because the government of Rwanda believed that the expression 'Rwandan genocide' or 'genocide in Rwanda' implicitly involves a double genocide logic, whereby the Hutu and Tutsi were both equally victims and perpetrators.⁷¹³ At this point, it should be noted that all these changes can understandably also be explained by the government's need to emphasise that only the Tutsi were targeted for elimination in whole or in part, as per the legal definition of genocide.

⁷⁰⁶ See the Kinyarwanda version of Organic Law No. 08/96 of 30 August 1996, *supra* note 39. The French and English translations simplified '*Itsembabwoko n'itsembatsemba*' to genocide.

⁷⁰⁷ See the Kinyarwanda version of Organic Law No. 40/2000 of 26 January 2001, *supra* note 40. The French and English translations simplified '*Itsembabwoko n'itsembatsemba*' to genocide.

⁷⁰⁸ See Law No. 69/2008 of 30 December 2008, *supra* note 1.

⁷⁰⁹ With emphasis.

⁷¹⁰ Law No. 2/1998 of 22 January 1998, *supra* note 46.

⁷¹¹ *Ibid.*, article 14. See also article 2.

⁷¹² H. Dumas and R. Korman, *supra* note 678, pp. xi and xii.

⁷¹³ *Ibid.*

When the new name – ‘genocide against the Tutsi’ – was introduced, not only were all domestic genocide-related laws adopted before 2008 revised accordingly, but also, and most interestingly, the government of Rwanda successfully managed to have the UNGA’s resolution of December 2003, which had previously recognised and designated 7 April of each year as the international day of reflection on *the genocide in Rwanda*, revised.⁷¹⁴ Since 12 December 2017, 7 April of each year has instead been designated the international day of reflection on the *genocide perpetrated against the Tutsi* in Rwanda in 1994.⁷¹⁵

As stressed by Johnston Busingye, minister of justice and attorney general of Rwanda, the review of the 2003 resolution was necessary as it ‘created some confusion in its title because it spoke of the “International Day of Reflection on the Genocide in Rwanda” without naming which genocide it was’.⁷¹⁶ He explicitly emphasised that

there are no crimes without perpetrators and victims; it is therefore important when we talk about the gravity of genocide, to state the facts, to qualify for the honor of the victims, and also for the historical clarity.⁷¹⁷

Although it cannot be authoritatively ascertained that the expression ‘genocide against the Tutsi’ is intended to collectively criminalise all Hutu, it seems that in a country such as Rwanda, whose history has been marked by ethnic conflicts between Tutsi and Hutu, an explicit reference to the ethnicity of the victims risks leading to the identification of the perpetrators, thereby leaving the field wide open for a possible collective criminalisation of all Hutu.⁷¹⁸ This risk appears to be materialised in the minister’s statement that ‘there are no crimes without perpetrators and victims’, since it supposes a collective victimisation of the Tutsi and a collective culpability of the Hutu, or at least suggests the mass participation of the Hutu population in the killings.

Regardless of the reasons that could have motivated the government of Rwanda to label the 1994 atrocities the ‘genocide against the Tutsi’, the collective victimisation and collective culpability that explicitly or implicitly might be inferred from this expression seems counterproductive. It undermines the government’s efforts to achieve unity and reconciliation by gathering all Rwandans under a single national identity, as discussed later in this chapter.

⁷¹⁴ UNGA, International Day of Reflection on the 1994 Genocide in Rwanda, A/RES/58/234, 23 February 2004.

⁷¹⁵ UNGA, Rwanda: draft decision. International Day of Reflection on the 1994 Genocide against the Tutsi in Rwanda, A/72/L.31, 12 December 2017, para. 1. The East African Legislative Assembly (EALA) of the East African Community (EAC) also adopted a similar resolution officially designating 7 April every year as the ‘EAC Day of Reflection on the Genocide against the Tutsi’ and calling on EAC Partner States to commemorate the genocide. See EALA, resolution of the assembly to commemorate the genocide against the Tutsi, EALA/RES/3/05/2013, 17 April 2013.

⁷¹⁶ Speech by Johnston Busingye, minister of justice and attorney general, 5th International Conference on Genocide, Sacramento State Campus, 1 November 2018, available at https://minijust.gov.rw/fileadmin/Documents/Speeches_2016-2017/Sacramento_Conference-Min_Busingye_Speech_01.11.18_.pdf, accessed on 2 November 2020.

⁷¹⁷ Ibid.

⁷¹⁸ H. Dumas and R. Korman, *supra* note 678, p. xi.

On the other hand, excluding the name of the genocide victims for the sake of unity and reconciliation under a single national identity could also have been potentially threatening to the victims, as it would not have recognised their ethnic identity and could have diluted their history of victimisation.

All these concerns about the potential risks associated with specifying or not specifying the ethnicity of the victims might have been the reason why, in its resolution renaming the 1994 atrocities in Rwanda, the UNGA tried to find a balance. In contrast to the minister of justice's statement ('there are no crimes without perpetrators and victims'), which could be interpreted to mean that Hutu were the perpetrators and Tutsi the victims, the UNGA accepted the changes sought by the government of Rwanda and renamed 7 April of each year the international day of reflection on the genocide *perpetrated against the Tutsi in Rwanda*, but noted in the same resolution that during the genocide against the Tutsi, Hutu and others who opposed the genocide were also killed.⁷¹⁹ This reminder from the UNGA sends a clear message that, during the genocide against the Tutsi, the Hutu who opposed the genocide or who were closely related to the Tutsi as well as other individuals, such as Belgian UN peacekeepers, were also killed and should be remembered. In other words, the UNGA resolution recognises that the Tutsi were the primary targets of the genocide – and probably the only victims of genocide according to the crime's definition – but also that not all Hutu were perpetrators. Some were perpetrators; some were victims and were killed, sometimes along with their Tutsi family members; some were bystanders; and some sheltered Tutsi.⁷²⁰

It is important to recall that the UNGA's inclusive resolution designating 7 April of each year as the international day of reflection on the genocide perpetrated against the Tutsi is not the only international remembrance day that has been recognised. In November 2005, the UNGA adopted a similar resolution designating 27 January – the anniversary of the liberation of the Auschwitz death camp – as the annual international day of commemoration of the victims of the Holocaust.⁷²¹ Likewise, the UNGA officially designated 9 December – the anniversary of the adoption of the 1948 Convention on Genocide – as the international day of commemoration and dignity of the victims of the crime of genocide and of the prevention of this crime.⁷²²

Unfortunately, in contrast to the genocide against the Tutsi and the Holocaust, a resolution to commemorate the Srebrenica genocide has not yet been approved by the UNGA. Srebrenica Remembrance Day (11 July) was only officially recognised by the European Parliament in its resolution of 15 January 2009.⁷²³

⁷¹⁹ UNGA, Rwanda: draft decision, *supra* note 715, para. 2.

⁷²⁰ E. Lesley, 'Death on display: Bodies and bones in Cambodia and Rwanda', in F. Ferrándiz and A. C. G. M. Robben, *Necropolitics: Mass Graves and Exhumations in the Age of Human Rights*, Philadelphia: University of Pennsylvania Press, 2015, p. 227.

⁷²¹ UNGA, International Day of Commemoration in Memory of the Victims of the Holocaust, A/RES/60/7, 1 November 2005.

⁷²² UNGA, International Day of Commemoration and Dignity of the Victims of the Crime of Genocide and of the Prevention of This Crime, A/RES/69/323, 11 September 2015.

⁷²³ EU Parliament, resolution on the Srebrenica commemoration, 2015/2747(RSP), 15 January 2009.

Despite several judgments by the International Tribunal for the former Yugoslavia (ICTY) classifying the 1995 events in Srebrenica as genocide⁷²⁴ and the ICJ judgment of 26 February 2007⁷²⁵ that concluded that the acts committed in Srebrenica were acts of genocide, Russia⁷²⁶ blocked the United Kingdom's proposal to internationally recognise the tragic events that took place in Srebrenica as genocide. It claimed that the British draft had been presented in a way that sought to place the blame on one community, contained elements that did not enjoy consensus among the members of the Security Council and was detrimental to reconciliation in Bosnia and Herzegovina.⁷²⁷

The national, regional and international remembrance days, as well as the memorials and genocide burial sites which constitute the basis of the memorialisation of the genocide against the Tutsi, acknowledge the human rights violations that the genocide victims suffered and give the victims an opportunity to voice their experiences and the suffering that they endured. Even though the genocide memorialisation activities recall bad memories and can be traumatic, memorialisation is considered to be a therapeutic process that allows survivors to work through their trauma.⁷²⁸ Despite the politicisation and the government's control over the memorialisation of the genocide against the Tutsi, it should be recognised that the commemoration period in Rwanda is an opportunity for the victims of the genocide against the Tutsi to come together to speak about and to communicate the sheer scale of the violations of their human rights and their enduring consequences, and thus to find a way to move forward through reconciliation.

5.2. The government's measures to guarantee non-repetition

By contrast with other forms of reparation that are primarily restorative or backward-looking, guarantees of non-repetition are forward-looking and benefit society as a whole.⁷²⁹ Against the backdrop of past events and violations, guarantees of non-repetition are concerned with potential future violations. Guarantees of non-repetition are defined as 'a combination of deliberate, diverse interventions that contribute to a reduction in the likelihood of recurring

⁷²⁴ See e.g. ICTY, *Prosecutor v. Krstić*, case no. IT-98-33-T, judgment of 2 August 2001; ICTY, *Prosecutor v. Krstić*, case no. IT-98-33-A, judgment of 19 April 2004; MICT, *Prosecutor v. Karadžić*, case no. MICT-13-55-A, judgment of 20 March 2019.

⁷²⁵ See ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, (judgment), application of the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports 2007, p. 43.

⁷²⁶ UNSC, 'The situation in Bosnia and Herzegovina', 7481st meeting, 8 July 2015.

⁷²⁷ Ibid. The then Russian ambassador to the United Nations Vitaly Chukin emphasised that the role of the council was to strengthen international peace and security, and that the council should let historians judge events and tribunals deliver verdicts. See UNSC, 'At Meeting Commemorating Twentieth Anniversary of Srebrenica Killings, Security Council Fails to Adopt Resolution', 7481st meeting, 8 July 2015, available at <https://www.un.org/press/en/2015/sc11961.doc.htm>, accessed on 2 November 2020.

⁷²⁸ L. M. Moore, '(Re) Covering the Past, Remembering Trauma: The Politics of Commemoration at Sites of Atrocity', (2009) 20 *Journal of Public and International Affairs* 57. See also C. De Ycaza and N. Fox, 'Narratives of Mass Violence: The Role of Memory and Memorialization in Addressing Human Rights Violations in Post-Conflict Rwanda and Uganda', (2013) 8(3) *Societies without Borders* 334–372.

⁷²⁹ See IACtHR, *Trujillo-Oroza v. Bolivia* (reparations and costs), judgment of 27 February 2002, para. 110. See also J. Schonsteiner, 'Dissuasive Measures and the "Society as a Whole": A Working Theory of Reparations in the Inter-American Court of Human Rights', (2007) 23 *American University International Law Review* 145.

violations'.⁷³⁰ Paragraph 23 of the UN Basic Principles and Guidelines lists some examples of such measures:

Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention: (a) Ensuring effective civilian control of military and security forces; (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; (c) Strengthening the independence of the judiciary; (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises; (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution; (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

From the above list, it seems clear that the obligations arising from guarantees of non-repetition can be satisfied by a broad variety of measures,⁷³¹ including social, cultural and institutional changes,⁷³² which should all focus on the underlying root causes and patterns of the violations.

To prevent the repetition of the violence and conflicts among Rwandans, the government of Rwanda initiated a series of critical reforms intended to address the roots and structural causes of the genocide against the Tutsi. At the institutional level, the CNLG and the National Unity and Reconciliation Commission (NURC) are the key government institutions responsible for implementing the various programmes that aim to guarantee non-repetition of the violence.

At the societal and cultural levels, as a way of putting into practice the 'never again' slogan, the government of Rwanda implemented far-reaching legislative reforms, including laws prohibiting hate speech⁷³³ – commonly known as the genocide ideology laws – and the removal of ethnicity on national identity cards.⁷³⁴ In other words, to ensure that the genocide could never again happen in Rwanda, the Rwandan government not only introduced a national identity and prohibited ethnic labels, but also promulgated anti-denial laws. These

⁷³⁰ P. de Greiff, report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Human Rights Council, A/HRC/30/42, 7 September 2015, paras 18 and 25.

⁷³¹ *Ibid.*, para. 23.

⁷³² See, D. Y. Guarnizo-Peralta, 'Guarantees of Non-Repetition and the Right to Health: Review of the Law and Evolving Practice of Judicial and Semi-Judicial Bodies at Global and Regional Levels', PhD thesis, Department of Law, University of Essex, January 2016, p. 79.

⁷³³ See for instance Law No. 18/2008 of 23 July 2008 relating to the punishment of the crime of genocide ideology, abrogated and replaced by the Law No. 84/2013 of 11 September 2013 on the crime of genocide ideology and other related offences, *Official Gazette of the Republic of Rwanda*, no. 43bis of 28 October 2013.

⁷³⁴ Law No. 47/2001 of 18 December 2001 instituting punishment for offences of discrimination and sectarianism, *Official Gazette of the Republic of Rwanda*, no. 4 of 15 February 2002.

preventive measures are discussed in the following subsections with a view to assessing the extent to which they have reduced, or could reduce, the likelihood of reoccurrence of conflicts among the population of Rwanda, and thus how they fit within the guarantees of non-repetition.

5.2.1. Preventing and combating genocide to guarantee the non-repetition of conflicts

As mentioned earlier, the CNLG is the first national, independent and permanent public institution created by the government of Rwanda with the overall mission of preventing and combating genocide.⁷³⁵ In line with this mission, it is entrusted with the following responsibilities:

1° to put in place a permanent framework for the exchange of ideas on genocide, its consequences and the strategies for its prevention and eradication; 2° to initiate the creation of a national research and documentation center on genocide; 3° to advocate for the cause of genocide survivors both within the country or abroad; 4° to plan and coordinate all activities aimed at commemorating the 1994 genocide; 5° to elaborate and put in place strategies that are meant for fighting genocide and its ideology; 6° to seek for assistance for genocide survivors and pursue advocacy as to the issue of compensation; 7° to elaborate and put in place strategies that are meant for fighting revisionism, negationism and trivialization; 8° to elaborate and put in place strategies meant to solve genocide consequences such as trauma and other diseases which resulted from genocide; 9° to cooperate with other national or international organs with similar mission.⁷³⁶

To fulfil its mission, the CNLG has put in place a permanent framework for the exchange of ideas on genocide, its causes and consequences and on strategies for its prevention and eradication.⁷³⁷ The CNLG strategies include organising educational talks in schools and prisons on how to deal with genocidal ideology and genocide denial in Rwandan society, as well as seminars on the consequences of genocide and the role of commemoration in preventing it.

The CNLG also organises international and national conferences on various topics related to genocide, prevention and remembrance, which bring together national and international scholars and policymakers. For instance, in April 2019, a two-day international conference on ‘preserving memory, championing humanity’ was organised by the CNLG.⁷³⁸ At this conference, topics such as ‘perspectives of a post-genocide generation’,⁷³⁹ ‘genocide and

⁷³⁵ Law No. 09/2007 of 16 February 2007, *supra* note 44.

⁷³⁶ *Ibid.*, article 4.

⁷³⁷ NURC, Unity and Reconciliation Process in Rwanda, Kigali, December 2016, p. 81.

⁷³⁸ See Kwibuka 25 Kigali International Conference: Preserving Memory, Championing Humanity, 4–5 April 2019, available at <http://kwibuka.rw/?p=390>, accessed on 2 November 2020.

⁷³⁹ The discussion panel consisted of Stéphane Audoin-Rouzeau (École des Hautes Études en Sciences Sociales (EHESS)), Edouard Bamporiki (Chairman of the National Itorero Commission), Catherine Coquio (Université Denis-Diderot), Aleksander Edelman (filmmaker) and Boatamo Mosupyoe (California State University, Sacramento).

collapse of society'⁷⁴⁰ and 'preserving memory and sustaining gains in a disruptive age'⁷⁴¹ were discussed by panels made up of national and international scholars, artists and policymakers. Similarly, as part of the eighteenth genocide commemoration events, the CNLG organised an international conference entitled '18 years after the genocide perpetrated against Tutsi: Testimonies and reflections'. Every year, an international conference is also organised on 9 December – the anniversary of the adoption of the Genocide Convention. The overall objective of organising national and international conferences is not only to raise awareness about the root causes and patterns that led to the genocide against the Tutsi but also to share experiences on how Rwanda has addressed the consequences of the genocide. Conferences also allow reflection on best practices for combating genocide, genocidal ideology and genocide denial in order to create a better future free of ethnic conflicts.

At school and university levels, the CNLG created the 'never again clubs' where students have debates and lectures on genocide prevention, genocide denial and genocidal ideology as well as other topics related to the genocide. The 'never again clubs' are designed to counteract parents who continue to teach divisive ideology to their children.⁷⁴²

In addition to setting the general policies on the memorialisation of the genocide against the Tutsi and monitoring related activities, the CNLG carries out research on the genocide and its causes and consequences, and preserves evidence of the genocide through documentation.⁷⁴³ In June 2012 – after the closure of the Gacaca courts – the CNLG inherited the archives of the SNJG.⁷⁴⁴ Written documents, audio recordings, videos and other media used during the Gacaca court hearings were transferred to the national commission in order to help combat genocide.⁷⁴⁵ The transfer of the SNJG archives to the CNLG was followed by a process of scanning and digitising the case files, primarily due to their historical significance and in order to allow easy online accessibility. According to Jean Damascène Bizimana, the CNLG's executive secretary, this process ended in 2018, and indexing was expected to take

⁷⁴⁰ The discussion panel consisted of Frank Chalk (Concordia University), Victoria Fontan (American University of Afghanistan), David Gakunzi (journalist), Bishop John Rucyahana (National Unity and Reconciliation Commission) and Andrew Wallis (author).

⁷⁴¹ The discussion panel consisted of Laure Iyaga (CEO, Sana Initiative, Rwanda), Jessica Géronald Mwiza (Ibuka France), Emmanuel Ndayizigiye (agronomist, Rwanda), Laetitia Tran Ngoc (researcher, Belgium) and Moses Turahirwa (fashion designer, Rwanda).

⁷⁴² D. Bontrovato, 'Rwanda, Twenty Years On: Assessing the RPF's Legacy through the Views of the Great Lakes Region's New Generation', (2015) 218 *Cahiers d'études africaines* 231.

⁷⁴³ The CNLG has so far published four books: *Planning and Execution of the Genocide Perpetrated against Tutsi in the Former Gisenyi Prefecture* (author's translation of *Itegurwa n'ishyirwa mu bikorwa rya jenocide yakorewe abatutsi mu yahoze ari perefegitura ya Gisenyi*) in 2015; *The Status of Genocide Ideology in Rwanda: 1994–2015* (author's translation of *Etat de l'idéologie du génocide au Rwanda: 1994–2015*) in 2016; *Testimonies and Needs of Genocide Survivors* in 2017; and *History of the Genocide against the Tutsi in the Former Ruhengeri Prefecture* (author's translation of *Amateka ya jenocide yakorewe abatutsi mu yahoze ari perefegitura ya Ruhengeri*) in 2018.

⁷⁴⁴ French acronym for 'Service National des Juridictions Gacaca'.

⁷⁴⁵ Organic Law No. 04/2012/OL of 15 June 2012 terminating Gacaca courts and determining mechanisms for solving issues which were under their jurisdiction, *Official Gazette of the Republic of Rwanda*, no. special of 15 June 2012, article 19.

two years.⁷⁴⁶ The forty-five million digitised pages⁷⁴⁷ and 8,000 CDs of trial recordings provide, among other things, insights into the ‘legal root causes’ of the genocide against the Tutsi, and serve as an important educational tool for Rwandans and the international community as a whole regarding the consequences of ethnic hatred and the necessity to prevent crimes such as genocide from happening in the future.⁷⁴⁸ The Gacaca archives constitute a tangible framework in which the memory of the genocide against the Tutsi is preserved. They reflect how past atrocities have been interpreted. Put another way, the digitised Gacaca judgments and recordings constitute the judicial memory of the genocide against the Tutsi.

In her discussion of the role and importance of legal memory in the formation of social or collective memory, Caroline Fournet refers to the ancestral maxim *res judicata pro veritate habetur*, which literally means that an adjudicated thing is regarded as the truth, thus emphasising that what is tried is remembered as the truth.⁷⁴⁹ She also highlights that ‘the conduct of the trials will be considered as the confirmation that the crimes did happen and that the criminals deserve to be tried’.⁷⁵⁰ Explaining the importance of memory in avoiding potential future conflicts, Fournet observes that

*with remembrance comes action and prevention. Memory is in fact nothing but a future ... ‘Remember your future’ ... It is thus the recollection of the past, the memory of the past, which will shape the future and if the past is forgotten, the future is bound to witness the repetition of past mistakes. If past genocides fail to be remembered, they are bound to happen again. It is on the memory of the crimes that any hope for the future, any hope of civilization, any hope of peace all rely.*⁷⁵¹

Digitisation and the promised upcoming online accessibility of the Gacaca archives – which represent the judicial memory – constitute an important tool for the CNLG in combating genocide denial. As stressed by the director of the Aegis Trust,⁷⁵² proper documentation and making the Gacaca archives accessible is a good way to make people see the genocide against the Tutsi as a reality, because even today there is denial of the genocide. In his words, ‘the only weapon is to keep evidence of what happened, that will show how it was planned and executed’.⁷⁵³

⁷⁴⁶ J. D. Bizimana, cited in M. Nkurunziza, ‘Kwibuka25: Major progress made on preservation of Gacaca archives’, *The New Times*, 10 April 2019, available at <https://www.newtimes.co.rw/news/kwibuka25-major-progress-made-preservation-gacaca-archives>, accessed on 2 November 2020.

⁷⁴⁷ Initially, there were over 60 million pages, but some pages were found to be blank and without any notes and were hence dropped.

⁷⁴⁸ A. L. M. de Brouwer and E. Ruwebana, *supra* note 41, p. 966.

⁷⁴⁹ C. Fournet, *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory*, Aldershot: Ashgate, 2007, p. xxxii.

⁷⁵⁰ *Ibid.*

⁷⁵¹ *Ibid.*, p. xxxi.

⁷⁵² A British NGO that manages the Kigali Genocide Memorial in partnership with the CNLG.

⁷⁵³ Rwanda Express, ‘Aegis Trust, CNLG in joint efforts to archive genocide records’, 12 November 2013, available at <http://rwandaexpress.blogspot.com/2013/11/aegis-trust-cnlg-in-joint-efforts-to.html>, accessed on 2 November 2020.

The Gacaca archives, genocide memorials and burial sites all form part of the memorialisation in Rwanda, and serve as historical records of the genocide against the Tutsi and as educational tools for future generations in Rwanda and worldwide.

5.2.2. Unity and reconciliation as guarantees of non-repetition

While the CNLG is the principal national body charged with the overall mission of preventing and fighting against genocide, the NURC is the principal national body in charge of unity and reconciliation in Rwanda. By contrast with truth and reconciliation commissions (TRCs), which are essentially based on the notion that *truth* is a healing path to reconciliation,⁷⁵⁴ the NURC seeks to achieve reconciliation through *unity*, avoiding the complex polemics about the truth. By focusing on unity rather than truth, the government of Rwanda seems to have embraced Nietzsche's famous dictum, 'the past has to be forgotten if it is not to become the gravedigger of the present'.⁷⁵⁵

In its attempt to avoid the repetition of conflicts among Rwandans, the government of Rwanda made the deliberate choice to concentrate on the future – unity and reconciliation – and not on the past, precisely because Rwandan history is potentially harmful to the unity of Rwandans. The NURC emphasises and promotes unity as a necessary and prevalent constituent of reconciliation. To this end, it was tasked with implementing policies and programmes designed 'to foster unity and reconciliation among the people of Rwanda who had experienced long periods of bad governance characterised by divisions, discriminations, human rights abuse and acts of violence'.⁷⁵⁶ According to the NURC, unity and reconciliation are

a consensus practice of citizens who have common nationality, who share the same culture and have equal rights; citizens characterized by trust, tolerance, mutual respect, equality, complementary roles/interdependence, truth, and healing of one another's wounds inflicted by history, with the objectives of laying a foundation for sustainable development.⁷⁵⁷

To fulfil its mission, the NURC has implemented several programmes designed to educate citizens and mobilise them to work towards unity and reconciliation in Rwanda. It runs various activities intended to change Rwandans' attitudes and emotions, such as *ingando* (retreats or solidarity camps),⁷⁵⁸ a programme of peace education in solidarity camps that aims to elucidate Rwandan history, explain the origins of the division among the population,

⁷⁵⁴ For details, see M. B. J. Hirsch et al., 'Measuring the impacts of truth and reconciliation commissions: Placing the global "success" of TRCs in local perspective', (2012) 47(3) *Cooperation and Conflict* 386–403; B. Ivanišević, 'Comparative Study on the Impact of Truth Commissions', International Center for Transitional Justice, May 2009.

⁷⁵⁵ M. Garber, *Shakespeare's Ghost Writers: Literature as Uncanny Causality*, New York and London: Routledge, 2010, p. 208.

⁷⁵⁶ NURC, 'Background of the National Unity and Reconciliation Commission', last updated 7 December 2009, available at <http://www.nurc.gov.rw/index.php?id=73>, accessed on 2 November 2020.

⁷⁵⁷ NURC, *The National Policy on Unity and Reconciliation*, 2007, pp. 6–7.

⁷⁵⁸ There are *ingando* camps for demobilised ex-combatants, for students about to go to public university and for released prisoners. See C. Mgbako, 'Ingando Solidarity Camps: Reconciliation and Political Indoctrination in Post-Genocide Rwanda', (2005) 18(1) *Harvard Human Rights Journal* 201–224.

promote patriotism and combat genocide ideology. Like the Gacaca system, *ingando* is a home-grown solution. It originated in a precolonial cultural institution that has been restored to promote the government's vision of national reconciliation.⁷⁵⁹ *Ingando* derives from the Rwandan verb *kugandika*, which refers to a process in which the elders of a community would leave the distractions of their daily lives and retreat to isolated places to solve problems of national concern such as war, famine and the expansion of the nation's borders.⁷⁶⁰ When the *ingando* programme started in 1996, it was administered by the Ministry of Youth, Culture and Sports.⁷⁶¹ It started as a programme for repatriated Rwandans, intended to foster a sense of nationalism among the returnee populations from the Republic of the Congo, Burundi, Uganda, Europe and elsewhere.⁷⁶² The NURC took over the *ingando* programme in 1999 and extended it to politicians, church and community leaders, former combatants and soldiers, students, sex workers, Gacaca judges, genocide perpetrators and women's associations.⁷⁶³ Running from several days to several months, *ingando* camps focus on courses on Rwandan unity and reconciliation, on civic education, on history that highlights the defects of the genocidal regime and on the present government's programmes and policies.⁷⁶⁴ The latter courses stress the democratic elements of the current government⁷⁶⁵ and the heroic conduct of the Rwandan Patriotic Army (RPA), the former army branch of the current ruling political party, the Rwandan Patriotic Front (RPF). The most important and prevalent form of *ingando* organised by the NURC in collaboration with the CNLG is the programme designed for Rwandan students at the end of secondary school before the commencement of their university studies.⁷⁶⁶ Considered the future leaders of Rwanda, the students – dressed in Rwandan Defence Force (RDF) uniforms – spend an average of two months studying the achievements of the government, the dignity of Rwandans, the question of ethnicity in Rwanda, and unity and reconciliation policies.

Ingando, which some foreign scholars regard as a mechanism of pro-RPF or pro-government ideological indoctrination, is an important channel through which the Rwandan population is educated about unity and national reconciliation, the eradication of genocidal ideology and 'divisionism', and Rwandan history.⁷⁶⁷ According to Fatuma Ndagiza, former executive secretary of the CNLG,

⁷⁵⁹ F. Ndagiza, 'Community Sensitization: Case of "Ingando" in Rwanda', International Conference on Security and Lasting Peace in the Great Lakes Region Africa, Kigali, 2003, p. 7, cited in J. Melvin, 'Correcting history: Mandatory education in Rwanda, Institute of Commonwealth Studies', (2013) 2 *Journal of Human Rights in the Commonwealth* 13.

⁷⁶⁰ A. Rusagara, Programme Officer of Advocacy, National Unity and Reconciliation Commission, cited in C. Mgbako, *supra* note 758, p. 208.

⁷⁶¹ *Ibid.*, p. 209.

⁷⁶² *Ibid.*

⁷⁶³ *Ibid.*

⁷⁶⁴ *Ibid.*

⁷⁶⁵ *Ibid.*

⁷⁶⁶ S. Thomson, 'Re-education for Reconciliation: Participant Observations on Ingando', in S. Straus and L. Waldorf (eds), *Reconstructing Rwanda: State Building and Human Rights after Mass Violence*, Madison, WI: University of Wisconsin Press, 2011, pp. 331–339. See also C. Mgbako, *supra* note 758, p. 201.

⁷⁶⁷ Sara Bawaya (Civic Education Acting Director of Syllabus Development and Training Programme, NURC), cited in J. Melvin, *supra* note 759.

for the youth, this program has acted to improve their capacity as potential leaders to undertake the necessary analyses of their role in society and be able to initiate change. The key objective being to engender attitude formation, crystallize and enhance the positive behavioral traits in the youth. This is evident in higher institutions of learning where students who have undergone this training (*ingando*) have proved more objective in handling diverse concerns at school.⁷⁶⁸

As the main forum in which Rwandan history is taught to pre-university students, opportunities for critical analysis at *ingando* are greatly restricted,⁷⁶⁹ a situation that legitimises the stated objective of *ingando* to 'correct all historical distortions that led to the disintegration of the Rwandan society'.⁷⁷⁰ This objective of 'correcting' has led to the creation of an official and selective narrative about what happened in Rwanda in 1994 – which has been variously referred to by international scholars as a 'government-constructed narrative',⁷⁷¹ 'chosen amnesia',⁷⁷² 'social amnesia',⁷⁷³ and a 'victor's narrative'.⁷⁷⁴ For Susanne Buckley-Zistel, the selective nature of the government of Rwanda's narrative about the roots of the genocide against the Tutsi and its subsequent acceptance by most Rwandans is a coping mechanism.⁷⁷⁵ According to her, it was easier for Rwandans to believe that the genocide came out of nowhere instead of facing the reality of decades of tensions between Hutu and Tutsi.⁷⁷⁶ Emphasising the potential side effects of the chosen amnesia on the Rwandan government's objectives of unity and reconciliation, Buckley-Zistel argues that

although now perhaps essential for local coexistence, [it] bears the danger of not challenging the social cleavages that rendered the genocide possible in the first place, and so obstructing their transformation in the future.

She believes that leaving social antagonisms untouched prevents the transformation of Rwandan society into a society in which ethnicity-related conflicts or killings will be impossible, and that this lack of change represents a time bomb.⁷⁷⁷

In contrast, elaborating on Nietzsche's famous dictum, Duncan Bell emphasises that 'memory is not always beneficial; it can be counter-productive. It can obstruct the potential for moving forward, for envisaging alternative futures'.⁷⁷⁸ For Bell,

⁷⁶⁸ Cited in J. Melvin, *supra* note 759, p. 14.

⁷⁶⁹ C. Mgbako, *supra* note 758, p. 221.

⁷⁷⁰ J. Melvin, *supra* note 759, p. 14.

⁷⁷¹ T. Hinan, 'To remember, or to forget? Collective memory and reconciliation in Guatemala and Rwanda', (2010) 18(1) *Totem: The University of Western Ontario Journal of Anthropology*, article 11.

⁷⁷² S. Buckley-Zistel, 'Remembering to Forget: Chosen Amnesia as a Strategy for Local Coexistence in Post-Genocide Rwanda', (2006) 76(2) *Journal of the International African Institute* 131–150. See also H. Nyseth Brehm and N. Fox, 'Narrating Genocide: Time, Memory, and Blame', (2017) 32(1) *Sociological Forum* 116–137.

⁷⁷³ S. Cohen, 'States of Denial: Knowledge, Accountability, and the Policing of the Past', (1995) 20(1) *Law and Social Inquiry* 7–50.

⁷⁷⁴ J. Melvin, *supra* note 759, p. 2.

⁷⁷⁵ S. Buckley-Zistel, *supra* note 772, p. 141.

⁷⁷⁶ *Ibid.*

⁷⁷⁷ *Ibid.*, p. 147.

⁷⁷⁸ D. Bell, *Memory, Trauma and World Politics: Reflections on the Relationship between Past and Present*, Basingstoke: Palgrave Macmillan, 2006.

to remember something is always to forget something else, and ... this is an intrinsically political relation. It is vital to understand the mutual constitution of remembering and forgetting, and to chart its modulations and its silences, for many politicians and scholars 'seem unaware of the implications of memory as a practice': 'Political debate deploys memories but it does not engage the problem of memory'.⁷⁷⁹

These contrasting theories demonstrate the complexity of the dialectical process of memorialisation in Rwanda and prove that there is no one perfect theory or solution that would fit all the situations encountered while dealing with a traumatic society in the aftermath of a conflict. On the one hand, it is good to know how to forget, and on the other hand, it is positively harmful to forget the past. To illustrate this, Janine N. Clark gives some historical examples of collective amnesia, including the massive project of forgetting that swept across Europe at the end of World War II. Taking France and Spain as examples, she remarks that

France's leaders sought to create a democratic republic not by confronting the legacy of the Vichy collaboration with the Nazis, but by emphasizing De Gaulle's unifying myth of French resistance. Later, in Spain, after the death in 1975 of the dictator Francisco Franco, there was an exercise in collective amnesia ... Everything was subordinated to the peaceful transition to democratic rule.⁷⁸⁰

As an example of the side effects of collective amnesia, Clark notes that some commentators maintain that Yugoslavia's unresolved past was a fundamental reason for the country's disintegration and slide into bloodshed in the early 1990s. According to these commentators, it was because the past – in particular the civil war that raged through Yugoslavia during World War II – was suppressed rather than dealt with that old grievances continued to fester. Branko Petranovic, for example, claims that 'aspirations to exact revenge and emotional demands to "pay back" for 1914–1918 and 1941–1945 cannot be wiped away from the minds of many'.⁷⁸¹ According to Roger Cohen, 'the methods held Tito's state together – an immense achievement – but left old wounds unsettled. Serbs and Croats, especially in exile, continued to nurse their wounds'.⁷⁸²

Taking into consideration the above conflicting theories, it can be argued that it would be over-simplistic to accept or reject any of these theories; what is more important is the fact that chosen amnesia serves a particular function arising from particular needs in the present,⁷⁸³ and what each society decides to remember and forget largely determines how it envisages its future.⁷⁸⁴ As Buckley-Zistel explains, Rwandans are aware of how history and memory had a devastating impact on Rwandan politics in the past and, in order to escape from the grip of

⁷⁷⁹ Ibid.

⁷⁸⁰ J. N. Clark, *Serbia in the Shadow of Milosevic: The Legacy of Conflict in the Balkans*, London and New York: Bloomsbury, 2008, pp. 76–77.

⁷⁸¹ B. Petranovic, *The Yugoslav Experience of Serbian National Integration*, New York: East European Monographs, 2002, p. 146.

⁷⁸² R. Cohen, *Hearts Grown Brutal: Sagas of Sarajevo*, 1st ed., New York: Random House, 1998, p. 45.

⁷⁸³ S. Buckley-Zistel, *supra* note 772, p. 134.

⁷⁸⁴ A. B. de Brito et al., *The Politics of Memory: Transitional Justice in Democratizing Societies*, Oxford: Oxford University Press, 2001, p. 160.

the past, they prefer to ‘eclipse’ parts of their historical conflicts for the sake of a better coexistence.⁷⁸⁵

Only through remembering what to forget, or chosen amnesia, are rural Rwandans able to cope with their present social milieu, their day-to-day life in the proximity of ‘killers’ who, truly or falsely, participated in the genocide, or ‘traitors’, who denounced the right or wrong people.⁷⁸⁶

Similarly, Charles Ntamaka has noted that Rwandans ‘are more preoccupied with restoring social harmony than with hanging on to memories. Without wanting to forget the victims of the genocide, they prefer to regain their normal life’.⁷⁸⁷ Ntamaka links the choice of harmonious coexistence to a Rwandan proverb, ‘*ubuze uko agira agwa neza*’, which translates as ‘if there is nothing you can do it is better to be nice’.⁷⁸⁸

In addition to *ingando*, another tool of the NURC to foster national values and patriotism among Rwandans is *itorero ry’Igihugu*, a sort of cultural school. Organised in partnership with the National Itorero Commission (NIC)⁷⁸⁹ and following similar schedules and settings to those of *ingando*, *Itorero ry’Igihugu* focuses on cultural activities and educates students about integrity, problem-solving and national values such as patriotism, defending the nation and ‘fondness’ for Rwandan culture.⁷⁹⁰ Officially launched by the Rwandan president in 2007, *itorero ry’Igihugu* is intended to help solve problems of bad mindsets, behaviours and practices by applying Rwandan cultural values.⁷⁹¹

Furthermore, as Janine N. Clark notes,

in addition to *ingando* and *Itorero ry’igihugu* [emphasis added], other NURC activities have included active participation in the legislative process that led to the establishment of the Gacaca courts, as well as assisting in the training of the Gacaca judges known as *inyangamugayo* (literally: people who do not like blame, meaning people of integrity); seminars on unity and reconciliation; ... the establishment of reconciliation clubs; national summits on unity and reconciliation; and the organisation of meetings between released prisoners and genocide survivors.⁷⁹²

It is worth noting that in order to measure the goals that have been achieved, the challenges that have been encountered and the strategies that have been put in place to foster unity and reconciliation,⁷⁹³ the NURC issued a national policy on unity and reconciliation⁷⁹⁴ in August

⁷⁸⁵ S. Buckley-Zistel, *supra* note 772, p. 146.

⁷⁸⁶ *Ibid.*

⁷⁸⁷ Cited in S. Buckley-Zistel, *supra* note 772, p. 146.

⁷⁸⁸ *Ibid.*, p. 145.

⁷⁸⁹ The NIC is a Rwandan civic education institution, whose primary aim is to preserve Rwandan culture by promoting values such as national unity, social solidarity, patriotism, integrity, bravery and tolerance, and teaching the ‘dos and don’ts’ of Rwandan society.

⁷⁹⁰ J. Melvin, *supra* note 759, pp. 14 and 15.

⁷⁹¹ *Ibid.*, p. 15.

⁷⁹² J. N. Clark, ‘National unity and reconciliation in Rwanda: A flawed approach?’, (2010) 28(2) *Journal of Contemporary African Studies* 140.

⁷⁹³ *Ibid.*, p. 10.

2007, which served as a monitoring and evaluation tool. Based on this policy, two reconciliation barometers were published by the NURC in 2010 and 2015 respectively.⁷⁹⁵ According to the 2015 Rwanda Reconciliation Barometer (RRB), the status of reconciliation in Rwanda stood at 92.5 per cent, as compared with 82.3 per cent in 2010.⁷⁹⁶ According to Ezechiel Sentama, co-author of the report,

in the aspect of understanding the past, present and how to envision the future, at least 92.2 per cent of Rwandans believe to have frankly discussed and understood major issues about the causes of divisionism in the history of Rwanda.⁷⁹⁷

Despite what is admittedly a success, the 2015 RRB still reveals that there is a long way to go to achieve reconciliation. It indicates that 28.9 per cent of Rwandans strongly believe that there are people who would still commit genocide if conditions were favourable, while 25.8 per cent believe there are Rwandans who are still sowing divisions and genocidal ideology in others.⁷⁹⁸ The NURC is also a crucial institution to foster social cohesion through the removal of Hutu, Tutsi and Twa ethnic labels in favour of a national Rwandan identity. As discussed in the following subsection, the removal of ethnicity seeks to achieve a united country free of ethnic conflicts that might lead to atrocities similar to those of 1994. It was accompanied by legislative reforms prohibiting hate speech.

5.2.3. The legislative reforms and ethnicity ban as guarantees of non-repetition

To address the institutional roots and ethnic structures that are considered to be the underlying causes of the 1994 genocide against the Tutsi, in the aftermath of the genocide the government of Rwanda embarked on legislative reforms, with the overriding objective of preventing the reoccurrence of the genocide by promoting national identity among Rwandans and prohibiting hate speech. Acknowledging the role of ethnic division and discrimination in the genocide,⁷⁹⁹ the 2003 Constitution of Rwanda – which emerged out of the legacy of the genocide against the Tutsi – emphasises the importance of national unity and the danger of division in both its preamble and its dispositions.⁸⁰⁰ It made the ‘eradication of ethnic, regional and other divisions and promotion of national unity’⁸⁰¹ one of the fundamental principles on which the Rwandan nation is founded. Manifesting this fundamental principle, the preamble specifies that Rwandans are ‘committed to preventing and punishing the crime of genocide, fighting genocide negationism and revisionism, eradicating genocide ideology

⁷⁹⁴ NURC, *The National Policy on Unity and Reconciliation*, Kigali, August 2007.

⁷⁹⁵ NURC, *Rwanda Reconciliation Barometer*, October 2010; NURC, *Rwanda Reconciliation Barometer*, December 2015.

⁷⁹⁶ *Ibid.*, pp. xiii–xiv.

⁷⁹⁷ Cited in R. Rwigyira, ‘At least 92% of Rwandans reconciled, says new survey’, *The New Times*, 28 January 2016, available at <https://www.newtimes.co.rw/section/read/196536>, accessed on 4 November 2020.

⁷⁹⁸ NURC, 2015, *supra* note 795, pp. xiii–xiv.

⁷⁹⁹ See Constitution of the Republic of Rwanda of 2003 revised in 2015, *Official Gazette of the Republic of Rwanda*, no. special of 24 December 2015, preamble para. 3.

⁸⁰⁰ *Ibid.* See S. Takeuchi, ‘Twin countries with contrasting institutions: Post-conflict state building in Rwanda and Burundi’, in Y. Mine et al. (eds), *Preventing Violent Conflict in Africa – Inequalities, Perceptions and Institutions*, Basingstoke: Palgrave Macmillan, 2013, p. 49.

⁸⁰¹ Constitution of the Republic of Rwanda of 2003 revised in 2015, *supra* note 799, article 10(1°) and (2°).

and all its manifestations, divisionism and discrimination based on ethnicity, region or any other ground'.⁸⁰²

5.2.3.1. *The legislative reforms and anti- denial laws*

The obligation to adopt legislative measures as guarantees of non-repetition overlaps, to a certain extent, with the primary duty to adopt legislative measures to bring domestic laws into conformity with international treaties.⁸⁰³ The first two 'fundamental principles' of the Rwandan Constitution are 'fighting the ideology of genocide and all its manifestations', and the 'eradication of ethnic, regional and other divisions'. To enforce these principles, legislations severely punishing the crimes of 'divisionism or sectarianism',⁸⁰⁴ 'genocide denial'⁸⁰⁵ and 'genocide ideology'⁸⁰⁶ (hereinafter anti-denial laws) were enacted.

The law on divisionism and sectarianism prohibited

the use of any speech, written statement or action that divides people, that is likely to spark conflicts among people, or that causes an uprising which might degenerate into strife among people based on discrimination.⁸⁰⁷

The law repressing the crime of genocide and other related international crimes goes much further than merely prohibiting the crime of genocide, and punishes any person who

will have publicly shown, by his or her words, writings, images, or by any other means, that he or she has negated the genocide committed, rudely minimized it or attempted to justify or approve its grounds, or any person who will have hidden or destroyed its evidence.⁸⁰⁸

The crime of 'genocide ideology' or '*Ingengabitekerezo ya jenocide*' in the Rwandan language (literally, 'the ideas of genocide') is defined in article 2 of Law No. 18/2008, which concerns the punishment of the crime of genocide ideology, as

an aggregate of thoughts characterized by conduct, speeches, documents and other acts aiming at exterminating or inciting others to exterminate people basing on ethnic group, origin, nationality, region, colour, physical appearance, sex, language, religion or political opinion, committed in normal periods or during war.⁸⁰⁹

⁸⁰² Ibid., preamble, para. 7.

⁸⁰³ HRC, General Comment 31, *supra* note 127, para. 7. See also AfrComHPR, *Avocats sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi*, Communication 231/99, 2000; AfrComHPR, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Communication 218/98, 2001; AfrComHPR, *Legal Resources Foundation v. Zambia*, Communication 211/98, 2001.

⁸⁰⁴ Law No. 47/2001 of 18 December 2001, *supra* note 734.

⁸⁰⁵ Law No. 33 bis/2003 of 6 September 2003 repressing the crime of genocide, crimes against humanity and war crimes, *Official Gazette of the Republic of Rwanda*, no. 21 of 1 November 2003.

⁸⁰⁶ Law No. 18/2008 of 23 July 2008 relating to the punishment of the crime of genocide ideology, *Official Gazette of the Republic of Rwanda*, no. 20 of 20 October 2008.

⁸⁰⁷ Law No. 47/2001 of 18 December 2001, *supra* note 734, article 1(2).

⁸⁰⁸ Law No. 33 bis/2003 of 6 September 2003, *supra* note 805, article 4.

⁸⁰⁹ Law No. 18/2008 of 23 July 2008, *supra* note 807, article 2.

Article 3 of the same law goes on to describe the crime of genocide ideology as behaviour manifested by facts aimed at dehumanising a person or a group of people with the same characteristics in one of the following manners:

threatening, intimidating, degrading through defamatory speeches, documents or actions which aim at propounding wickedness or inciting hatred; marginalizing, laughing at one's misfortune, defaming, mocking, boasting, despising, degrading creating confusion aiming at negating the genocide which occurred, stirring up ill feelings, taking revenge, altering testimony or evidence for the genocide which occurred; killing, planning to kill or attempting to kill someone for purposes of furthering genocide ideology.⁸¹⁰

All the above-mentioned Rwandan anti-denial laws were criticised for being too vague, confusing and far-reaching by various scholars⁸¹¹ and international human rights organisations.⁸¹² They were – and still are – regarded as threatening freedom of speech as well as the principles of legality and legal certainty protected by regional and international human rights treaties ratified by Rwanda⁸¹³ and by the Constitution of Rwanda itself. According to Fred Cowell, these laws were so confusing that almost no Rwandan, including judges responsible for their interpretation and even the parliamentarians who passed them, had a clear understanding of what exactly constitutes genocide ideology or of what conduct is criminalised under these laws.⁸¹⁴

In light of these criticisms, such far-reaching laws seem particularly dangerous because they are open to political influence, in the sense that the State prescribes who to prosecute, on what charges, and with what evidence.⁸¹⁵ However, despite all the loopholes that have been – or may be – attributed to the above-mentioned anti-denial laws,⁸¹⁶ it should be acknowledged that in a country healing from a genocide caused by ethnic polarisation driven by the media and hate speech, such anti-denial laws appear very reasonable, and even desirable.

⁸¹⁰ Ibid., article 3.

⁸¹¹ Y.-O. N. Jansen, 'Denying Genocide or Denying Free Speech? A Case Study of the Application of Rwanda's Genocide Denial Laws', (2014) 12(2) *Northwestern Journal for International Human Rights* 191. See also N. Barry, 'A view of the impact of genocide denial laws in Rwanda', in P. Behrens, O. Jensen and N. Terry (eds), *Holocaust and Genocide Denial: A Contextual Perspective*, Abingdon: Routledge, 2017, pp. 118–130; D. E. Uwizeyimana, 'Aspects and Consequences of the Rwandan Law of Genocide Ideology: A Comparative Analysis', (2014) 5(23) *Mediterranean Journal of Social Science* 2372–2375.

⁸¹² Amnesty International, 'Safer to stay silent: The chilling effect of Rwanda's laws on "genocide ideology" and "sectarianism"', 2010, p. 7, available at <https://www.amnesty.org/download/Documents/36000/afr470052010en.pdf>, accessed on 4 November 2020.

⁸¹³ ICERD, 1965; ICCPR, 1966; UNCRC, 1989; CRPD, 2006. By virtue of the overwhelming rate at which relevant treaties have been ratified and its inclusion in the UDHR, freedom of speech is now considered to be a norm of customary international law. See Emily Howie, 'Protecting the human right to freedom of expression in international law', (2018) 20 *International Journal of Speech-Language Pathology* 12–15.

⁸¹⁴ F. Cowell, 'Participatory Rights in Rwanda: Genocide Ideology Laws and the Future of Political Space', in M. Campioni and P. Noack, *Rwanda Fast Forward: Social, Economic, Military and Reconciliation Prospects*, Basingstoke and New York: Palgrave Macmillan, 2012, pp. 47–49.

⁸¹⁵ Ibid.

⁸¹⁶ See C. Sculier, *La Pratique judiciaire du contentieux de l'idéologie du génocide et infractions connexes au Rwanda: Limites et défis d'application*, Brussels: Avocats sans Frontières, 2011.

Negationism, revisionism and trivialisation of the genocide against the Tutsi would be deeply offensive to survivors and their descendants as well as to Rwandan society as a whole and to the international community. Leaving aside the fact that they may serve the hidden agenda of the politicians, the anti-denial laws are important as they recognise the victimhood of the dead and of the survivors. This is important because, as emphasised by Caroline Fournet,

by denying the crime, deniers deny that there ever were victims and consequently annihilate their existence. In turn, the denial of the victims' very existence denies the existence of the group as such ... and the destruction of the group – or genocide – continues.⁸¹⁷

Therefore, it can be claimed that along with their potential effect of guaranteeing the non-recurrence of the genocide in Rwanda, the Rwandan denial laws also have the merit of strengthening the recognition of the victimhood and suffering of those killed and of those who survived the genocide. In fact, since a genocide is a denial of the right of a certain group of people to exist – in this case the Tutsi – this right needs to be restored after the genocide, and one way that the government of Rwanda deemed appropriate was the use of anti-denial laws. Not prohibiting negationism, revisionism and trivialisation of the genocide against the Tutsi would ultimately amount to a continued denial of the Tutsi's right to existence.

5.2.3.2. *The promotion of national identity and the abolition of ethnic identities*

In addition to the anti-denial laws, and mindful of the role of ethnic categories on national identity cards in facilitating the identification of victims during the genocide against the Tutsi, the government of Rwanda outlawed ethnic labels both on national identity cards and in public discourse, and promoted the national identity of Rwandans. The Rwandan government believes ethnicity is an invention of the foreigners who colonised Rwanda. The narrative of the history of ethnicity in Rwanda that is taught by government officials is one of precolonial Rwandan unity, of peaceful coexistence among Hutu, Tutsi and Twa, which was spoiled by Belgian occupation and ethno-politics.⁸¹⁸ The precolonial period is portrayed as a time of solidarity and social cohesion among Rwandans, while the colonial period from 1884 to 1962 is described as a time of political manipulation of ethnic identities, which resulted in tensions among Hutu and Tutsi shortly before independence and in a growing anti-Tutsi sentiment that fuelled the genocide in 1994.⁸¹⁹

The Belgian colonisers are accused of having favoured the Tutsi and, by establishing ethnic identity cards indicating whether a person was a Hutu, Tutsi or Twa, of turning what were considered fluid social classes into tangible ethnic divisions among Rwandans.⁸²⁰ It is claimed that when the Tutsi elite increasingly demanded independence, the Belgian

⁸¹⁷ C. Fournet, *supra* note 749, p. 17.

⁸¹⁸ S. Hoeksema, 'Ingando: Re-Educating the Perpetrators in the Aftermath of the Rwandan Genocide', in U. Ü. Üngör (ed.), *Genocide: New Perspectives on Its Causes, Courses and Consequences*, Amsterdam: Amsterdam University Press, 2016, p. 204.

⁸¹⁹ J. Mason, *Qualitative Researching*, 2nd ed., London: Sage, 2002, p. 18.

⁸²⁰ R. Lemarchand and M. Niwese, 'Mass murder, the politics of memory and post-genocide reconstruction: The cases of Rwanda and Burundi', in B. Pouligny, S. Chesterman and A. Schnabel (eds), *After Mass Crime: Rebuilding States and Communities*, Tokyo: United Nations University Press, 2007, p. 170.

colonisers switched their support to a more accommodating Hutu elite. This shift in support to the larger Hutu population resulted in a Hutu revolution in 1959 and later in an authoritarian Hutu regime after independence in 1962, which lasted until the genocide against the Tutsi that began in April 1994.

Surprisingly, while underlining the role of colonial power in the genocide, the official narrative of the genocide against the Tutsi often avoids drawing any connection to the civil war launched by the RPF on 1 October 1990 or to the assassination of President Juvénal Habyarimana on 6 April 1994, which marked the start of the genocide countrywide. In other words, even though the genocide took place alongside the above-mentioned armed conflict that lasted from October 1990 until July 1994, any attempt to connect it to the civil war or the assassination of Juvénal Habyarimana could lead to prosecution for minimising or justifying the genocide against the Tutsi.⁸²¹

It is interesting to note that this narrative, which disconnects the genocide against the Tutsi from the civil war launched by the RPF, seems to contradict the rationale of having entrusted Rwandan courts with the jurisdiction to prosecute genocidal acts committed in the period from 1 October 1990 – the starting date of the civil war – to 31 December 1994. It is true that the civil war does not explain or justify the genocide against the Tutsi; however, it can be argued that the civil war created conditions conducive to the genocide,⁸²² just as the assassination of President Juvénal Habyarimana on 6 April 1994 was the immediate trigger.

However, assigning sole responsibility for what happened in Rwanda to the Belgian colonisers and their ethno-politics, while painting the picture of a precolonial Rwandan unity leads to a feeling of collective victimisation. Blaming foreigners for what happened in Rwanda in 1994 gives comfort and relieves the burden of individual guilt. Disassociating the civil war and the assassination of President Juvénal Habyarimana from the genocide against the Tutsi while pinning the blame on the colonisers minimises the role of Rwandans in the genocide, and consequently facilitates their ability to live together or unite once again. Diverting the blame onto the colonisers takes away any opportunity to reflect upon individual or collective responsibility among the Rwandan population.

What the above narrative omits – or does not make explicit – is that ‘since colonial times, Rwandans experienced variations on the politics of exclusion, practiced alternately by the Tutsi under colonial rule and the Hutu after independence’.⁸²³ Ethnicity thus masked deeper problems in Rwandan society. According to Jean Vanier, ‘oppressed groups, who spend much of their energy struggling against their oppressors, succeed and eventually become the oppressors in an effort to maintain their own power’.⁸²⁴

⁸²¹ Law No. 33 bis/2003 of 6 September 2003, *supra* note 805, article 4.

⁸²² See B. Harff, ‘No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955’, (2003) 97(1) *American Political Science Review* 57–73.

⁸²³ J. Strain and E. Keyes, ‘Accountability in the Aftermath of Rwanda’s Genocide’, in J. Stromseth (ed.), *Accountability for Atrocities: National and International Responses*, Ardsley, NY: Transnational Publishers, 2003, p. 87.

⁸²⁴ J. Vanier, *Finding Peace*, Toronto: House of Anansi Press, 2003, pp. 12–13.

Accordingly, as it was believed that ethnicity had been manipulated by the coloniser and subsequently politicised by the post-colonial regime dominated by the Hutu, the government opted for the prohibition of ethnic labels as a preventive mechanism. However, the suppression of ethnicity has multiple competing implications. On the side of the victims of the genocide against the Tutsi, suppressing ethnicity and embracing national identity could hamper the recognition of their victimhood status. The national identity sought and taught by the government risks not having the same impact on the victims/survivors, and could be threatening since it does not recognise the victims' ethnicity. It may potentially be seen as diluting their victimisation.⁸²⁵ In light of this, it can be inferred that the fear of undermining victimhood and trivialising suffering could explain the tolerance of a public reference to ethnicity during the commemoration of the genocide.

On the side of the genocide perpetrators, the national identity could give members of the perpetrators' ethnic group an opportunity to restore the negative identity that was bestowed on their ethnic group by their role in the genocide. Embracing national identity can be a way to distance oneself from an ethnicity in the name of which the genocide was committed.⁸²⁶

It can also be argued that the national identity not only threatens the victimhood status, it also threatens the rights of the minority ethnic group in Rwanda known as the Twa (which makes up almost one per cent of the Rwandan population). Even if it is true that neither the Hutu nor the Tutsi have the characteristics necessary to constitute two different ethnic groups,⁸²⁷ and thus gathering Hutu and Tutsi under the same national identity would not – technically – violate their rights to cultural identity as provided in various international human rights instruments ratified by Rwanda,⁸²⁸ national identity would, however, violate the cultural rights of the Twa. The Twa, or pygmies, generally speak the same language as the Hutu and the Tutsi but do not share the same religious beliefs or live together. The Twa have unique traditions and social organisation, with 'distinctive dialects and intonation comprehensible only to other Twa, and unique elements of culture and custom'.⁸²⁹ Until their eviction from the forests, they used to live off hunting; they now live off pottery and can technically be considered a separate ethnic group.⁸³⁰ With the national identity policy, the cultural rights of the Twa population have been overlooked, and the banning of ethnic references has left the Twa without a proper name. They are sometimes referred to as the 'historically marginalised

⁸²⁵ See C. Kanazayire et al., 'Does Identification with Rwanda Increase Reconciliation Sentiments between Genocide Survivors and Non-Victims? The Mediating Roles of Perceived Intergroup Similarity and Self-Esteem during Commemorations', (2014) 2(1) *Journal of Social and Political Psychology* 493–494.

⁸²⁶ *Ibid.*

⁸²⁷ They both speak the same language, share the same religious beliefs and live together.

⁸²⁸ ICCPR, article 27; ICESCR, articles 13, 14 and 15.

⁸²⁹ G. McDougall, 'Report of the Independent Expert on Minority Issues on Her Mission to Rwanda', UN Doc. A/HRC/19/56/Add.1, 28 November 2011, para. 54.

⁸³⁰ It should be recalled here that the right to cultural identity 'consists of the right of all ethnic-cultural groups and their members to belong to a determined culture and to be recognized as different; to maintain their characteristic culture and their cultural patrimony, both tangible and intangible; and not be forced to belong to a different culture or to be unwillingly assimilated by it'. See O. R. Ruiz-Chiriboga, 'The right to cultural identity of indigenous peoples and national minorities: A look from the inter-American system', (2006) 5 *SUR – International Journal on Human Rights* 45.

people’ – reflecting their historical, political, social and economic exclusion – and often stereotyped as primitive and uneducated.⁸³¹

It can therefore be argued that, as a result of putting all three ethnic groups under one national identity for the sake of unity and the prevention of potential future ethnic conflicts, the Twa have been denied their right to enjoy their own culture and to profess and practice their own religion as provided by the ICCPR.⁸³²

Banning ethnicity further contradicts the Rwandan government’s obligation to protect and promote cultural diversity.⁸³³ With the policy of national identity, not only did the Twa lose the enjoyment of their indigenous rights, but their organisations became unlawful and were obliged to make certain changes to their structure and status. Organisations working for the promotion and protection of the Twa’s rights as an indigenous people were forced to change their names⁸³⁴ and/or redefine their mandate to avoid sanctions and fully comply with the Constitution of Rwanda.⁸³⁵ Self-identification as a member of, or working for, an ethnic group is generally regarded as fuelling conflicts among Rwandans and sowing divisions.⁸³⁶

It is nevertheless important to stress that the 2015 Rwanda Reconciliation Barometer (RRB) indicates that efforts to group all Rwandans under a single, unique identity seem to have been fruitful. The number of Rwandans who view themselves through an ethnic lens reduced slightly from 30.5 per cent in 2010 to 27.9 per cent in 2015. With regard to social cohesion, the level of trust, positive interactions and solidarity among Rwandans is rated at 96.1 per cent.⁸³⁷

I would like to conclude by quoting Holocaust survivor Primo Levi’s remarks in *The Drowned and the Saved* on ‘the memory of the offense’. According to Levi, when the reality of the past clashes with the needs of present reality,

there are those who lie consciously, coldly falsifying reality itself, but more numerous are those who weigh anchor, move off, momentarily or forever, from genuine memories, and fabricate for themselves a convenient reality. The past is a burden to them; they feel repugnance for things done or suffered and tend to replace them with others. The substitution may begin in full awareness, with an invented scenario, mendacious, restored, but less painful than the real one; they repeat the description to others but also to themselves, and the

⁸³¹ G. Mwijuke, ‘We are simply Batwa, not a “historically marginalised people”’, *The East African*, 25 October 2014, available at <https://www.theeastafrican.co.ke/rwanda/News/We-are-simply-Batwa-not-a-marginalised-people-/1433218-2499322-8ti9mez/index.html>, accessed on 4 November 2020.

⁸³² See article 27.

⁸³³ See articles 2, 3 and 5 of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which was ratified by Rwanda on 16 July 2012.

⁸³⁴ One example is the Communauté des Autochtones Rwandais (CAURWA), which was forced to remove ‘Autochtones’ (‘indigenous’) from its name and replace it with ‘Potiers’ (‘potters’), becoming the Communauté des Potiers du Rwanda (COPORWA).

⁸³⁵ Article 54 of the 2003 Rwandan Constitution prohibits all associations based on ‘race, ethnic group, tribe, lineage, region, sex, religion or any other division which may lead to discrimination’.

⁸³⁶ B. R. Hartley, ‘Rwanda’s post-genocide approach to ethnicity and its impact on the Batwa as an indigenous people: An international human rights law perspective’, (2015) 15(1) *QUT Law Review* 62.

⁸³⁷ NURC, 2015 *supra* note 795, p. xv.

distinction between true and false progressively loses its contours, and man ends by fully believing the story he has told so many times and continues to tell, polishing and retouching here and there the details which are least credible or incongruous or incompatible with the acquired picture of historically accepted events: initial bad faith has become good faith.⁸³⁸

Therefore, the chosen amnesia or selective memory when it comes to the root causes of the genocide against the Tutsi is a mechanism of constructing a convenient reality with the hope of building a 'united nation' free of potential future ethnic conflicts. As part of constructing this nation, the government of Rwanda initiated and financed a number of programmes and projects so as to improve the welfare of the survivors of the genocide against the Tutsi.

5.3. The government's rehabilitation measures for the victims of the genocide against the Tutsi

The genocide against the Tutsi left a considerable number of children and adult genocide survivors on their own without homes and families. A 1998 survey conducted by the FARG estimated the 'neediest survivors' to number 282,000, of which 48,000 were widows, 147,000 were fatherless, 10,000 motherless and 64,000 orphans (who had lost both parents).⁸³⁹ Similarly, a genocide survivors' census published in 2008 by the Rwandan national institute of statistics showed that the total number of survivors (or *rescapés*, that is, those persecuted because of their ethnicity or because of their opposition to the genocide) was 309,368, of which forty-two per cent were male and fifty-eight per cent were female. According to the same report, twenty-one per cent were orphans while 10.3 per cent were widows and 7.3 per cent had a disability.

As mentioned earlier, the FARG⁸⁴⁰ was established to provide assistance to the neediest survivors in the areas of education, housing, health, psychological support and income generation. Within the limits of its capacity, the government of Rwanda pledged six per cent⁸⁴¹ of its annual budget to finance the FARG's activities and rehabilitative programmes.⁸⁴² As the FARG budget cannot accommodate the needs of all genocide survivors, the FARG was purposely created to promote the social welfare of the neediest survivors of the genocide against Tutsi who fall under the following categories:

⁸³⁸ P. Levi, *The Drowned and the Saved*, trans. R. Rosenthal, New York: Vintage Books, 1989, p. 27.

⁸³⁹ J. Borton and J. Eriksson, *Lessons from Rwanda—Lessons for Today*, Copenhagen: Ministry of Foreign Affairs, 2005, p. 32 (footnote omitted).

⁸⁴⁰ Law No. 02/98 of 22 January 1998 (*supra* note 47) was amended in 2008 by Law No. 69/2008 of 30 December 2008 (*supra* note 1), which was in turn amended and replaced by Law No. 81/2013 of 11 September 2013 (*supra* note 595).

⁸⁴¹ Law No. 02/98 of 22 January 1998 determining the organisation, competence and functioning of the FARG provided that the government would contribute five per cent of the national budget and that every employee in the public or private sector would make a contribution equivalent to one per cent of their gross salary. The new law increased the government's contribution to six per cent and removed the employees' contribution.

⁸⁴² Law No. 81/2013 of 11 September 2013, *supra* note 595, article 16(1^o).

1° orphans⁸⁴³ and widows of the Genocide against the Tutsi; 2° elderly people who were left childless during the Genocide against the Tutsi; 3° survivors whose houses were destroyed, property looted and those who inherited loans from banks due to the genocide against the Tutsi; 4° survivors with physical disability due to the Genocide against the Tutsi in consideration of the degree of their disability, those infected with HIV/AIDS, surviving mothers of Genocide against the Tutsi and those living with chronic diseases infected during the Genocide against the Tutsi; 5° children under eighteen (18) years survivors of the Genocide against the Tutsi who are single mothers due to poor living conditions resulting from the Genocide against the Tutsi.⁸⁴⁴

The above list entails that in order to be eligible for the FARG's assistance, one needs to be a 'survivor' of the genocide against the Tutsi or associated massacres and to be 'in need'. The 'neediest' criterion generally refers to those rendered vulnerable as a result of violence directed at them and/or the killing of either their parents, their partners or their families during the genocide period from 1 October 1990 to 31 December 1994.

5.3.1. The FARG packages and recipients' eligibility

To fulfil its mandate, since 1998 the FARG has organised its activities into five key programmes, namely, education, shelter, healthcare, income-generating activities and direct support.

In terms of education, according to a recent evaluation report covering the period from 2010 to 2017 commissioned by the FARG, 'about 65,334 students were supported and completed different levels of education; 100.2 billion FRW [€ 100.2 million] that the government has allocated were spent in total for education programs during 7 years'.⁸⁴⁵

In terms of healthcare, the report notes that

451,610 beneficiaries/cases have been supported throughout the period of 2010–2017 whereby 10,763 billion [€10.763 million] were spent on health programme during the same period. 451,425 beneficiaries/cases got treatment inside of the country and the amount spent on this medical treatment in the country is equivalent to 9,155 billion [€9.155 million]. 185 beneficiaries/cases got specialised treatment outside of the country and around 1,608 billion [€1.608 million] were spent on abroad treatments.⁸⁴⁶

The same report specifies that '24,268 beneficiaries were assisted under the income generating activities and 5,5 billion [€5.5 million] were spent under the income generation program',⁸⁴⁷ while '23,000 beneficiaries were assisted on a monthly basis under the direct support programme and FRW13,840,132,707 [€13,840,132.707] was spent in 7 years'.⁸⁴⁸

⁸⁴³ Although the ordinary meaning of the term 'orphan' refers to someone who lost both parents, the FARG law also considers someone who lost one parent to be an orphan.

⁸⁴⁴ Law No. 81/2013 of 11 September 2013, *supra* note 595, article 7.

⁸⁴⁵ FARG, 'Evaluation of FARG activities: 2010–2017, Final Report', Kigali, September 2018, p. viii.

⁸⁴⁶ *Ibid.*

⁸⁴⁷ *Ibid.*, p. ix.

⁸⁴⁸ *Ibid.*, p. x.

Under the shelter programme, the report notes that ‘3,202 houses were constructed for the amount of FRW12.6 billion [€12.6 million]. 2,382 houses were rehabilitated for the amount of FRW11.3 billion [€11.3 million]. The whole shelter program cost 24 billion FRW [€24 million]’.⁸⁴⁹

According to Theophile Ruberangeyo, the FARG director general, the government of Rwanda has injected over RWF267 billion (€262,605,981) into five programmes, but education and health took the lion’s share.⁸⁵⁰ ‘So far, 107,489 students have been assisted with FRW84.8 billion [€83,404,446.4] to complete secondary school since 1998 whereas 33,349 students have been assisted to complete their bachelor’s degree at a cost of FRW89.7 billion [€88,223,807.1]. Most of them have got jobs’,⁸⁵¹ according to Emmanuel Munyangondo, the FARG’s director of planning, monitoring and evaluation.

To access the FARG’s assistance, a beneficiary needs to provide a certificate establishing his or her survivor status, which should be endorsed by the mayor of the district and by a local survivors’ association representative. As mentioned above, the way the FARG defines a ‘survivor’ is different from the commonly known definition of a victim.⁸⁵² The 1998 FARG law defined a ‘survivor’ as

a person who survived genocide and massacres committed in Rwanda between October 1, 1990, and December 31, 1994, consisting in acts meant to: i) exterminate persons and destroy their property because of their ethnic origin; ii) exterminate persons and destroy their property because of their opinion or of those of close relatives who were against genocide and massacres.⁸⁵³

It appears from this definition that the term ‘survivor’ is not reserved only for the Tutsi, as it encompasses both Tutsi – people who escaped genocide – and moderate Hutu – people who escaped massacres. As explained by Heidy Rombouts, a victim may be, for example, someone who lost family members in the genocide but was not directly targeted themselves. For instance, a child of a Hutu father who lost his or her Tutsi mother is not considered a ‘survivor’ or ‘*rescapé*’ even though he or she qualifies as a ‘victim’ of the genocide. Rombouts explains that

⁸⁴⁹ Ibid.

⁸⁵⁰ T. Ruberangeyo, cited in J. D’A. Mbonyinshuti, ‘FARG @20: Celebrating achievements, focusing on sustainable reintegration and the development for survivors’, *The New Times*, 8 April 2019, available at <https://www.newtimes.co.rw/featured/farg-20-celebrating-achievements-focusing-sustainable-reintegration-and-development>, accessed on 4 November 2020.

⁸⁵¹ E. Munyangondo, cited in M. Nkurunziza, ‘Kwibuka25: FARG restores hope for young genocide survivors’, *The New Times*, 15 March 2019, available at <https://www.newtimes.co.rw/news/kwibuka25-farg-restores-hope-young-genocide-survivors>, accessed on 4 November 2020.

⁸⁵² The term victims ‘means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power’. See UNGA, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, November 1985, article 1.

⁸⁵³ See article 14 of the 1998 FARG law.

whereas ‘harm’ or ‘loss’ is central to the notion of victim, central to the notion of rescapé is the fact of ‘having escaped persecution,’ which is interpreted in an ad hoc manner ... Moreover, in principle, not all rescapés benefit from the FARG: in theory (though not always in practice), only the needy rescapés would receive benefits.

Even though the meaning of ‘survivor’ under the 1998 FARG law theoretically extends the FARG benefits to moderate Hutu, in practice the FARG is regarded as a Tutsi fund for three different reasons, namely, the renaming of the 1994 atrocities, the ethnicity of the principal recipients of the FARG’s assistance and the complexity of genocide issues in inter-ethnic marriage cases,⁸⁵⁴ as explained below.

By contrast with the 1998 FARG law,⁸⁵⁵ both the 2008 and 2013 FARG laws abandoned the initial inclusive definition of ‘survivor’. Due to the renaming of the 1994 atrocities as ‘the genocide against the Tutsi’, instead of ‘genocide and massacres’, the 2008 and 2013 FARG laws redefined survivors as ‘survivors of the genocide against the Tutsi committed between 01 October 1990 and 31 December 1994’,⁸⁵⁶ without providing any further explanation. Furthermore, while the 2008 FARG law covered survivors of the genocide against the Tutsi ‘and other crimes against humanity’, the 2013 FARG law abandoned references to crimes against humanity and thus implicitly restricted the beneficiaries of the fund solely to genocide survivors (i.e. Tutsi).

Another reason why the FARG is considered a Tutsi fund is that in practice the Tutsi are the principal beneficiaries – if not the sole recipients – of the FARG’s assistance. So far, and to the best of my knowledge, there is no data available demonstrating any Hutu recipient of the FARG’s assistance. This, however, does not necessarily mean that no Hutu has benefited from the FARG’s assistance, since the lack of such data may be connected to the Rwandan ethnicity-free policy or to the lack of a clear definition of a moderate Hutu.

Lastly, the lack of a clear definition of a moderate Hutu reveals the complexity of the survivor status, especially when it comes to cases of inter-ethnic marriage. Even though, under the 1998 FARG law, survivor status, and thus eligibility for the FARG’s assistance, should be determined on a case-by-case basis without consideration of ethnicity, the practice has proved difficult in the cases of inter-ethnic marriage, such as

a Tutsi wife of a Hutu man; the cases of two widows (a Hutu widow of a moderate Hutu man and a Hutu widow of a Tutsi man); and the cases of the two children (a child of a Hutu father – alive and a murdered Tutsi mother and a child of a murdered Tutsi father and a Hutu mother).⁸⁵⁷

⁸⁵⁴ See also C. Ferstman, M. Goetz and A. Stephens, *supra* note 359, p. 522.

⁸⁵⁵ This law was amended in 2008 by Law No. 69/2008 of 30 December 2008, which was in turn amended and replaced by Law No. 81/2013 of 11 September 2013. See Law No. 69/2008 of 30 December 2008, *supra* note 1, and Law No. 81/2013 of 11 September 2013, *supra* note 595.

⁸⁵⁶ *Ibid.*, article 2(1^o).

⁸⁵⁷ H. Rombouts, *supra* note 235, p. 388.

To illustrate this complex aspect of the genocide in Rwanda, Rombouts gives the example of an illegitimate orphan girl whose Tutsi mother was killed in the genocide but who was not granted the status of survivor because the local selecting committee of survivors concluded that she was not persecuted. According to Rombouts,

the illegitimate girl had lost her Tutsi mother with whom she had always lived in the 1994 genocide. When arriving at her home one of the militiamen remembered her Hutu father (with whom she had never lived) and brought her to his family, after having killed her mother. The key question was whether the girl had been persecuted and whether she could be a FARG student.⁸⁵⁸

This real case is mirrored in the two hypothetical cases provided by Rombouts that illustrate the difference between the notion of victim and the notion of survivor/*rescapé*:

An orphan who lost his Tutsi father in the genocide, but lives with his Hutu mother is automatically considered a *rescapé*. ... This child is thus a Tutsi, therefore automatically hunted down and thus a *rescapé*. On the contrary, a child that lost his Tutsi mother during the genocide, but lives with his Hutu father is not considered a *rescapé*. ... He is a Hutu and he was thus not hunted down (the burden of proof to indicate the contrary is very high) and therefore not a *rescapé*.⁸⁵⁹

These hypothetical cases demonstrate not only the double standards in the treatment of people who suffered similar harm but also the complex issue of how to determine whether a moderate Hutu meets the criteria for survivor status.⁸⁶⁰

As argued by Naomi Roht-Arriaza, it is practically impossible in many cases to appropriately provide reparations to the victims and survivors in a country that is ethnically divided, as it may foster fresh resentment over perceived favouritism, or even be seen as part of a collective punishment strategy.⁸⁶¹ She emphasises that

in countries like Rwanda, where Hutu and Tutsi live intertwined, services and infrastructure cannot feasibly be reserved to the 'victims' group, and so development projects framed as reparation are of equal benefit to victims, bystanders and even, at times, perpetrators.⁸⁶²

Despite all its shortcomings, the fact remains that the FARG has promoted and supported the social welfare of the neediest survivors of the genocide against the Tutsi. Through the various programmes discussed above, the FARG empowered genocide survivors – even if not all of them – and contributed to their socio-economic development, which in all probability would not have been possible otherwise. The genocide against the Tutsi left most of them in extreme poverty compared with those who were not persecuted.

⁸⁵⁸ Ibid., pp. 393–394.

⁸⁵⁹ H. Rombouts and S. Vandeginste, *supra* note 89, p. 337.

⁸⁶⁰ For a personal story of the child of a Hutu father and Tutsi mother, see J. C. Rwibasira, *The Man with Two Faces: My Life in Rwanda*, Groningen: Ter Verpoozing, 2015, 46.

⁸⁶¹ N. Roht-Arriaza, 'Reparations Decisions and Dilemmas', (2004) 27(2) *Hastings International and Comparative Law Review* 188.

⁸⁶² Ibid.

5.3.2. The FARG: a philanthropic fund with reparative effects

As it can be inferred from its mission, the FARG is an assistance mechanism that should be distinguished from reparation. The latter is supposed to make up for any losses that were suffered and eventually wipe out as far as possible the consequences of the harm suffered, while the former aims at assistance and is chiefly concerned with the needs of the survivors.⁸⁶³

Neither the survivors nor the government of Rwanda regard the FARG packages as a form of reparation, but they do recognise their reparative effects for their beneficiaries. In the survivors' view, the FARG's assistance should be distinguished from their right to reparation since reparation – as opposed to the FARG programmes – aims at specifically addressing and acknowledging the horrific and wrongful nature of the crime(s) they suffered as well as the devastating impact of the harm done to them, whereas the FARG programmes have a more humanitarian character and do not consider the individual scope of the harm endured when providing assistance to its recipients.⁸⁶⁴ In the government's view, 'labeling FARG packages as forms of reparation would create legal entitlement for all genocide survivors and a debate on the amount' (to quote Johnston Busingye, Rwandan minister of justice and attorney general).⁸⁶⁵ According to Busingye, despite their reparative effects, the government does not 'yet' regard the FARG packages as forms of reparation but rather as assistance, so as to precisely highlight both the non-legal obligation and entitlement that might otherwise derive from their being considered forms of reparation.⁸⁶⁶ In his words,

We have been very careful not allow it to be a direct private payment, a direct private payment compensation, a direct private reparation. The FARG focuses on construction and rehabilitation of houses of the most vulnerable survivors, education, healthcare, etc ... without considering the level of the harm suffered. All that we needed is to enable survivors to become self-sustainers. So, this is our concept of reparation in the Rwandan context. What we have failed to do, and you, intellectuals, you should help us, is to engage openly in debate and defend this line. We always defer it.⁸⁶⁷

According to the Rwandan minister of justice,⁸⁶⁸ the government's current focus with the FARG programmes is to improve the quality of the support provided to survivors so that – hypothetically – when the reparations due to the genocide victims are debated, the government will be able to present the FARG recipients whose lives have been changed and improved as tangible evidence of the FARG's reparative effects. Asked whether the FARG was the replacement for the VCF that has been promised since 1996, Busingye replied,

⁸⁶³ See P. C. Bornkamm, *supra* note 21, p. 132.

⁸⁶⁴ REDRESS, 'No justice without reparation: Recommendations for reparation for survivors of the 1994 genocide', discussion paper, July 2012, p. 17. See also the detailed findings from the author's interviews with genocide survivors in chapters seven and eight.

⁸⁶⁵ Interview with the author on 14 February 2019 in the minister's office in Kimihurura.

⁸⁶⁶ *Ibid.*

⁸⁶⁷ *Ibid.*

⁸⁶⁸ *Ibid.*

Not yet. We didn't take a deliberate decision in that regard. But, when I see where things are going and read the political mood, I do not think that it is only me who would imagine that this is the case. ... In brief, I do not think that we have made a deliberate decision that the FARG will replace the VCF but I personally believe that could be the future option.⁸⁶⁹

In light of the above, although the minister did not expressly affirm that the FARG has replaced the VCF, it can be inferred from his statement that the VCF is no longer a priority for the government.

In light of the reparative effects of the FARG programmes, it can be contended that, even though they are purely humanitarian and overlap with the state's general obligation to provide basic services to its population, the FARG programmes and their effects on survivors could fit the concept of rehabilitation as a form of reparation for two main reasons. First, the FARG programmes allow survivors to recover the self-determination of their own lives and enable them to live with dignity and in the hope of a brighter future. Second, the eligibility for the FARG programmes is linked to having been victimised by the genocide against the Tutsi, thereby fitting the concept of victim rehabilitation.

Despite their humanitarian nature, the FARG packages and services provided to the survivors of the genocide against the Tutsi can thus be assimilated to most of the reparation measures that have been considered to fall within the concept of rehabilitation by a number of international human rights instruments and/or monitoring bodies and courts. For instance, without providing an exhaustive list, the UN Basic Principles and Guidelines define rehabilitation as including 'medical and psychological care as well as legal and social services'.⁸⁷⁰ In its general comment 3 on the implementation of article 14, the CAT

affirms that the provision of means for as full rehabilitation as possible for anyone who has suffered harm as a result of a violation of the Convention should be holistic and include medical and psychological care as well as legal and social services.

The CAT further emphasises that rehabilitation

seeks to enable the maximum possible self-sufficiency and function for the individual concerned, and may involve adjustments to the person's physical and social environment. Rehabilitation for victims should aim to restore, as far as possible, their independence, physical, mental, social and vocational ability; and full inclusion and participation in society.⁸⁷¹

Likewise, in a number of cases, educational, medical or similar services, scholarships and/or study materials for survivors,⁸⁷² housing assistance and infrastructure investment in roads, sewers and drinking water have been considered part of rehabilitation measures.⁸⁷³

⁸⁶⁹ Ibid.

⁸⁷⁰ UN Basic Principles and Guidelines, principle 21.

⁸⁷¹ CAT, General Comment 3 on the implementation of article 14 by state parties, 13 December 2012, para. 11.

⁸⁷² IACtHR, *Barrios Altos v. Peru* (reparations and costs), judgment of 30 November 2001, paras 50.3 and 50.4; IACtHR, *Cantoral Benavides* (reparations and costs), judgment of 3 December 2001, paras 99.6 and 99.8;

5.4. Conclusion

This chapter has explored the various non-pecuniary programmes and policies put in place by the government of Rwanda to deal with the legacy of the genocide against the Tutsi, and assessed whether they actually served the aim of reparation in terms of satisfaction, guarantees of non-repetition and rehabilitation.

As evidenced in this chapter, dealing with past atrocities such as the 1994 genocide against the Tutsi encompasses much more than establishing the accountability of genocide perpetrators, seeking the truth and providing financial reparations. Taking into consideration the particularities of the conditions that led to the genocide against the Tutsi and the characteristics of post-genocide Rwandan society, dealing with the legacy of the genocide against the Tutsi also required a combination of various measures, such as memorialisation, prohibition of ethnic identification, adoption of anti-denial laws and promotion of unity and reconciliation policies.

Although it is not clear whether it was done for this particular purpose, the government's memorialisation of the genocide against the Tutsi provided satisfaction to genocide survivors, as is further substantiated in chapter eight. As discussed in this chapter, the memorialisation in Rwanda has been socially constructed in light of the post-genocide reality and present-day interests resulting from the fact that survivors and perpetrators live in close proximity. To pay tribute to the victims, the memory of the genocide against the Tutsi has been preserved through memorial sites and national, regional and international commemorations. The commemoration of the genocide against the Tutsi holds important symbolic value and constitutes an essential part of the victims' satisfaction, since it gives them a unique opportunity to speak and share with the entire community the magnitude of the violations suffered and their enduring consequences. As corroborated by my findings, detailed in chapter eight, commemoration is a time for all Rwandans to 're-member'⁸⁷⁴ with the victims, to recollect and to recognise the horror of the crimes committed, the magnitude of the harm caused and the ongoing suffering of the victims.

The exhumation of dead bodies and the reburials at memorial sites restore the dignity the victims lost in their death but also provide a physical place to which all survivors, including those who do not know where their loved ones were killed and buried, can go and pay tribute

IACtHR, *Durand and Ugarte v. Peru* (reparations and costs), judgment of 3 December 2001, para. 45.3; IACtHR, *Gómez-Paquiyaury Brothers v. Peru* (merits, reparations and costs), judgment of 8 July 2004, para. 253.13; IACtHR, *Juvenile Reeducation Institute v. Paraguay* (preliminary objections, merits, reparations and costs), judgment of 2 September 2004; paras 340.12 and 340.14; IACtHR, *Plan de Sánchez Massacre v. Guatemala* (reparations), judgment of 19 November 2004, para. 125.7; HRC, *Raul Sendic Antonaccio v. Uruguay* (Communication R.14/63), UN Doc. Supp. no. 40 (A/37/40) at 114 (1982), para. 21; HRC, *Elena Beatriz Vasilskis v. Uruguay* (Communication 80/1980), UN Doc. Supp. no. 40 (A/38/40) at 173 (1983), para. 12; HRC, *Gustavo Raúl Larrosa Bequio (author's brother) v. Uruguay* (Communication 88/1981) (R.22/88), ICCPR, A/38/40, para. 13.

⁸⁷³ IACtHR, *Plan de Sánchez Massacre v. Guatemala* (reparations), judgment of 19 November 2004, paras 125.7 to 125.9.

⁸⁷⁴ In the sense of 'coming together'. This term is borrowed from Viebach. See J. Viebach, *supra* note 676, p. 11

to their family members who were killed in the genocide against the Tutsi. Visiting the memorial sites and paying their respects to their loved ones gives a sense of satisfaction to the survivors and a feeling that they are close to them, as further explained in chapter eight.

To overcome the repetition of the ethnic conflicts that have characterised the history of Rwanda, the government abolished the ethnic labels for which people killed and were killed and promoted the national identity. Doing away with ethnic divisions has been deemed the best way to guarantee non-repetition of ethnic conflicts. Although the abolition of the ethnic labels/identities has the side effect of diluting the victimhood status of those killed and of those who survived the genocide against the Tutsi, it can nevertheless be argued that it has so far stabilised the country and substantially limited the risk of similar violations. As discussed further in chapter eight, the promotion of a single Rwandan national identity has restored self-esteem and fostered peaceful coexistence between survivors, families of perpetrators and/or perpetrators themselves.

Affirmative action/assistance by the government - through FARG - has improved the social welfare of the neediest survivors of the genocide against the Tutsi. Even if this assistance is philanthropic and does not necessarily involve any individual right, thereby differing from the notion of reparation, it is nevertheless linked to the genocide victimhood status and its rehabilitative effect on the recipients cannot be overlooked. As corroborated by the findings analysed in chapter eight, the FARG has empowered genocide survivors and contributed to their socio-economic development. Most importantly, and although the FARG only benefits a small portion of the survivors, its mere existence is a recognition of the victimhood status of the victims of the genocide against the Tutsi, while its service packages for survivors send out the signal that 'their situation and living conditions matter' and the 'government cares'.

PART II

THE VICTIMS' PERCEPTIONS OF THE REPARATION MEASURES IN RWANDA

CHAPTER SIX

INTRODUCTION TO THE EMPIRICAL RESEARCH CONDUCTED IN RWANDA

The first part of this study discussed the normative basis for the rights to a remedy and reparations, and states' related duties, as well as the reparative mechanisms put in place by the government of Rwanda. The remaining task for the second part of it is to investigate, present and discuss how the survivors of the genocide against the Tutsi understand the reparative mechanisms put in place to address the consequences of the genocide.

Understanding survivors' opinions is fundamental to any assessment of whether the measures adopted by the government of Rwanda in response to the genocide against the Tutsi, as discussed in part I, lived up to their intended promises, i.e. whether, in the eyes of the victims, these measures addressed the harm they suffered.

Since, to the best of my knowledge, there is very little to no research on the genocide victims' perceptions of the Rwandan reparation mechanisms, I decided to carry out a survey and gather raw first-hand information by interviewing a number of genocide survivors and one government representative.

Serving as an introduction to the empirical research, this chapter discusses the methodology used to obtain the results presented in chapters seven and eight. As the aim of the survey was to analyse the attitudes and opinions of genocide victims concerning mechanisms for dealing with the consequences of the genocide against the Tutsi that were put in place by the government of Rwanda, the TARR model developed by Stephan Parmentier⁸⁷⁵ provided a useful framework to analyse the genocide victims' attitudes and opinions regarding the government's responses to the genocide against the Tutsi. The TARR model comprises four building blocks corresponding to four key issues or challenges in the process of dealing with past atrocities, namely: searching for truth about the past (T); ensuring accountability of the perpetrators (A); providing some form of reparation to the victims (R); and promoting reconciliation(R).

⁸⁷⁵ S. Parmentier, 'Global Justice in the Aftermath of Mass Violence: The Role of the International Criminal Court in Dealing with Political Crimes', (2003) 41(1/2) *International Annals of Criminology* 203–224. See also S. Parmentier and E. Weitekamp, 'Political Crimes and Serious Violations of Human Rights: Towards a Criminology of International Crimes', in S. Parmentier and E. Weitekamp (eds), *Crime and Human Rights*, Amsterdam and Oxford: Elsevier, 2007, pp. 109–144.

As the TARR model emphasises the interrelations among the four building blocks,⁸⁷⁶ findings from my interviews with the genocide survivors/victims are discussed in two separate but related chapters. Chapter seven deals with the first two building blocks and discusses the genocide survivors/victims' opinions and attitudes regarding the truth about the genocide in Rwanda (T) and the accountability of the genocide perpetrators (A), while chapter eight discusses the remaining two building blocks, i.e. the genocide survivors' opinions and attitudes regarding reparation (R) and reconciliation (R) in Rwanda.

It should be borne in mind that my reason for choosing the TARR model is not to test it but rather to grasp the attitudes and opinions of the genocide survivors/victims in relation to each of the four core issues mentioned above.

Moreover, throughout my analysis, I shall refer to other scholarly findings from similar studies conducted in other countries and related theoretical concepts in order to develop a more comprehensive understanding of the opinions and attitudes of victims with regard to dealing with harm resulting from past atrocities such as genocide, crimes against humanity and war crimes.

6.1. Methodology

As stated above, the legal analysis in part I ascertained the normative basis of the rights to a remedy and reparations, and discussed how the government of Rwanda has fulfilled its related duties. However, the extent to which the mechanisms were efficient and effective cannot be assessed solely by a legal analysis. A thorough exploration of the effectiveness of the mechanisms put in place in Rwanda and the extent to which they actually addressed the harm inflicted on the victims requires us to go beyond a purely legal analysis. An empirical study is best suited to test whether the mechanisms established to address the consequences of the genocide lived up to what the state was required to do and accomplish, to assess whether these mechanisms achieved this on the ground and matched the expectations of the genocide survivors, and thus to determine whether the legal measures fulfilled the Rwandan government's obligation to provide reparation.⁸⁷⁷

My empirical research tests whether reparation, as defined under international law or customary international law, can be achieved in a post-conflict society such as Rwanda, where genocide survivors and perpetrators as well as their families live in close proximity and share similar impoverished conditions. Lee E. Teitelbaum has aptly described the necessity of turning to

⁸⁷⁶ E. Weitekamp et al., 'How to deal with mass victimization and gross human rights violations: A restorative justice approach', in U. Ewald and K. Turkovic (eds), *Large Scale Victimisation as a Potential Source of Terrorist Activities: Importance of Regaining Security in Post-Conflict Societies*, Amsterdam: IOS Press, 2006, pp. 217–241, p. 221.

⁸⁷⁷ See P. Martin, 'Empirical Legal Research and Policy-Making', in P. Cane and H. M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research*, Oxford: Oxford University Press, 2010.

empirical research to advance our understanding of the law and the very functioning of legal systems, arguing that

if laws are intended to produce certain results, questions about whether they do produce the expected results, whether they produce other results, and whether the identifiable results are as consistent with the reason for law as one might have anticipated, are all important to examine.⁸⁷⁸

6.2. *Qualitative semi-structured interviews*

I undertook to collect verifiable empirical data, as I deemed this the most appropriate method to obtain a meaningful conclusion regarding the materialisation – or not – of the right to an effective remedy and of adequate reparation for the victims of the genocide against the Tutsi. In the absence of other data on the genocide survivors' perceptions of the reparative mechanisms put in place to deal with the consequences of the genocide against the Tutsi in Rwanda, I conducted primary data collection and subsequent analysis in the form of semi-structured interviews.⁸⁷⁹ As the survey aimed at collecting information from the genocide survivors on their personal experiences, perceptions and beliefs regarding the mechanisms made available to them in response to the harm they had suffered, a qualitative semi-structured interview method was chosen because of its flexible nature.⁸⁸⁰ The qualitative interview method was used because it was deemed appropriate for studies – like this one – that seek to understand personal experiences, perspectives and meanings,⁸⁸¹ and the semi-structured interview method was preferred as it offers the advantage of having a pre-prepared list of guiding questions – to be asked to all interviewees – supplemented by follow-up questions⁸⁸² to probe the interviewees and encourage them to elaborate and express their views in their own terms. Specifically, the semi-structured interview method allowed me to react to individual respondents' answers by asking more questions, in order to gain a deeper understanding and thus generate more valuable, detailed information.

To ensure that all respondents were asked the same core questions and that all important issues necessary to inform my research were covered, an interview guide was developed.⁸⁸³ The semi-structured interview guide containing twenty-seven open questions functioned as a general map that helped me to maintain focus and facilitate a deep exploration of the respondents'

⁸⁷⁸ L. E. Teitelbaum, 'An overview of law and social research', (1985) 35(4) *Journal of Legal Education* 466. Italics in original.

⁸⁷⁹ For details about the use of semi-structured interviews, see B. Svend, 'Unstructured and Semi-Structured Interviewing', in P. Leavy, *The Oxford Handbook of Qualitative Research*, 1st ed., Oxford: Oxford University Press, 2014, p. 287. See also B. Svend, 'Unstructured and Semi-Structured Interviewing', in P. Leavy, *The Oxford Handbook of Qualitative Research*, 2nd ed., Oxford: Oxford University Press, 2020.

⁸⁸⁰ M. DeJonckheere and L. M. Vaughn, 'Semi-structured interviewing in primary care research: A balance of relationship and rigour', (2019) 7(2) *Family Medicine Community Health* 1.

⁸⁸¹ See J. Mason, *supra* note 819.

⁸⁸² See W. C. Adams, 'Conducting Semi-Structured Interviews', in K. E. Newcomer, H. P. Hatry and J. S. Wholey (eds), *Handbook of Practical Program Evaluation*, 4th ed., 2018, p. 493.

⁸⁸³ See P. Leavy, *supra* note 879, p. 287.

experiences.⁸⁸⁴ Each question had subsequent prompts to help respondents focus on relevant information directly linked to my research. Overall, the semi-structured interview guide provided a framework within which I could develop questions, sequence them and make decisions about which information to pursue in greater depth.⁸⁸⁵ The list of questions forming the interview guide can be found in Appendix A.

6.3. Interviews with genocide survivors

The field work was conducted in Rwanda over a period of six months from 1 October 2018 to 30 March 2019. In order to find genocide survivors willing to share their experiences and thoughts, I contacted three genocide survivors' associations (AERG,⁸⁸⁶ IBUKA⁸⁸⁷ and AVEGA) but for unknown reasons only AVEGA (*Association des Veuves du Génocide Agahozo*) responded positively to my request for interviews with its members/beneficiaries.

AVEGA is a non-profit organisation for Rwandan genocide widows, established on 15 January 1995 by fifty genocide widows⁸⁸⁸ who had survived the genocide against the Tutsi. It acquired its legal personality on 30 December of the same year.⁸⁸⁹ Located in the Rwandan capital of Kigali AVEGA operates⁸⁹⁰ all over Rwanda, supporting 20,312 women (widows) and 71,478 of their dependents. According to the 2010 AVEGA report, among its members 5,628 widows are aged 58 or over, and 926 are childless.

Even though only AVEGA responded positively to my request, I believe that this does not affect the reliability of my findings: considering the number of its members and their dependents, its presence across the country and the degree of harm suffered by its members – loss of husbands, children or relatives⁸⁹¹ and a high rate of HIV seroconversions⁸⁹² – AVEGA responses provided

⁸⁸⁴ L. Webley, 'Qualitative Approaches to Empirical Legal Research', in P. Cane and H. M. Kritzer, *supra* note 877, p. 928.

⁸⁸⁵ See M. Q. Patton, *Qualitative Research and Evaluation Methods: Integrating Theory and Practice*, 4th ed., London: Sage, 2014.

⁸⁸⁶ French acronym for 'Association des Étudiants et Élèves Rescapés du Génocide'. AERG is 'an association of student survivors of genocide [c]reated on 20/10/1996 at format UNR by 12 students and it has quickly grown. Now AERG is represented nationally at 44 Universities and institutes of higher learning and 475 secondary schools in Rwanda, with a total country-wide membership of 43,398'. For further details see <https://aerg.org.rw/index.php/aerg/sample-page/>, accessed on 5 November 2020.

⁸⁸⁷ IBUKA, 'which literally refers to "remembrance", is both a collective of all victim associations and a non-government association with its own structures. Founded on 14 December 1995, it comprises 15 member organisations, which work to perpetuate the memory of genocide and provide support to genocide survivors'. For more details see <https://survivors-fund.org.uk/about/our-work/local-partners/ibuka/>, accessed on 5 November 2020.

⁸⁸⁸ AVEGA only has women members.

⁸⁸⁹ Ministerial Order No. 156/05 of 30 October 1995, as modified by Ministerial Order No. 89/11 of 5 May 2006.

⁸⁹⁰ AVEGA activities are grouped into four different categories: (1) medical care and treatment for trauma, (2) socio-economic development, (3) advocacy, justice and information, and (4) institutional capacity Building. See the AVEGA website, <https://avega-agahozo.org/>, accessed on 5 November 2020.

⁸⁹¹ 732 AVEGA members have lost their relatives, husbands and children, and have no immediate family at all. See <http://urubuga.org/avega-gahozo/>, accessed on 5 November 2020.

sufficient data to effectively inform my research. It should also be noted that AVEGA is the oldest survivors' organisation in Rwanda, and most of its beneficiaries are also members of AERG and IBUKA.

After a positive response to my request, I personally met with the president of AVEGA, who, after learning about my research and understanding the objective of my survey, agreed to assist me in gaining access to AVEGA members. She immediately asked the executive secretary of AVEGA, Etienne Kalisa, to inform all AVEGA district counsellors about my research and ask them to help me access the AVEGA members in their districts across the country. The AVEGA district counsellors were asked to select genocide survivors who were able and willing to share their experiences with me. Because of the nature and sensitivity of my interviews, the AVEGA district counsellors were specifically asked to select respondents who they knew were able to cope with their trauma.⁸⁹² It was only after the identification of the respondents that their telephone numbers were communicated to me by AVEGA district counsellors; I then contacted them by phone and arranged the time and place of the interview.

As mentioned earlier, and in order to gain a better insight into the genocide survivors'/victims' personal experiences, perspectives and understandings with regard to the reparative mechanisms put in place to deal with the consequences of the genocide against the Tutsi, fifty-two survivors – all women – selected by AVEGA district counsellors were interviewed. All these interviews were held in the privacy of their home or workplace, or another place of their choosing.

It should be acknowledged that the fact that fifty-two respondents (members of AVEGA) were selected on the basis of their capacity to cope fairly well with their trauma may have affected the findings, which may thus not be generalizable. It might be that those who can cope less well have been more traumatised, have not healed since and have a more negative attitude towards the reparation scheme than those who have found a way to cope.

To mitigate potential biases that might have arisen from the way the fifty-two respondents who were members of AVEGA were selected, twenty-seven other genocide survivors who were not members of AVEGA were also interviewed. Of these twenty-seven survivors, eleven were people I personally knew were genocide survivors whom I randomly contacted; nine were recommended to me by friends; and seven were recommended to me by some of the genocide survivors I interviewed.

From the outset, it can be noted that the stories of the two groups of survivors (AVEGA members and non-members) that I interviewed seem to be reliable because they show coinciding patterns. The interviews with the twenty-seven non-AVEGA members did not significantly differ

⁸⁹² 1,599 AVEGA members are HIV-positive due to sexual assault during the 1994 genocide. See <http://urubuga.org/avega-gahozo/>, accessed on 5 November 2020.

⁸⁹³ See L. Webley, *supra* note 884, p. 935.

from the respondents selected by AVEGA. However, here too a bias might have occurred since survivors who are prepared to talk might very well be less traumatised than others, and the above remarks about the impact of trauma on the perception of the reparation mechanisms might thus also hold true with respect to the interviews conducted with the individuals I selected myself or on the basis of recommendations. There is, however, no way around this, and – with this caveat in mind – my findings may still prove useful and insightful, especially since they are understood here as an explorative sample.

All in all, I interviewed seventy-nine (79) genocide survivors from all thirty districts, but the number of survivors interviewed per district differs. This sample of seventy-nine survivors is, of course, only a small fraction of the genocide survivor population in Rwanda⁸⁹⁴ and is thus not representative.⁸⁹⁵ This is, however, not exceptional; empirical research conducted on the Rwandan genocide generally relies on smaller samples of respondents.⁸⁹⁶ Furthermore, the figure of seventy-nine is large enough to identify a trend in the reactions of genocide survivors to prosecutions, reparation mechanisms and governmental responses. The high level of similarity in the responses of these seventy-nine interviewees suggests that I had reached the saturation point and acquired sufficient data for my research.⁸⁹⁷

Of the seventy-nine interviewed survivors, seventeen are male (21.51 per cent) and sixty-two are female (78.49 per cent). They were between thirty-eight and seventy-one years old at the time of the interviews; i.e. between thirteen and forty-six years old at the time of the genocide. The fact that 78.49 per cent of all interviewed survivors are female is linked not only to the above-explained selection method but also to the fact that a large majority of genocide survivors are women.⁸⁹⁸

⁸⁹⁴ A Rwandan census of genocide survivors estimates there to be 309,368 survivors still living in Rwanda (180,593 female and 128,775 male, including 43,048 children and young adults aged between 13 and 20). See Institut National de la Statistique du Rwanda (INSR), *Recensement des rescapés du génocide de 1994: Rapport final*, Kigali, May 2008.

⁸⁹⁵ See L. Webley, *supra* note 884, p. 935.

⁸⁹⁶ See *infra* section 6.3.1. Some examples: Karen Brounéus interviewed sixteen women genocide survivors (see K. Brounéus, 'Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts', (2008) 39(1) *Security Dialogue* 55–76); Kanyangara et al. interviewed fifty survivors and fifty perpetrators of the genocide against the Tutsi (see P. Kanyangara et al., *Collective Rituals, Emotional Climate and Intergroup Perception: Participation in 'Gacaca' Tribunals and Assimilation of the Rwandan Genocide*, (2007) 63(2) *Journal of Social Issues* 387–403); for her research on the South African Truth and Reconciliation Commission, Catherine Byrne interviewed thirty survivors (see C. C. Byrne, 'Benefit or Burden: Victims' Reflections on TRC Participation, Peace and Conflict', (2004) 10(3) *Journal of Peace Psychology* 237–256).

⁸⁹⁷ For more details on saturation, see B. Saunders et al., 'Saturation in qualitative research: Exploring its conceptualization and operationalization', (2018) 52(4) *Quality & Quantity* 1893–1907.

⁸⁹⁸ See INSR, *supra* note 894.

6.4. Conduct of the interviews

To ensure the respondents correctly understood the questions that were put to them, individual interviews were conducted face to face in Kinyarwanda (the Rwandan language) and all respondents were informed about the confidential nature of the interview and encouraged to talk freely. I also emphasised that if they felt uncomfortable at any point during the interview they could stop without having to provide any explanation.⁸⁹⁹ Informed consent was verbally obtained at the start of each interview. To comply with the promised confidentiality, the names of the respondents were not recorded. In my files they are referred to by a code rather than by their name, and general references have been used in this chapter in order to grant full anonymity. Likewise, the exact place of the interviews is never specified, only the fact that they were conducted in Rwanda.

To give the genocide survivors the required space and enable them to talk about their experiences, thoughts and feelings, the semi-structured interviews varied from thirty-six minutes to an hour and mainly consisted of open-ended questions.⁹⁰⁰ All interviews were audiotaped (destroyed after use) and then translated and transcribed into English by me. Time constraints and the remoteness of the geographic locations meant I was unable to present the translations of the interviews to the participants. The potential ethical issues generated by this were, however, mitigated by the fact that I explained the purpose of the interviews to all participants and they gave their express consent. Furthermore, sending the translations to them would have been a purely theoretical exercise since the vast majority of participants cannot speak or write English.

6.5. Use of survivors' statements

To convert the interview transcripts into a coherent narrative which would give a sense to what the genocide survivors/victims said, I included summary themes from the survivors'/victims' interview statements⁹⁰¹ and heavily relied on direct quotations that let the survivors speak for themselves.⁹⁰² For confidentiality reasons, these direct quotations are always anonymised so that they cannot be linked back to the interviewee.

To obtain information about the government's perceptions and position with respect to reparations for the harm inflicted on the genocide victims, I also contacted Johnston Busingye,

⁸⁹⁹ See G. K. Huysamen, *Methodology for the Social and Behavioral Sciences*, Halfway House: Southern Book Publishers, 1994, p. 181.

⁹⁰⁰ On the use of open questions, see E. Singer and M. P. Couper, 'Some Methodological Uses of Responses to Open Questions and Other Verbatim Comments in Quantitative Surveys', (2017) 11(2) *methods, data, analyses* 115–134; S. C. Weller et al., 'Open-ended interview questions and saturation', (2018) 13(6) *PLoS ONE*, available at <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0198606&type=printable>, accessed on 5 November 2020.

⁹⁰¹ See B. Gillham, *Research Interview*, London and New York: Continuum International Publishing Group, 2000, p. 60.

⁹⁰² *Ibid.*, p. 74.

the minister of justice and general attorney of the Republic of Rwanda. Instead of responding to my letter (which was directly addressed to him) in writing, he invited me for a conversation in his office, as he said there were certain issues in my letter that needed a verbal discussion to be addressed. In a conversation held on 14 February 2019 that lasted one hour and twenty-seven minutes, Busingye explained to me the Rwandan government's position on the issue of reparation for the harm resulting from the genocide against the Tutsi.

Finally, it should be noted that in order to secure the confidentiality of the interviewees, all interviews' audios were destroyed after their transcription in English. Transcriptions do not contain any information that may lead to the identification of the interviewees.

CHAPTER SEVEN

VICTIMS' PERCEPTIONS OF TRUTH-SEEKING/TRUTH-TELLING AND THE ACCOUNTABILITY OF PERPETRATORS

*'But for sorrow there is no remedy provided by nature; it is often occasioned by accidents irreparable, and dwells on objects that have lost or changed their existence; it requires what it cannot hope, that the laws of the universe should be repealed; that the dead should return, or the past should be recalled.'*⁹⁰³

These words of Samuel Johnson express an overwhelming feeling among the survivors of the genocide against the Tutsi regarding the reparation mechanisms made available to them in Rwanda.

As mentioned in chapter six, the TARR model is the basic framework through which my findings are presented. Therefore, since uncovering the past and unveiling the truth can lead to accountability, the findings in this chapter focus on the victims' perceptions of the first two building blocks: truth and accountability.

Before delving deeper into my findings on the genocide victims' perceptions of truth and accountability in Rwanda (7.2.), it is important to begin with a brief overview of other scholars' findings on the effects of truth-seeking/truth-telling and accountability on victims' psychological states (7.1.).

7.1. The impact of truth-seeking/truth-telling and accountability on victims' psychological health

Human rights violations such as genocide, crimes against humanity and war crimes have a profound and devastating impact on the victims, their families and friends, and the affected communities.⁹⁰⁴ The most common acknowledged consequences include fear, depression,

⁹⁰³ S. Johnson, *The Works of Samuel Johnson*, vol. II: *The Rambler*, Frankfurt: Yale University Press, 2018, p. 226.

⁹⁰⁴ See J. G. Murphy, 'Forgiveness and Resentment', in J. G. Murphy and J. Hampton, *Forgiveness and Mercy*, Cambridge: Cambridge University Press, 1988, pp. 16–17. The impact of civil wars and other forms of human rights violations on civilians is particularly well documented. See D. Silove, 'The psychosocial effects of torture, mass human rights violations, and refugee trauma: Toward an integrated conceptual framework', (1999) 187(4) *Journal of Nervous and Mental Disease* 200–207; N. Patel, B. Kellezi and A. C. Williams, 'Psychological, social and welfare interventions for psychological health and well-being of torture survivors', (2014) 11 *Cochrane Database*

anxiety, insomnia, self-blame, a feeling of loss of control and post-traumatic stress.⁹⁰⁵ Many victims of human rights violations experience deep emotions of anger, hatred and a desire for revenge on those who wronged them; these emotions can last for years after the abuse ends.⁹⁰⁶

Although victims' preferences for truth and justice – in terms of accountability – are generally acknowledged,⁹⁰⁷ their actual impact on the victims' healing remains highly contentious among scholars. As discussed in the following subsection, some argue that truth-telling processes provide psychological and emotional benefits to victims⁹⁰⁸ (see section 7.1.1 for more detail) whereas others contend that they actually cause more harm than good (see section 7.1.2 for more detail).⁹⁰⁹ Interestingly, a few others assert that truth-telling has neither positive nor negative psychological effects on victims.⁹¹⁰

7.1.1. How victims can benefit from truth-seeking/truth-telling processes

Studies that support the therapeutic effect of truth-telling have shown that a victim's ability to cope with the impact or consequences of human rights violations depends on a variety of factors and that 'one of the primary means to find closure and overcome trauma and anxiety is through account-making'.⁹¹¹ They generally acknowledge that when victims are provided with the opportunity to recount their own traumatic experience, the pain they suffered is shared and the

Systematic Reviews 1–66; H. Johnson and A. Thompson, 'The development and maintenance of post-traumatic stress disorder (PTSD) in civilian adult survivors of war trauma and torture: A review', (2008) 28(1) *Clinical Psychology Review* 36–47; Z. Steel et al., 'Association of torture and other potentially traumatic events with mental health outcomes among populations exposed to mass conflict and displacement: A systematic review and meta-analysis', (2009) 302(5) *JAMA* 537–549.

⁹⁰⁵ See J. Shapland and H. Matthew, 'What Do We Know about the Effects of Crime on Victims?', (2007) 14(2) *International Review of Victimology* 175–217; J. O'Connell, *supra* note 301, at 295–345.

⁹⁰⁶ J. G. Murphy, *supra* note 905, pp. 16–17.

⁹⁰⁷ See for instance M. Başoğlu et al. 'Psychiatric and cognitive effects of war in former Yugoslavia: Association of lack of redress for trauma and posttraumatic stress reactions', (2005) 294(5) *JAMA* 580–590; V. Espinoza Cuevas, M. L. Ortiz Rojas and P. Rojas Baeza, 'Truth Commissions: An Uncertain Path? Comparative Study of Truth Commissions in Argentina, Chile, El Salvador, Guatemala and South Africa from the Perspectives of Victims, Their Relatives, Human Rights Organizations and Experts', Geneva: Association for the Prevention of Torture, June 2002.

⁹⁰⁸ See for instance J. L. Herman, 'The mental health of crime victims: Impact of legal intervention', (2003) 16(2) *Journal of Traumatic Stress* 159–162; U. Orth and A. Maercker, 'Do Trials of Perpetrators Retraumatize Crime Victims?', (2004) 19(2) *Journal of Interpersonal Violence* 212–227.

⁹⁰⁹ See for instance K. Brounéus, 'Rethinking Reconciliation: Concepts, Methods, and an Empirical Study of Truth Telling and Psychological Health in Rwanda', Uppsala University, 2008; K. Brounéus, *supra* note 896, pp. 55–76; K. Brounéus, 'The Trauma of Truth Telling: Effects of Witnessing in the Rwandan Gacaca Courts on Psychological Health', (2010) 54(3) *Journal of Conflict Resolution* 408–437; J. O'Connell, *supra* note 301, at 333–334.

⁹¹⁰ See for instance M. Başoğlu et al., *supra* note 907, p. 588.

⁹¹¹ J. Doak, 'The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions', (2011) 11(2) *International Criminal Law Review* 269. See also M. J. Horowitz, *Stress-Response Syndromes*, New York: Springer, 1986; K. Harber and J. Pennebaker, 'Overcoming Traumatic Memories', in S.-A. Christianson (ed.), *The Handbook of Emotion and Memory: Research and Theory*, London: Lawrence Erlbaum Associates, 1992.

feelings involved transformed from shame to dignity.⁹¹² Externalising one's traumatic experience through storytelling is recognised as an effective coping mechanism for many people facing upheavals resulting from violent crime.⁹¹³ It has been suggested that oral accounts can help reduce feelings of anger, anxiety and depression,⁹¹⁴ bolster self-confidence⁹¹⁵ and even improve physical health.⁹¹⁶ In other words, truth-telling (usually associated with truth-seeking) is considered a necessary, if not vital, tool in the victim's process of healing. Other things that are recognised as essential components of victims' healing are enabling victims to speak in a setting where their experiences are validated,⁹¹⁷ acknowledging and validating their pain and suffering, helping them to relive their traumatic experience in a conducive and safe environment, showing empathy towards them and allowing and supporting them to mourn their losses.⁹¹⁸

Delineating the distinct impact of truth-seeking and truth-telling respectively, it has been asserted that sharing their suffering can allow victims to move beyond trauma, hopelessness, numbness and preoccupation with loss and injury,⁹¹⁹ while knowing the circumstances in which their family member(s) died, where they are buried and who was responsible for their death can facilitate the grieving process,⁹²⁰ provide closure and end uncertainty.

In light of the above, Raquel Aldana has noted that

truth is important for its potential to (1) alleviate the suffering of the surviving victims, (2) vindicate the memory or status of the direct victim of the violation; (3) increase the surviving

⁹¹² I. Agger and S. Buus Jensen, 'Testimony as Ritual and Evidence in Psychotherapy for Political Refugees', (1990) 3(1) *Journal of Traumatic Stress* 115. See also J. Herman, *Trauma and Recovery: The Aftermath of Violence – From Domestic Abuse to Political Terror*, New York: Basic Books, 1997; M. Minow, *The Hope for Healing: What Can Truth Commissions Do?*, Princeton, NJ: Princeton University Press, 2000.

⁹¹³ J. Smyth and J. Pennebaker, 'Sharing One's Story: Translating Emotional Experiences into Words as a Coping Tool', in C. R. Snyder (ed.), *Coping: The Psychology of What Works*, Oxford: Oxford University Press, 1999; J. S. Kenney, 'Gender roles and grief cycles: Observations of models of grief and coping in homicide survivors', (2003) 10 *International Review of Victimology* 19–37; M. White et al., *Narrative Means to Therapeutic Ends*, New York: W. W. Norton, 1990.

⁹¹⁴ O. T. Orbuch et al., 'Account-Making and Confiding as Acts of Meaning in Response to Sexual Assault', (1994) 9 *Journal of Family Violence* 249–264.

⁹¹⁵ J. Koenig Kellas and V. Manusov, 'What's in a story? The relationship between narrative completeness and tellers' adjustment to relationship dissolution', (2003) 20 *Journal of Social and Personal Relationships* 285–307.

⁹¹⁶ R. Enright and R. Fitzgibbons, *Helping Clients Forgive: An Empirical Guide for Resolving Anger and Restoring Hope*, Washington DC: American Psychological Association, 2000.

⁹¹⁷ M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Boston: Beacon Press, 1998, p. 67.

⁹¹⁸ See J. P. Lederach, *The Journey toward Reconciliation*, Scottsdale, PA: Herald Press, 1999; N. Biggar, *Burying the Past: Making Peace and Doing Justice after Civil Conflict*, Washington DC: Georgetown University Press, 2001; E. Staub and L. A. Pearlman, 'Healing, reconciliation, and forgiving after genocide and other collective violence', in R. G. Helmick and R. L. Petersen (eds), *Forgiveness and Reconciliation: Religion, Public Policy, and Conflict Transformation*, Philadelphia: Templeton Foundation Press, 2001, pp. 195–217.

⁹¹⁹ M. Minow, *supra* note 917.

⁹²⁰ See P. Hazan, 'Measuring the impact of punishment and forgiveness: A framework for evaluating transitional justice', (2006) 88 *International Review of the Red Cross* 19–47.

victims' depth of understanding into the circumstances and causes that led to the atrocity, and (4) encourage society to confront its dark past and through it to seek reform.⁹²¹

Similarly, according to Jonathan Doak,

it is said that truth-finding may serve to vindicate the victim's status as an innocent party and encourage perpetrators to accept responsibility; that it assists in reducing feelings of anger; and even that it constitutes a 'psychological premise' that must be fulfilled in order to obtain justice and reconciliation for individual victims.⁹²²

For this reason, as observed by Michael Lapsley,

memory can be healed by individuals. To this end individuals need to talk about their distinctive pasts, put their memories on the table, open them up, clean them out and in so doing facilitate healing.⁹²³

In the words of John D. Ciorciari and Jaya Ramji-Nogales, it can be also argued that

dialogue can humanize complex historical conflicts and enable former adversaries to engage positively with one another. Moreover, in order to create a more comprehensive and accurate historical picture and help answer the question of 'why?,' the process needs to allow safe space for both victims and perpetrators to share their experiences.⁹²⁴

Another point worth noting, which is closely related to truth-seeking and truth-telling, is that holding accountable those who wronged the victims also helps to alleviate some of the victims' psychological pain and/or the traumatic effects of the atrocities they have suffered, whereas impunity is a source of continued anguish and an obstacle to personal and social healing.⁹²⁵ This can in essence explain why lesser sanctions, or amnesties, can never satisfy victims' demand for retributive punishment. However, on this point it is important to recall Ulrich Orth's study of crime victims in Germany, which found no relationship between the severity of the punishment and the desire for revenge.⁹²⁶

⁹²¹ R. Aldana, 'A Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities', (2006) 5 *Journal of Human Rights* 109.

⁹²² J. Doak, *supra* note 911, p. 275. See also R. Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes', (2004) 26 *Human Rights Quarterly* 605–685; J. Herman, *Trauma and Recovery*, London: Pandora, 1992; R. Petersen and S. Zukerman, 'Anger, Violence and Political Science', in M. Potegal, G. Stemmler and C. Spielberger (eds), *International Handbook of Anger*, London: Springer, 2010.

⁹²³ M. Lapsley, 'Healing the memory: Cutting the cord between victim and perpetrator – Interview with Father Michael Lapsley by Hannes Siebert', (1997) 6(3–4) *Track Two* 46.

⁹²⁴ J. D. Ciorciari and J. Ramji-Nogales, 'Lessons from the Cambodian Experience with Truth and Reconciliation', (2013) 19 *Buffalo Human Rights Law Review* 216.

⁹²⁵ P. N. Pham et al., 'So We Will Never Forget: A Population-Based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia', *UC Berkeley Reports*, 2009, pp. 29–30.

⁹²⁶ U. Orth, 'Does perpetrator punishment satisfy victims' feelings of revenge?', (2004) 30(1) *Aggressive Behavior*, 68.

Accountability involves acknowledging victims' experiences and dignity as well as condemning those who wronged them. In other words, accountability officially recognises the victims' suffering and condemns the abuses perpetrated against them.⁹²⁷ Equally important, whereas putting perpetrators on trial generally shows the community's solidarity with the victims, whether they survived or not, the subsequent conviction and punishment of the perpetrators provides physical protection and psychological security to the victim-survivors. Placing responsibility on the perpetrator is said to alleviate some victims' survival guilt, because trials cleanse the shame of the victims by placing blame on the perpetrators while revealing information on the circumstances of the atrocities and/or the identity of those who perpetrated them.⁹²⁸

This importance of putting perpetrators on trial is generally corroborated in the academic literature, whether in psychology or legal studies. According to Rosa Garcia-Peltoniemi, a therapist, 'judicial processes can be very valuable in validating victims by recognising that the events happened, that they caused the victims great suffering, and that they were wrong,'⁹²⁹ while legal scholar Michael Scharf writes that

acknowledging the suffering of victims and their families, helping to resolve uncertain cases and allowing victims to tell their story ... can serve as a sort of 'historical group therapy session' for an entire country, facilitating national reconciliation and individual rehabilitation and imparting to the citizenry a sense of dignity and empowerment that can help them move beyond the pain of the past.⁹³⁰

In the same vein, the late judge Antonio Cassese claimed that

trials establish individual responsibility over collective assignation of guilt, i.e., they establish that not all Germans were responsible for the Holocaust, nor all Turks for the Armenian genocide, nor all Serbs, Muslims, Croats or Hutus but individual perpetrators.⁹³¹

In a study on the psychosocial effects of participating in the Gacaca proceedings, Bernard Rimé et al. affirmed that 'participation in Gacaca favoured a personalization or individuated perception of members of the outgroup'.⁹³² In a similar vein, as observed by Rachel D. Godsil et al.,

⁹²⁷ See J. Zalaquett, 'Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints', in N. J. Kritz (ed.), *Transitional Justice*, Washington DC: United States Institute of Peace Press, 1995, pp. 3–31; N. Roth-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law', (1990) *California Law Review* 449–513.

⁹²⁸ *Ibid.*

⁹²⁹ Cited in J. O'Connell, *supra* note 301, at 317.

⁹³⁰ M. P. Scharf, *supra* note 21, at 626.

⁹³¹ A. Cassese, 'Reflections on International Criminal Justice', (1998) *Modern Law Review* 1–10. See also J. E. Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda', (1999) 24 *Yale Journal of International Law* 373.

⁹³² B. Rimé et al., 'The impact of Gacaca tribunals in Rwanda: Psychosocial effects of participation in a truth and reconciliation process after a genocide', (2011) 41 *European Journal of Social Psychology* 704.

increased contact between groups can reduce implicit bias through a wide variety of mechanisms, including altering their images of the group or by directly improving evaluations of the group.⁹³³

Proponents of therapeutic effects of truth-telling and the accountability of perpetrators thus ground their arguments both on the potential of the former to externalise victims' traumatic experiences in a sympathetic environment as well as to validate the wrongness of what happened to them⁹³⁴ and the extent of the harm they suffered, and on the potential of the latter to re-establish their dignity.

Put another way, the advocates of the curative effects of truth-telling contend that it provides a sense of justice to victims and thus lessens their feelings of anger, desire for vengeance and sense of grievance that, if not addressed, could otherwise lead to acts of mob justice. Likewise, accountability through truth-telling heals psychological trauma, since truth-telling reduces any desire for retribution and has the potential to make the victims more forgiving and tolerant, and thus more likely to support, or even engage in, reconciliation with those who wronged them.

7.1.2. Why truth-seeking/truth-telling processes can be potentially harmful

In contrast to the potential benefits mentioned above, other scholars have expressed some scepticism about the therapeutic benefits of truth seeking and truth-telling, particularly because of the risk of retraumatisation. In their view, truth-telling is potentially harmful to victims not only because testifying/storytelling unearths psychological issues that have been put to rest and reopens the victims' old wounds,⁹³⁵ but also because their participation in the criminal process is said to be stressful and disruptive to their healing.⁹³⁶ Having to face the perpetrators and being exposed to painful reminders of their experience⁹³⁷ can exacerbate their fragile mental health.

⁹³³ R. D. Godsil et al., 'Addressing implicit bias, racial anxiety, and stereotype threat in education and health care', (2014) 1 *Science of Equality* 13.

⁹³⁴ See R. Aldana, 2006, *supra* note 921, p. 116.

⁹³⁵ D. Mendeloff, 'Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice', (2009) 31(3) *Human Rights Quarterly* 592–623. See also D. Mendeloff, 'Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?', (2004) 6(3) *International Studies Review* 355–380; D. Mendeloff, 'The Psychological Impact of Post-Conflict Truth-Telling: A Critical Examination', paper presented at the Responses to Atrocity Workshop, University of Wisconsin, 21 April 2007; B. Hamberand and R. A. Wilson, 'Symbolic closure through memory, reparation and revenge in post-conflict societies', (2002) 1(1) *Journal of Human Rights* 35–53.

⁹³⁶ A. J. Lurigio and P. A. Resick, 'Healing the psychological wounds of criminal victimization: Predicting postcrime distress and recovery', in A. J. Lurigio et al. (eds), *Victims of Crime: Problems, Policies and Programs*, Thousand Oaks, CA: Sage, 1990, p. 60. See also D. S. Riggs and D. G. Kilpatrick, 'Families and friends: Indirect victimization by crime', in *ibid.*, p. 122.

⁹³⁷ R. Elias, *The Politics of Victimization: Victims, Victimology and Human Rights*, New York: Oxford University Press, 1986, pp. 160–162; C. B. Wortman et al., 'Coming to terms with the sudden, traumatic death of a spouse or child', in R. C. David et al. (eds), *Victims of Crime*, 2nd ed., 1997, pp. 108 and 118.

This is what was shown by Karen Brounéus' survey on the effects of testifying in the Rwandan Gacaca courts. According to her, 'witnesses in the Gacaca reported higher levels of depression and PTSD than did non-witnesses'. Her explanation for this is that

witnessing may have this worsening effect on depression and PTSD because of the nature of witnessing in truth-telling procedures; it involves a type of short and intensive trauma exposure that has been found to be retraumatizing in previous psychological research.⁹³⁸

Similarly, in a survey by Brandon Hamber, Dineo Nageng and Gabriel O'Malley involving twenty survivors who testified before the TRC in South Africa, sixty per cent of respondents (twelve survivors) reported optimism about the benefits of truth-telling before they testified whereas only ten per cent (two survivors) had a positive view after testifying. Thirty-five per cent (seven survivors) had a negative view of the experience and fifty-five per cent (eleven survivors) were ambivalent about it.⁹³⁹

Talking about the experience of the victims, officials of the Trauma Center for Victims of Violence and Torture reported that some fifty to sixty per cent of the victims who appeared and testified before the TRC suffered serious difficulties after testifying.⁹⁴⁰ According to Trudy de Ridder, the director of the Center, despite their initial feeling of relief and sense of being unburdened some victims experienced 'a return and intensification of symptoms associated with the original violations as well as the onset of new symptoms that may be related to an actual retraumatisation caused by retelling the story'.⁹⁴¹

Against this background, it can be noted that those criticising the healing capacities of storytelling do not completely reject its therapeutic effect. Rather, they express concern about the forum provided to the victims, the outcome of the storytelling processes and the length of time for which victims were exposed to their own trauma or that of others.

Studies have also shown that healing is a long-term process⁹⁴² and that a short exposure to traumatic experiences in a public forum may increase or worsen a person's trauma rather than decrease it. As rightly noted by Brounéus, gradual or continuous exposure to a traumatic event leads to habituation, desensitisation or relearning.⁹⁴³ Hayner has aptly summed up the reasons for the scepticism about the healing effects of the TRC on victims, explaining that 'healing and

⁹³⁸ K. Brounéus, 2010, *supra* note 909. See also E. Staub, 'Justice, Healing and Reconciliation: How the Peoples' Courts in Rwanda Can Promote Them', (2004) 10(1) *Peace and Conflict: Journal of Peace Psychology* 25–32, 27; P. Clark, 2010, *supra* note 41, pp. 33–46.

⁹³⁹ B. Hamber, D. Nageng and G. O'Malley, "'Telling It Like It Is ...': Understanding the Truth and Reconciliation Commission from the Perspective of Survivors", (2000) 26 *Psychology in Society* 18.

⁹⁴⁰ S. Daley, 'In Apartheid Inquiry, Agony Is Relieved but Not Put to Rest,' *New York Times*, 17 July 1997.

⁹⁴¹ T. de Ridder, 'The Trauma of Testifying: Deponents' Difficult Healing Process', (1997) 6(3–4) *Track Two* 32.

⁹⁴² H. M. Weinstein and E. Stover, 'Introduction: Conflict, Justice and Reclamation', in H. M. Weinstein and E. Stover (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, New York: Cambridge University Press, 2001, p. 13.

⁹⁴³ K. Brounéus, 2010, *supra* note 909, p. 412.

reconciliation are both long-term processes that go far beyond the capacity of any one short-term commission'.⁹⁴⁴

With respect to my research, it is interesting that the above claims regarding the curative or damaging aspects of storytelling are reflected in my findings. As is further discussed below, all the Rwandan genocide victims that I interviewed reported that the Gacaca system that allowed them to speak about their experience and to confront the perpetrators was a 'bitter medicine' – their way of saying that the Gacaca was 'traumatic but healing'.

7.2. The therapeutic effect of the Gacaca system

As is further detailed below, there are three main reasons why the survivor respondents reported that the Gacaca system generally had a therapeutic effect: (1) the government's decisions to prosecute those who wronged them, (2) the role of the Gacaca courts in defusing suspicion and mistrust among Rwandans by giving the opportunity to the survivors to tell their stories and confront their aggressors, and (3) the possibility – for some – to find the remains of their loved ones and give them a proper burial, after information on the fate of the victims was revealed during the proceedings.

7.2.1. The government's decision to prosecute and punish genocide perpetrators

As discussed earlier, research shows that the Rwandan government was committed to 'end[ing] the culture of impunity' by holding accountable everyone suspected of having contributed to the genocide against the Tutsi.⁹⁴⁵

All the survivors I interviewed appreciate the Rwandan government's commitment to full accountability for those responsible for the crimes, and they expressed their satisfaction with full accountability by referring to the former government's culture of impunity for the crimes committed against the Tutsi following the Hutu revolution of 1959.

The interviewees believe that it was the first time in the history of Rwanda that perpetrators of crimes against the Tutsi community had been put on trial. All the survivors I interviewed felt that the genocide trials not only acknowledged their victimhood but also restored their dignity and integrity as human beings, which they felt they had lost through the impunity of past constant violence. They all believe that the impunity that characterised Rwanda in the aftermath of the monarchy and colonial period explains the mass participation of ordinary citizens in the genocide

⁹⁴⁴ P. B. Hayner, 'Past Truths, Present Dangers: The Role of Official Truth Seeking in Conflict Resolution and Prevention', in P. C. Stern and D. Druckman (eds), *International Conflict Resolution after the Cold War*, Washington DC: National Academy Press, 2000, p. 353.

⁹⁴⁵ See W. A. Schabas, *supra* note 349, p. 4; J. Herrmann, 'A Critical Analysis of the Transitional Justice Measures Incorporated by Rwandan Gacaca and Their Effectiveness', (2012) 19 *James Cook University Law Review* 95.

against the Tutsi. This echoes Barbara Harff's finding that genocide is more likely when there were past genocides. Effectively dealing with it can break this vicious circle.⁹⁴⁶

The survivors' expression of satisfaction with the Rwandan government's decision to investigate and prosecute the criminal acts inflicted on them also mirrors the distinction made by Stanley Cohen between knowledge and acknowledgement of past atrocities. According to Cohen, 'knowledge is a private state in which individuals know what has occurred, whereas acknowledgement is the public discourse of what has occurred, thereby making it an official and socially acknowledged truth'.⁹⁴⁷ With respect to acknowledgement, one of the survivors I interviewed reported that

with the prosecution of the perpetrators, the government of Rwanda sent a message to those who participated in the massacres that killing a Tutsi was killing a human being, not a snake as they used to call us, and that it was a crime to kill a Tutsi.⁹⁴⁸

Likewise, a seventy-one year old widow said:

There was a time when killing a Tutsi was not a crime in Rwanda. I know many people who became *bourgmestres* after burning the Tutsi's houses and forcing them into exile following the 1959 Hutu revolution. Some of those responsible for the killings in Kibilira sector in 1991 were given good positions or promoted in the government, especially at the local level where they committed the crimes. We feared them a lot.⁹⁴⁹

These statements not only indicate the survivors' satisfaction with the government putting an end to impunity, but also corroborate research findings that genocide often begins with the 'dehumanisation' of the targeted group.⁹⁵⁰ The general impunity for the criminal acts inflicted on the Tutsi community since the abolition of the monarchy and colonialism led to the denial of the Tutsi community members' humanity. All the survivors I interviewed believed that the *routinisation* of killings – with impunity – led to a widespread dehumanisation⁹⁵¹ of the Tutsi, while the prosecution of the perpetrators of the genocide against the Tutsi re-humanised them. In

⁹⁴⁶ B. Harff, *supra* note 822, p. 62.

⁹⁴⁷ Cited in N. Schrodtt, *Modern Turkey and the Armenian Genocide: An Argument about the Meaning of the Past*, New York: Springer, 2014, p. 303. See also S. Cohen, *supra* note 358, p. 225.

⁹⁴⁸ Interview conducted by the author in Rwanda, January 2019.

⁹⁴⁹ Interview conducted by the author in Rwanda, February 2019.

⁹⁵⁰ See L. T. Harris and S. T. Fiske, 'Dehumanized Perception: A Psychological Means to Facilitate Atrocities, Torture, and Genocide?', (2011) *NIH, Z Psychol* 175–181; C. M. Jorgensen, 'A Case Study Analysis of Dehumanization in Rwanda and Darfur', PhD thesis, Nova Southeastern University, 2016; R. S. Neilsen, "'Toxification" as a more precise early warning sign for genocide than dehumanization? An emerging research agenda', (2015) 9(1) *Genocide Studies and Prevention: An International Journal* 83–95; J. Hagan and W. Rymond-Richmond, 'The Collective Dynamics of Racial Dehumanization and Genocidal Victimization in Darfur', (2008) 73(6) *American Sociological Review* 875–902.

⁹⁵¹ For more details on routinisation and dehumanisation and the relationship between the two, see H. C. Kelman and V. L. Hamilton, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility*, New Haven: Yale University Press, 1989.

other words, in their view the government's decision to ensure full accountability for genocide perpetrators ended a long period of dehumanisation of the Tutsi community.⁹⁵²

7.2.2. The role of the Gacaca courts in defusing suspicion and mistrust between Hutu and Tutsi

Like other victims of violent crimes, all seventy-nine survivor respondents reported that their lives after the genocide and before the beginning of the Gacaca proceedings were overwhelmed by sentiments of anger, anguish, resentment and frustration that robbed them of hope. Some of them reported that they could not sit close to their Hutu neighbours at church, as they regarded every Hutu as a *génocidaire* who might have been involved in killing their family members. They said that they had lost hope in their future life because they were consumed with anger and anxiety due to their everyday contact with the individuals they considered to be responsible for their suffering. Because of not knowing what had happened to their loved ones, survivors were living in constant fear of their neighbours and felt resentment towards them. For instance, one survivor respondent said:

My heart was full of hate against the Hutu. I regarded every Hutu as the killer of my relatives and family members. I had heinous feelings towards them, so that I could not even sit close to a Hutu in church or at community meetings.⁹⁵³

As illustrated in the previous section, the literature suggests that sharing traumatic experiences with others helps the healing process, especially if others share their experiences as well, and if the audience listens attentively and seriously and validates the experiences.⁹⁵⁴

A close analysis of the survivor respondents' comments seems to suggest that sharing their experiences through storytelling during the Gacaca proceedings progressively diffused resentment, and allowed the survivors to regain the hope and dignity they felt they had lost in the aftermath of the genocide against the Tutsi. From their responses, it would seem that telling their stories – and sometimes hearing other similar and/or more traumatic stories – and getting support or validation from the audience – that is, from the general assembly of the village – paved the way for their full recovery. The survivors reported that by sharing their traumatic experiences during the Gacaca hearings, they gave voice to their rage, anger and hatred towards the perpetrators, which until then had been eating them up inside.

⁹⁵² For more details on the move from impunity to accountability, see Z. D. Kaufman, 'Transitional Justice as Genocide Prevention: From a Culture of Impunity to a Culture of Accountability', in J.-D. Gasanabo, D. J. Simon and M. M. Ensign, *Confronting Genocide in Rwanda: Dehumanization, Denial, and Strategies for Prevention*, Kigali: CNLG, 2014, pp. 363–378.

⁹⁵³ Interview conducted by the author in Rwanda, November 2018.

⁹⁵⁴ On the healing role of sharing traumatic events with others, see T. Rosenberg, *Haunted Lands: Facing Europe's Ghosts after Communism*, New York: Random House, 1995, and T. Garton Ash, *The File: A Personal History*, New York: Random House, 1997.

Describing the healing effect of the Gacaca proceedings on their everyday lives, sixty-eight survivor respondents (eighty-six per cent) affirmed that, prior to the Gacaca proceedings, they were ‘walking dead’ and that testifying in the Gacaca hearings enabled them to regain their lost selves and thus restored their faith in the future. This feeling of restored faith in the future echoes Judith Herman’s assertion that

when the action of telling a story has come to its conclusion, the traumatic experience truly belongs to the past. At this point, the survivor faces the tasks of rebuilding her life in the present and pursuing her aspirations for the future.⁹⁵⁵

Similarly, the same sixty-eight survivor respondents said that the opportunity to confront the perpetrators in public and before members of the community who recognised their suffering gave them a feeling of regaining power over their aggressors. They reported that seeing their aggressors trembling – because of fear and shame – in public and before their family members allowed them to regain the dignity they felt they had lost during the genocide.

Analysis of the survivors’ statements also reveals that the participation of the whole community in the Gacaca proceedings and the stories of both the victims and the perpetrators helped to defuse a certain amount of suspicion that existed in the aftermath of the genocide. As one survivor respondent said:

I was living with the fear that those who killed my husband and my first-born daughter would come and kill me during the night. I could not sleep because I suspected all my neighbours to be the killers of my family members. It is only during the Gacaca proceedings that I learned about my husband and daughter’s deaths. Since then, I no longer suspect my neighbours and the sleepless nights have stopped.⁹⁵⁶

This quote clearly shows another positive consequence of sharing experiences, namely that the Gacaca system defused the survivors’ feelings of mistrust and suspicion, which were common in the aftermath of the genocide. It became clear from my interviews with the genocide survivors that Gacaca defused the survivors’ feelings of mistrust and suspicion because it enabled both survivors and perpetrators to exchange their views on what had happened, under the close scrutiny of the members of the community where the crimes had been committed. In other words, the Gacaca proceedings brought the genocide survivors and the community at large closer together and enabled all of them to speak out about what had occurred. By establishing individual responsibility, the Gacaca system progressively mitigated the feelings among the survivors that *all* Hutu were responsible for the genocide. As one survivor put it:

Before the Gacaca proceedings, I regarded all Hutu as criminals – *génocidaires*. I considered every Hutu responsible for the death of my family members.

⁹⁵⁵ J. Herman, *supra* note 912, p. 195.

⁹⁵⁶ Interview conducted by the author in Rwanda, October 2018.

I was of the view that all Hutu had killed people. But during the Gacaca proceedings, and when perpetrators were placed in different categories and started to plead guilty, I gradually changed my mind about the Hutu and finally realised that there are good Hutu who did not participate in the genocide and who saved some Tutsi.⁹⁵⁷

The survivor respondents believe that the active participation of all the residents of the village in the Gacaca proceedings encouraged people to let the truth come out. It not only enabled the community to establish individual responsibility but also to bear witness to what had been done to the victims.⁹⁵⁸ One of the survivor respondents said that:

even though the Gacaca did not help me to find out where my loved ones were disposed of, it at least allowed me to find out who had participated in their killings. Neighbours gave testimonies about what they saw during the genocide. Without the Gacaca, I would not have found out how my family members were killed. Everything I know is thanks to the Gacaca.⁹⁵⁹

The above genocide survivors' statements corroborate Godsil et al.'s theory – discussed above – on the effect of increased contact between former enemy groups on implicit biases. Therefore, it can be claimed that participation in the Gacaca court proceedings at the lowest level of the community increased not only the interaction between former enemies but also cross-ethnic tolerance and trust, and consequently reduced the perception of the other as a threat and the feelings of anxiety, prejudice and bias.

As an illustration of the levels of mutual trust among the former enemies, the survivor respondents referred to the inter-ethnic marriages that have been – or are being – celebrated between Tutsi and Hutu, the community service that the Tutsi and Hutu carry out together on the last Saturday of every month (*umuganda*) and the cultural practice of 'cow gifts'⁹⁶⁰ between Tutsi and Hutu. According to the respondents, no one could have predicted that such inter-ethnic relationships between Tutsi and Hutu would ever have been possible after what happened during the genocide against the Tutsi. As will be further explained in the next chapter, all respondents reported that the Gacaca system served as the minimum foundation on which all other reconciliation activities have been based.

⁹⁵⁷ Interview conducted by the author in Rwanda, March 2019.

⁹⁵⁸ See M. Geetanjali, 'Achieving Reconciliation through Prosecution in the Courts: Lessons from Rwanda', (2011) 28(3) *Conflict Resolution Quarterly* 331–348.

⁹⁵⁹ Interview conducted by the author in Rwanda, October 2018.

⁹⁶⁰ In Rwandan culture, giving and accepting a cow as a gift from someone is a sign of friendship, alliance and eternal loyalty.

7.2.2. Finding loved ones' bodies and giving them a proper burial

Fifty out of the seventy-nine⁹⁶¹ survivor respondents (sixty-three per cent) reported that the Gacaca system played a significant role in their healing journey as it allowed them to give a decent burial to their loved ones. According to the respondents, the Gacaca confession and guilty plea procedure allowed them to acquire otherwise unobtainable information about the fate of their loved ones who had been killed and were still missing. They recognise that without the Gacaca system, which encouraged genocide perpetrators to confess to their crimes, they would not have been able to find their loved ones' bodies and give them a decent burial at the memorial sites.

Comments from fifty survivor respondents (sixty-three per cent) suggest that the therapeutic aspect of giving a decent burial to loved ones is closely related to the Rwandan cultural belief that malicious spirits of dead family members who are not buried can haunt the surviving family members. As the Gacaca system allowed them to obtain information on the fate and location of loved ones who were killed in the genocide, some survivors were able to give a proper burial to their loved ones and thus to no longer live in fear of their malicious spirits. The therapeutic aspect of giving a proper burial to loved ones in Rwandan culture has also been noted by Rachel Ibreck, who (citing a Rwandan psychiatrist who treated many survivors) says that if dead bodies are not buried, restless and malicious spirits can be felt as a burden, haunting their relatives. Thus, 'allowing people to bury their loved ones means that they are no longer haunted'.⁹⁶²

Believing in the malicious spirits of individuals who are not properly buried is not unique to Rwandan culture. According to Erin Handley, many Cambodians believe that 'families should cremate the remains of the dead and store the ashes in a stupa to liberate the victims' souls for reincarnation'.⁹⁶³

Expressing her satisfaction with having been able to find and give a proper burial to members of her family, one survivor said:

The Gacaca process played a very great role in truth finding, especially finding out where our murdered loved ones were disposed of. I didn't know the circumstances in which my family members had died, but those who did it confessed before the Gacaca and I pardoned them just to have peace of mind. I forgave them because they allowed me to bury my son and relatives, and I

⁹⁶¹ Twenty-seven survivor respondents made no reference to the proper burial of their loved ones when explaining the therapeutic aspects of the Gacaca system.

⁹⁶² Cited in R. Ibreck, 'The politics of mourning: Survivor contributions to memorials in post-genocide Rwanda', (2010) 3(4) *Memory Studies* 336.

⁹⁶³ E. Handley, 'The ethics of exhumation', *Phnom Penh Post*, 5 January 2017, available at <https://www.phnompenhpost.com/post-life/ethics-exhumation>, accessed on 5 November 2020. See also J. M. Fleischman, 'Working with the Remains in Cambodia: Skeletal Analysis and Human Rights after Atrocity', (2016) 10(2) *Genocide Studies and Prevention: An International Journal* 121–130; M. Klinkner, 'Forensic Science for Cambodian Justice', (2008) 2 *International Journal of Transitional Justice* 241–243.

now have a place where I often go when I feel lonely or I need to tell them how much I still love them.⁹⁶⁴

Additionally, it should be noted that sixty-four survivor respondents (eighty-nine per cent) – including all those who do not know the whereabouts of their loved ones⁹⁶⁵ – expressed satisfaction with the government's commemoration policy, which includes a week of mourning and one hundred days of remembrance. They acknowledged that during the commemoration period, they reconnect with their loved ones. According to them, the sympathetic attitude of the Rwandan community during the commemoration period and the government's assistance in organising and conducting the commemoration activities play a great role in their healing process. Sixty-four of the survivors I interviewed (eighty-one per cent) confirmed the healing role of the commemoration of the genocide against the Tutsi, thereby corroborating the findings of my previous chapter, namely that the memorial and burial sites provide victim-survivors with a physical place to *re-member*,⁹⁶⁶ remember, pay tribute to and pray for their loved ones.

7.3. The retraumatising effect of the Gacaca system

Although all survivor respondents acknowledged the healing effect of the Gacaca courts, referring to it as a medicine, they nevertheless stated that this medicine was bitter. Their responses reveal various factors that made their experience of the Gacaca system so hard. As discussed below, aside from the retraumatisation generated by the knowledge of the horrendous things done to their loved ones, the survivor respondents also felt that the penalties imposed by the Gacaca courts were too lenient relatively to the harm inflicted on them.⁹⁶⁷ Furthermore, they regarded the Gacaca proceedings as having failed to establish the causes of the genocide.

7.3.1. The retraumatisation of genocide survivors

As discussed in the first section of this chapter, certain empirical research on truth-telling in Rwanda and in South Africa has shown that testifying in settings such as Gacaca courts or TRCs may cause or increase the survivors' psychological harm.⁹⁶⁸

⁹⁶⁴ Interview conducted by the author in Rwanda, February 2019.

⁹⁶⁵ Eighteen out of seventy-two survivor respondents reported not knowing where some or all of their loved ones killed in the genocide had been buried or dumped.

⁹⁶⁶ *Re-member* is a term borrowed from Viebach. It is used here to mean 'reuniting' the living and dead members of a family. This constructed word emphasises that at the memorial sites, genocide survivors not only recall their murdered loved ones and the time they spent with them, but are also reunited with them. See J. Viebach, *supra* note 676, p. 11.

⁹⁶⁷ See J. Rafferty, "'I Wanted Them to Be Punished or at Least Ask Us for Forgiveness': Justice Interests of Female Victim-Survivors of Conflict-Related Sexual Violence and Their Experiences with Gacaca", (2018) 12(3) *Genocide Studies and Prevention: An International Journal* 95–118.

⁹⁶⁸ K. Brounéus, 2008, *supra* note 896, 'p. 71; P. Kanyangara et al., 'Collective Rituals, Emotional Climate and Intergroup Perception: Participation in "Gacaca" Tribunals and Assimilation of the Rwandan Genocide', (2007) 63(2) *Journal of Social Issues*, 387–403; C. C. Byrne, *supra* note 896.

For instance, all sixteen of the female Rwandan genocide survivors who testified in the Gacaca courts and were interviewed by Brounéus reported that giving testimony involved intense psychological suffering.⁹⁶⁹ Many of them described being ill days before giving testimony, as well as during and after the proceedings.⁹⁷⁰ As Brounéus emphasises, in contrast to the healing myth of telling one's traumatic story before the Gacaca courts or before any non-specialised forum dealing with trauma, giving testimony during the Gacaca hearings re-traumatised the survivors 'due to the short-term exposure testifying involves, as well as to the vulnerable position of testifying in an environment surrounded by family members of the perpetrators, as well as by the perpetrators themselves'.⁹⁷¹

Similarly, the study of Kanyangara et al., involving interviews with fifty genocide survivors and fifty genocide perpetrators, concluded that participation in Gacaca proceedings had both emotional and socio-psychological impacts. The authors argue that Gacaca may induce strong emotional responses by reactivating the traumatic events connected to the experience of genocide.⁹⁷²

Interestingly, some research on the effect of testifying before the South African TRC – a forum very similar to Gacaca system⁹⁷³ – has reached the same conclusion. For instance, Catherine Byrne, in her qualitative research focusing on the experiences of thirty survivors who participated in the TRC, revealed that a small number of those interviewed viewed it as a positive and empowering experience, while for many others it appeared to be a painful and disempowering process replete with unmet expectations and promises.⁹⁷⁴ Likewise, Stein et al. concluded that participation in the TRC increased the victims' distress and/or anger, and that giving testimony was thus not necessarily helpful to survivors.⁹⁷⁵

However, even though the above-mentioned research emphasises the traumatic – rather than healing – effects of forums such as the Gacaca courts and TRCs, the survivor respondents I interviewed, while they acknowledged the retraumatisation that often results from telling or hearing the truth, also recognised the important role that telling or hearing the truth played in their healing process. For all the survivor respondents, the Gacaca system came at the cost of re-

⁹⁶⁹ K. Brounéus, 2008, *supra* note 896, p. 71.

⁹⁷⁰ *Ibid.*, p. 68.

⁹⁷¹ *Ibid.*, p. 71.

⁹⁷² P. Kanyangara et al., *supra* note 968, p. 401.

⁹⁷³ Both TRCs and Gacaca courts aim to bring resolution and healing to internal post-conflict situations, and their methods for achieving this goal include a combination of getting to the truth about events during the conflict period; assuring some form of justice for the victims; and reconciling the groups involved in the conflict. For a comparison between TRCs and the Gacaca system, see C. King, 'Truth, Justice, and Reconciliation: A Comparison of the South African Truth and Reconciliation Commission and the Rwandan Gacaca Court System', master's thesis, University of Victoria, 2011, and N. Ephgrave, 'Women's testimony and collective memory: Lessons from South Africa's TRC and Rwanda's gacaca courts', (2015) 22(2) *European Journal of Women's Studies* 177–190.

⁹⁷⁴ C. C. Byrne, *supra* note 896, pp. 237 and 243.

⁹⁷⁵ D. J. Stein et al., 'The Impact of the Truth and Reconciliation Commission on Psychological Distress and Forgiveness in South Africa', (2008) 43(6) *NIH, Soc Psychiatry Psychiatr Epidemiol* 462.

experiencing their traumas. They all reported that their first participation in and/or testimony at the Gacaca proceedings was painful due to the horrible stories they heard from other survivors and the perpetrators' explanations of how their loved ones were killed. According to the respondents, telling their stories brought back horrible memories that they had repressed, and hearing the atrocious things that had been done to their loved ones made the Gacaca process extremely difficult emotionally.

Interestingly, similar to the above-mentioned empirical research, forty-nine survivor respondents (sixty-eight per cent) reported that the first days of their participation in the Gacaca proceedings were painful but that – with time – continuous participation in the proceedings significantly helped them to cope with their trauma. Continuous exposure to other survivors' stories, to the confessions of, and accusations against genocide perpetrators, and to the validation of their own stories by the community members eased their suffering.

Against this background, it may be contended that to achieve full healing, genocide survivors often have to re-experience every detail of the traumatic experience they suffered. This corroborates Brandon Hamber's theory that psychological trauma can only disappear by providing the space for survivors to feel heard:⁹⁷⁶

Through giving testimony the process of re-living and building a context of meaning for survivors can be facilitated. This can serve the cognitive function of re-shaping the event for the survivor but also allow for the individual's feelings to be dealt with and for the essentially abnormal event to be integrated into the cognitive and emotional matrix of the survivors' life.⁹⁷⁷

Emphasising the healing ritual of the TRC, Hamber further argues that

healing rituals normally contain a process of specifying the trauma, reliving it's [*sic*] effects, developing personalised symbols of the trauma, performing symbolic acts of parting with the past and the performance of symbolic acts of becoming something new.⁹⁷⁸

Additionally, in response to my question about why they continued to participate in the Gacaca proceedings given the strong emotional reactions they had to endure, all forty-nine of the survivor respondents who acknowledged having been re-traumatised by their first days at the Gacaca hearings reported that giving testimony was part of their 'inherited' responsibility. They reported that testifying in place or on behalf of their loved ones gave them a sense of 'mission accomplished', which made them feel relieved of the burden or responsibility they had inherited. One survivor respondent said: 'We – survivors – had to be the voice of the voiceless parents,

⁹⁷⁶ B. Hamber, 'Do Sleeping Dogs Lie? The Psychological Implications of the Truth and Reconciliation Commission in South Africa', paper presented at seminar no. 5, Centre for the Study of Violence and Reconciliation, 26 July 1995, p. 3.

⁹⁷⁷ *Ibid.*, p. 4.

⁹⁷⁸ *Ibid.*, pp. 4–5.

spouses, brothers, sisters and even friends and neighbours *silenced* by the genocide ... I think that is even the reason we survived'.⁹⁷⁹ Another survivor said: 'Testifying was the only way to honour and restore the dignity of our loved ones killed in the genocide';⁹⁸⁰ struggling to hold back tears, she added: 'I have to live my own life and that of my loved ones'.⁹⁸¹ However, even though most of the survivor respondents felt relieved after re-experiencing their trauma, they still live with what is known as 'survivor's guilt'.⁹⁸²

7.3.2. Disproportionality between the punishment and the harm suffered

A substantial amount of research on victim-survivors' perceptions of justice has demonstrated that, in their view, the punishment of genocide perpetrators constitutes an important measurement of justice and thus an acknowledgement of the harm they suffered. Socio-legal scholar Nicola Henry argues that 'justice is often measured by the outcome of the trial: a guilty verdict and appropriate punishment'; such an outcome is a formal recognition and acknowledgement of the harm done. Meanwhile, a punishment that is too light is often viewed by victim-survivors as minimising their suffering.⁹⁸³ Likewise, criminologist Maggie Sumner argues that from the victim-survivors' perspective, where perpetrators' guilt has been established then justice demands punishments proportionate to the amount of harm done.⁹⁸⁴

In other words, in order to feel that justice has been done, most victims need to see that the pain and suffering they endured has consequences for those who wronged them.⁹⁸⁵ The victims' desire for proportionality between the pain or harm suffered and the punishment of the perpetrators reveals their need to make the perpetrator 'feel bad', since feeling bad indicates that the perpetrator has learned a lesson.⁹⁸⁶ This is reflected in my empirical findings, as the need for proportionality was reported by forty-eight of the seventy-nine survivor respondents (close to sixty-one per cent). They expressed regret about the disproportionality between the Gacaca penalties imposed on the perpetrators and the harm suffered. They believe that the punishments

⁹⁷⁹ Interview conducted by the author in Rwanda, February 2019.

⁹⁸⁰ Interview conducted by the author in Rwanda, December 2018.

⁹⁸¹ *Ibid.*

⁹⁸² For more details on 'survivor's guilt', see S. Juni, 'Survivor Guilt: A Critical Review from the Lens of the Holocaust', (2016) 22(3) *International Review of Victimology* 321–337, and S. P. Hutson et al., 'Survivor Guilt', (2015) 38(1) *Advances in Nursing Science* 20–33.

⁹⁸³ See N. Henry, 'Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence', (2009) 3(1) *International Journal of Transitional Justice* 130–131.

⁹⁸⁴ See M. Sumner, 'Retribution', in E. McLaughlin and J. Muncie (eds), *The SAGE Dictionary of Criminology*, 3rd ed., London and Thousand Oaks: Sage, 2013, p. 386.

⁹⁸⁵ See U. Orth, *supra* note 926, at 62–70; M. Gollwitzer, M. Meder and M. Schmitt, 'What gives victims satisfaction when they seek revenge?', (2011) 41 *European Journal of Social Psychology* 364–374.

⁹⁸⁶ *Ibid.*, p. 372. See also M. Gollwitzer and M. Denzler, 'What makes revenge so sweet: Seeing the offender suffer or delivering a message?', (2009) 45 *Journal of Experimental Social Psychology* 840–844.

for those responsible for the genocide – especially in cases of confessions and/or guilty pleas⁹⁸⁷ – were not severe enough to reflect the harm inflicted upon them:

Gacaca was a ‘bitter medicine’ for us survivors. It was bitter because the penalties issued by the Gacaca were not proportionate to the crime committed and most of the perpetrators were given lenient penalties.⁹⁸⁸

In the respondents’ view, genocide perpetrators took advantage of what they perceived to be overly lenient penalties and falsely confessed to minor crimes that did not reflect the actual harm they had inflicted, or omitted more serious crimes. One of the survivors whose entire family was wiped out argued that the punishments imposed on perpetrators were inadequate and not severe enough:

The perpetrators’ confession was good and helped a lot in shedding light on what happened but reducing the penalties associated with their confessions was not fair to us victims. I heard a story where some perpetrators, when trying to persuade the accomplices or other perpetrators to confess and plead guilty, were telling them that ‘killing a Tutsi is not bad, all that is bad is not acknowledging the killings’. This is how perpetrators understood the confession and guilty plea procedure. The light penalties that they were subjected to after pleading guilty felt that way. Many of them confessed not because they were really expressing remorse but because they were taking advantage of the procedure.⁹⁸⁹

Likewise, another survivor expressed deep disappointment about the effects of the confession and guilty plea procedure on the penalty:

It is shocking to see a person who confessed to killing your loved ones be released from prison only because he confessed. This is what happened to the one who killed my wife. He was released immediately after trial awaiting his three-year community service penalty before – supposedly – serving his two and a half years of imprisonment. Surprisingly, nineteen years later, he has served his community service penalty but has not yet served his two and a half years in prison.⁹⁹⁰

⁹⁸⁷ For instance, perpetrators placed in the second category who pleaded guilty or made use of the guilty plea procedure before being placed on the list of accused incurred a punishment of twenty to twenty-four years’ imprisonment, but only one sixth of their sentence was served in prison, as one third was commuted to a suspended sentence and half to community service. Under the 2004 Gacaca Organic Law, the penalty was: Twenty-five to thirty years for perpetrators of the same category who had not pleaded guilty or made use of the guilty plea procedure.

Twelve to fifteen years (of which half was spent in prison and another half commuted to a suspended sentence) for those who confessed after being put on the accused list,
Seven to twelve years (of which half was spent in prison and another half commuted to a suspended sentence) for those who confessed before being put on the accused list.

⁹⁸⁸ Interview conducted by the author in Rwanda, November 2018.

⁹⁸⁹ Interview conducted by the author in Rwanda, December 2018.

⁹⁹⁰ Interview conducted by the author in Rwanda, January 2019.

Interestingly, the responses of forty-one out of the forty-eight survivor respondents who expressed dissatisfaction with the penalties that were imposed indicate that they would have liked to see genocide perpetrators serve life prison sentences, whereas the remaining seven survivor respondents considered the death penalty the appropriate sanction. This preference for life imprisonment or the death penalty reveals the victims' concern about their physical safety and their desperate need for recognition of the gravity of the individual harm they had suffered, rather than their need for vengeance. From the survivors' perspective, too light a punishment for those who wronged them amounts to a minimisation of their suffering.⁹⁹¹

One mutilated genocide survivor whose three children were killed expressed a deep feeling of insecurity and anger:

The people who killed them are now back to the village after serving only nine years in prison. They are happily living with their families. They have children to rely on for help. But I do not have any person that I can call to go and fetch water and/or firewood for my daily subsistence. Do you now think that what I suffered was considered? Sometimes I even think that they laugh at me.⁹⁹²

7.3.3. The Gacaca system's failure to establish the causes and conditions leading to the genocide

Victims' right to truth has been found to be a general state obligation by international courts,⁹⁹³ and has been restated in policy papers and resolutions passed by the United Nations. The UN Commission on Human Rights, for instance, says that 'every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes'.⁹⁹⁴ It also emphasises that

victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate.⁹⁹⁵

However, as rightly noted by Weitekamp et al.,

⁹⁹¹ For more details about the victims' perceptions of the punishments, see N. Henry, *supra* note 983, pp. 114–134; M. Sumner, *supra* note 984, pp. 386–387; H. van der Merwe, 'What Survivors Say about Justice: An Analysis of the TRC Victim Hearings', in A. R. Chapman and H. van der Merwe (eds), *Truth and Reconciliation in South Africa: Did the TRC Deliver?*, Philadelphia: Pennsylvania Press, 2008, p. 44.

⁹⁹² Interview conducted by the author in Rwanda, November 2018.

⁹⁹³ Y. Naqvi, 'The right to the truth in international law: Fact or fiction?', (2006) 88(86) *International Review of the Red Cross*, 245–273.

⁹⁹⁴ Report of Diane Orentlicher, the independent expert to update the set of principles to combat impunity, addendum, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, principle 2.

⁹⁹⁵ *Ibid.*, principle 4.

The truth that is revealed in court trials, international and national, is a fragmented fact finding process to serve as an evidence to prove or refute the guilt, but never intends to bring forward the truth of the conflict as a social phenomenon.⁹⁹⁶

The authors further argue that 'trials do not allow perpetrators or survivors to produce a story that might coincide and lead to the explanation of the causes of the conflict'.⁹⁹⁷ They emphasise that a better understanding of the causes of the conflict can result from a mechanism 'that allows perpetrators and survivors to tell their own story and that allows them to gain back the control over their position and their role in the conflict'.⁹⁹⁸ With this in mind, it is still important to recall that one of the goals of the Gacaca courts was precisely to establish the causes that led to the genocide against the Tutsi. However, forty-three of the seventy-nine survivor respondents (fifty-four per cent) reported that the courts failed in this mission. My interviews with the genocide survivors show that, in their attempt to regain control of their lives and to give meaning to their experience, survivors needed to know the perpetrators' motives and understand why they were targeted.⁹⁹⁹ Their statements, made approximately seven years after the closure of the Gacaca courts in 2012, reveal that they still wonder why their neighbours, friends, spouses and children, with whom they had been peacefully living and sharing everything, suddenly decided to kill them. To put it another way: as mentioned above, forty-three survivor respondents reported having knowledge of what happened and of the identity of the perpetrators thanks to the Gacaca proceedings, but the reasons why they suddenly became targets are still unknown to them. According to one of these respondents,

when I think about what happened in 1994 and how suddenly we became the targets of our friends, neighbours and even of our own family members, I always wonder what went wrong. I know that since 1990, there had been tension between Hutu and Tutsi because of the war launched by Inkotanyi from Uganda but, as a simple farmer, I had a good relationship with my neighbours, sharing everything including our joys and sorrows. In only one night things fell apart and I still wonder why my son, parents, brothers and cousins were killed like animals and thrown in a latrine like rubbish.¹⁰⁰⁰

Another survivor respondent expressed similar feelings:

Twenty-five years after the death of my husband and two of my four children, I still do not know why they were killed. All I know is that I was persecuted and my family members killed because we were Tutsi, but I do not recall when being a Tutsi became a crime. I used to have Hutu friends, and even the spiritual fathers of my children killed in the genocide are Hutu. I would like

⁹⁹⁶ E. Weitekamp et al., *supra* note 876, p. 223.

⁹⁹⁷ *Ibid.*

⁹⁹⁸ *Ibid.*

⁹⁹⁹ For more detail on giving a meaning to one's traumatic experience, see B. Hamber, D. Nageng and G. O'Malley, *supra* note 939, pp. 18–42.

¹⁰⁰⁰ Interview conducted by the author in Rwanda, November 2018.

to be told why my husband and children were killed because I live with the fear that the same might happen again.¹⁰⁰¹

Against this background, it can be argued that the need – shared by forty-three survivor respondents – to know the causes and conditions that contributed to the genocide against the Tutsi reflects their desperate need to make sense of their individual traumatic experiences. Being kept in the dark about the motives of the perpetrators greatly undermines their healing process, since they remain unable to give any meaning to their suffering, and especially to the death of their loved ones.

Moreover, the criticisms of the Gacaca system by the above-mentioned survivor respondents can perhaps be attributed in part to its mixture of retributive and restorative justice, with the retributive aspect dominating over the restorative in the Gacaca proceedings. When prosecuting and punishing perpetrators of the genocide against the Tutsi, the Gacaca courts overlooked many other elements of the phenomenon of mass victimisation, such as its societal, victimological and criminological relevance.¹⁰⁰² Like other courts, the Gacaca courts focused on establishing responsibility in individual cases without necessarily establishing the connection between the stories/information provided by the victims and perpetrators in the various cases they adjudicated. This is why the truth produced by the Gacaca courts is first and foremost an individual truth, relating to the facts of one or more individual cases.

7.4. Conclusion

This chapter has focused on two elements of justice: truth on one hand and accountability of perpetrators on the other. It provided insights into genocide survivors' experiences of justice delivered through mechanisms of truth-telling, truth seeking and holding perpetrators to account, and into how the Gacaca process helped them to heal the wounds of the genocide against the Tutsi.

As discussed in this chapter, all seventy-nine of the genocide survivors I interviewed recognise the Rwandan government's efforts to deal with the consequences of the genocide against the Tutsi. They appreciate the government's decision to prosecute those responsible for the harm they suffered. Even though they still believe that the full truth has yet to be told, they nevertheless believe that the prosecution of the genocide perpetrators ended a long period of dehumanisation that they had suffered since the 1959 Hutu revolution and up to the 1994 genocide against the Tutsi. The full accountability of the perpetrators was viewed by the survivors I interviewed as an admission of the wrongful acts committed against them and a recognition of the pain and losses they suffered. Most importantly, the survivors' desire for

¹⁰⁰¹ Interview conducted by the author in Rwanda, October 2018.

¹⁰⁰² For details on the limits of retributive justice and aspects of the phenomenon of mass victimisation, see E. Weitekamp et al., *supra* note 876, p. 225.

harsher punishments and longer sentences was driven by several underlying needs, for instance for safety, retribution, validation and vindication. Equally important, victim-survivors needed an opportunity to tell their stories. As reported by the survivor respondents, not only did the Gacaca system give a voice to their rage, anger and hatred, which had been eating them up inside, it also allowed them to acquire otherwise unobtainable information and played a significant role in defusing suspicion and mistrust among Rwandans.

CHAPTER EIGHT

VICTIM-SURVIVORS' PERCEPTIONS OF REPARATION AND RECONCILIATION IN RWANDA

The reparative mechanisms made available to the genocide survivors and processes of reconciliation were the second and third core elements of my interview script. For the reasons explained in the subsequent subsections, the survivor respondents' answers revealed not only a general feeling of gratitude for the government's efforts in addressing the consequences of the genocide against the Tutsi, but also a certain feeling of regret, as they all believe that the harm they suffered was only partially recognised (8.1.). Moreover, while eight out of the seventy-nine survivor respondents (ten per cent) believed that the government's assistance to the neediest survivors through the FARG graded the suffering and categorised the victims of the same crime (8.2.), twenty-eight (thirty-five per cent) expressed a feeling of social envy towards ex-combatants (8.3.). Interestingly, even though some survivors still believe that little has been done to address the harm they suffered, forty-six out of the seventy-nine survivors (fifty-eight per cent) reported that reconciliation has already been achieved despite the lack of adequate reparations (8.4.).

8.1. The partial recognition of the harm suffered

All the genocide survivors I interviewed felt dissatisfaction and disenchantment about the fact that their right to reparation was restricted to material or property-related harm only. They viewed the restriction of their right to seek reparation, restitution and/or compensation for looted property as only a partial and minor acknowledgement of the real harm inflicted on them. According to them, the restriction to looted property seems to imply that the only harm they suffered was material. One of them poignantly expressed the feeling that the greatest harm suffered – human loss – was ignored:

Out of all that the genocide took away from me, I was awarded by the Gacaca courts only RWF 235,000 [i.e. €235] for the destruction of my house and pillage of my crops and cows. Nothing for my children and relatives killed during the same genocide. I know there is no price for the life of a human being and nothing can bring back my loved ones but I think that something can be done to at least recognise their death and the role they had in my life, and the role they still would have had, had they not been killed.¹⁰⁰³

Another said:

¹⁰⁰³ Interview conducted by the author in Rwanda, January 2019.

Saying that there is no price for my loved ones killed in the genocide does not make any sense. I lost the people I was relying on for a better life, and I know that when someone is killed or handicapped following a car accident, the courts find a formula for compensation. [pause] Why can't they use that formula in my case?¹⁰⁰⁴

Seventy survivor respondents (eighty-eight per cent) gave answers indicating that their need for reparations reflects their need for compensation for what they lost due to the death of their loved ones, rather than a haggling over their loved ones' pecuniary value. It reflects the genocide survivors' need for acknowledgement of the individual harm they suffered and for the perpetrators to accept responsibility for their wrongdoing. These seventy survivor respondents regarded reparation for the loss of a family member as a form of admission of the unjust and the wrongful nature of the harm inflicted on them, and as a recognition¹⁰⁰⁵ of the pain and loss they had suffered. In this context, not allowing them to seek reparation – or not providing reparation – for their loved ones killed in the genocide against the Tutsi is viewed by them as a negation of the crimes committed and the wrongs they suffered.¹⁰⁰⁶ Providing reparations to victims can therefore be seen as a factual and moral recognition that their rights were violated,¹⁰⁰⁷ that they were harmed and that the state and any individuals who are legally accountable for committing or enabling the violations are under the obligation to repair the harm inflicted on them. It can therefore be said that reparations for loss of family members can be seen as part of the recognition of the wrongs inflicted on the victims and/or survivors¹⁰⁰⁸ and as a mechanism for overcoming victimisation.¹⁰⁰⁹

An additional reason for the need for compensation for the death of loved ones can be attributed to the Rwandan culture of interdependence between parents and their children or relatives. The interdependence between members of a family resonates in the Rwandan proverb '*Urukwavu Rukuze Rwonka Abana*', which can be literally translated into English as 'an old rabbit is breastfed by its children', meaning 'when the parents grow old, it's the children's turn to look after them'.

Limiting reparations to restitution and/or compensation of looted property is thus viewed by these seventy survivor respondents as ignoring the role their loved ones were playing or were expected to play in their lives. These seventy survivors are feeling that they have been left

¹⁰⁰⁴ Interview conducted by the author in Rwanda, March 2019.

¹⁰⁰⁵ See the concept of acknowledgement as explained by S. Cohen, *supra* note 358, p. 225.

¹⁰⁰⁶ For more discussion on acknowledgement and knowledge, see *ibid*.

¹⁰⁰⁷ See *ibid*.

¹⁰⁰⁸ See Amnesty International, *Combating Torture: A Manual for Action*, Amnesty International Publications, London: United Kingdom, 2003, p. 147.

¹⁰⁰⁹ See UN Basic Principles and Guidelines, principle 3 (scope of the obligation) read together with principle 16 (states should endeavour to establish national programmes). United Nations Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, chapter 15: 'Protection and Redress for Victims of Crime and Human Rights Violations', New York and Geneva: United Nations, 2003, pp. 749–810.

behind and must survive without their household breadwinners, who were killed in the genocide. Due to the culture of interdependence that characterises Rwandan society, the loss of family members is not just an emotional loss – pain and suffering – but on top of that a material and financial loss of support on which they depended. The survivors thus believe that not providing reparation for the death of their loved ones is tantamount to ignoring their existence, a situation that exacerbates their trauma.

By way of explanation for the limitation of the victims' right to reparations to material loss only, the minister of justice specified that

we realised that the moment we get tempted to pay money as a form of reparation in case of deaths of family members, we will create three main problems. First of all, with monetary compensation, everyone who lost a member of his/her family becomes a beneficiary, he/she becomes entitled to something. You create an entitlement. Second, with monetary compensation, you automatically create a debate about the amount. A negotiation which might look like someone who goes to the market and starts bargaining over the price of a cow. Third, with monetary compensation you may give an opportunity to sadistic people and to negationism or denial ... We could give such people the opportunity to say 'after all, you were paid'.¹⁰¹⁰

The minister's statement – which reflects the government's position – shows the dilemma of setting a pecuniary value on human suffering or human life as well as the risk of foregoing discussion on the underlying causes of the genocide against the Tutsi on the pretext that reparations have been provided. Apart from the risk of reducing the life of a human being to a monetary expression, the minister's statement also highlights the problem of providing reparation for mass victimisation in a context where resources are scarce and where a large part of the population – victims, perpetrators and bystanders – lives in extreme poverty. In this context, providing reparation to victim-survivors, the majority of whom are Tutsi, could have increased a sort of social envy towards the Tutsi or generated a feeling of resentment among their Hutu neighbours.

8.2. The hierarchy of suffering and the categorisation of victims

According to Naomi Roht-Arriaza,

reparations are distinguishable from reconstruction and from victim assistance first, by their roots as a legal entitlement based on an obligation to repair harm, and second, by an element of recognition of wrongdoing as well as harm, atonement, or 'making good'.¹⁰¹¹

¹⁰¹⁰ Interview conducted by the author with Johnston Busingye, minister of justice and attorney general of the Republic of Rwanda, on 14 February 2019 in the minister's office in Kimihurura.

¹⁰¹¹ N. Roht-Arriaza, 'Reparations and Economic, Social, and Cultural Rights', in D. N. Sharp (ed.), *Justice and Economic Violence in Transition*, New York: Springer Science Business Media, 2014, p. 114.

Similarly, explaining the main differences between social services and reparations, Rodrigo Uprimny Yepes argues that

reparations have in the first place a focus on the past; they are backward looking at least in legal theory, because the main purpose is to restore victims to the conditions they enjoyed before they were victimized. On the other hand, social services have their focus in the present and in the future; they are present and future looking, because their aim is to satisfy immediately, or in a very short term, the core content of economic and social rights; they aspire to realize progressively the full content of these rights.¹⁰¹²

Interestingly, as noted by Roht-Arriaza¹⁰¹³ and other scholars such as Cristian Correa¹⁰¹⁴ and Peter Van der Auweraert,¹⁰¹⁵ in order to transform social benefits into reparation programmes, the state must publicly communicate that the social benefits are provided to the victims in fulfilment of its obligation to repair the harm caused to the victims – as compensation for its failure to prevent the violations – and in recognition of the harm suffered. However, it is worth noting that when social benefits are explicitly provided as a measure of reparation – i.e. in response to the state's obligation to repair the harm caused to the victims and in recognition of their victimhood – the victims may not necessarily consider such social benefits to be genuine reparations if they do not differ – or differ only slightly – from the ordinary state support provided to other citizens.

Seventy-one survivor respondents (almost ninety per cent) reported that they had benefited from at least one of the FARG packages. Their responses show that among all the services provided to the neediest survivors discussed in chapter five, the education component is the most appreciated, since it gives – or has given – them or their children the possibility of becoming socially and economically self-reliant. However, as expressed by forty-three of the seventy-one survivors who benefited from at least one of the FARG packages (sixty-one per cent), failure to achieve economic and social self-esteem or the average economic status of a Rwandan family due to lack of employment or a source of income frustrates most of the young survivors who benefited from the FARG education package and thus undermines their healing process. As conveyed by one survivor,

education and even healthcare do not put food on the table or provide clothes. My two young sisters and I finished university two years ago but we do not have a permanent job. Sometimes I get occasional jobs but because of lack of stability I cannot plan for the future. My sisters and I

¹⁰¹² R. U. Yepes, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice', (2009) 27(4) *Netherlands Quarterly of Human Rights* 626.

¹⁰¹³ Ibid.

¹⁰¹⁴ C. Correa, *Integrating Development and Reparations for Victims of Massive Crimes*, University of Notre Dame: Center for Civil and Human Rights, July 2014.

¹⁰¹⁵ P. Van der Auweraert, *Reparations for Wartime Victims in the Former Yugoslavia: In Search of the Way Forward*, Geneva: International Organization for Migration (IOM), 2013.

always do apply for jobs but it is difficult to get one because many university graduates are unemployed and the competition is high.¹⁰¹⁶

While those who benefited – or still benefit – from FARG packages regret that these packages are insufficient due to the lack of accompanying measures – like employment – all the survivors I interviewed who have not benefited from FARG support (i.e. eight out of seventy-nine) because they were not deemed to be among the neediest believe that FARG packages implicitly created a categorisation among the survivors of the same crime. They criticise the FARG policy for being unfair, since it did not acknowledge their suffering to the same level as that of those supported by the FARG. They thus have the impression that there are two categories of victims of the genocide against the Tutsi: those severely affected and those less affected.

It appears from the statements of the eight survivors who did not benefit from FARG packages that the limitation to the neediest survivors creates a sort of social envy among genocide survivors. Heidy Rombouts has even found that this limitation made people feel that the FARG was discriminatory.¹⁰¹⁷ According to Rombouts, even though FARG assistance – legally speaking – should be regarded as a legitimate form of affirmative action, FARG packages to the neediest survivors fuel ethnic tensions and thus fuel further resentment.¹⁰¹⁸ Explaining the risks of providing assistance to one ethnic group – or part of it – while excluding another group living in similar conditions, Rombouts remarks that

giving access to one group in society, in majority Tutsi, to education for example while many other people in society, in majority Hutu, lack the means to access proper secondary education is problematic, especially in terms of a renewed, be it reconciled, balance in society.¹⁰¹⁹

Similarly, providing different social benefits to survivors and other citizens experiencing the same level of poverty – as is the case with FARG packages – risks creating high social envy. As demonstrated by Rombouts, this is the case in Rwanda, where providing free secondary and university education, housing and healthcare to the neediest survivors – mostly Tutsi – gives the impression to other citizens, mainly from the Hutu community, that the Tutsi community is ‘privileged’.¹⁰²⁰

Providing humanitarian assistance to the most vulnerable survivors not only creates social envy, but also shows the difficulties that impoverished post-conflict countries – or transitional societies

¹⁰¹⁶ Interview conducted by the author in Rwanda, October 2018.

¹⁰¹⁷ H. Rombouts, *supra* note 235, pp. 402–409.

¹⁰¹⁸ *Ibid.*

¹⁰¹⁹ *Ibid.*, p. 408.

¹⁰²⁰ *Ibid.*, p. 380.

– face in fulfilling their concurrent obligations to meet their citizens' basic needs¹⁰²¹ and to provide reparations. Legally speaking, according to Rodrigo Uprimny Yepes,

there is a tension between the duty of States to make all efforts to rectify an unjust harm done to victims and its duty to adopt measures to achieve a fair distribution of benefits and burdens among all members of society.¹⁰²²

From my conversation with the minister of justice, in order to address these competing priorities the government of Rwanda seems to have opted for a developmental approach, providing social benefits to the neediest genocide survivors in order to improve their lives. However, the social benefit nature of FARG packages and the government's developmental approach could explain why even those survivors who benefit – or have benefited – from them still believe that the harm they suffered has not yet been addressed. None of the survivors I interviewed regard past or ongoing FARG packages as genuine reparations, but rather as part of the government's obligation to provide for its population's basic needs. The fact that survivors do not regard FARG packages as genuine reparations but rather as social benefits substantiates Pablo de Greiff's claim that 'strictly speaking, a development program is not a program of reparation'¹⁰²³ and that

development programs have a very low reparative capacity, for they do not target victims specifically, and what they normally try to achieve is to satisfy basic and urgent needs, which makes their beneficiaries perceive such programs, correctly, as ones that distribute goods to which they have rights as citizens, and not necessarily as victims.¹⁰²⁴

Against this background, it is worth noting that, even though FARG packages created social envy towards and among survivors and are not regarded as genuine reparations by the beneficiaries, they have nevertheless had a positive, albeit minimal, effect on the living conditions of a few survivors. All seventy-one of the survivor respondents who are beneficiaries of FARG packages reported that without FARG support they would not have been able to cope with their situation of extreme poverty, which was caused or worsened by the genocide against the Tutsi. In the perception of the survivors, the FARG packages demonstrate the government's good intentions to assist the most vulnerable survivors, even if they cannot be considered equivalent to reparations for the harm they suffered.

¹⁰²¹ International Covenant on Economic, Social and Cultural Rights (ICESCR), article 2(1). It is a general duty of states to ensure minimum material conditions for all their citizens so that they can live with dignity. Social services are grounded on the state's duty to fulfil economic, social and cultural rights and on the idea of distributive justice and the principle of non-discrimination.

¹⁰²² R. U. Yepes, *supra* note 1012, p. 626.

¹⁰²³ P. de Greiff, *supra* note 170, p. 470.

¹⁰²⁴ *Ibid.*

8.3. *Victim-survivors' feelings of social envy towards ex-combatants*

It is not uncommon for disarmament, demobilisation and reintegration (DDR) and reparations programmes to coexist in a post-conflict period. However, this coexistence can create tension. One of the frequent criticisms levelled at DDR programmes is that while they distribute benefits to ex-combatants, victims – by contrast – receive nothing. According to Pablo de Greiff, 'providing benefits to ex-combatants without attending to the claims of victims not only leaves victims at a comparative disadvantage but gives rise to new grievances'.¹⁰²⁵

Twenty-eight out of the seventy-nine survivor respondents (thirty-six per cent) – mostly those residing near the demobilisation camp in Musanze District or close to demobilised ex-combatants¹⁰²⁶ – expressed anger and disappointment regarding the government's financial support for ex-combatants. They feel that their demands for reparations have been disregarded while generous demobilisation packages were provided to former members of the FAR (*Force Armée Rwandaise*)¹⁰²⁷ and other ex-combatants, such as demobilised RPF soldiers and Rwandan Hutu rebels returning to Rwanda from the forests of the Democratic Republic of the Congo.

The support for ex-combatants is part of the government's DDR strategy, implemented by the Rwandan Demobilization and Reintegration Commission (RDRC) established in 1997.¹⁰²⁸ The financial support provided to ex-combatants aims to ensure that all demobilised ex-combatants are successfully reintegrated into their communities both socially and economically.¹⁰²⁹

In the process of demobilisation, ex-combatants spend three weeks to three months in demobilisation centres, where they undergo an extensive education programme on various government policies. At the end of the programme, and before being relocated in their community, the ex-combatants receive a resettlement package in order to help them meet their basic needs and build a civilian household. Those with special needs, such as disabled ex-combatants, also receive recognition of service allowances and vulnerability support grants.¹⁰³⁰ Depending on rank, the reintegration support varies from €135 to €1,815, whereas the recognition of service allowance ranges from €270 for privates to €905 for colonels.¹⁰³¹

¹⁰²⁵ P. de Greiff, 'Establishing Links between DDR and Reparations,' research brief, International Center for Transitional Justice, February 2010, p. 4.

¹⁰²⁶ It can probably be attributed to their awareness of the demobilisation package allocated to ex-combatants at the end of their reintegration training.

¹⁰²⁷ Former government military forces that organised and carried out the genocide against the Tutsi.

¹⁰²⁸ W. Lötscher, 'Reintegration of Ex-Combatants and Reconciliation in Rwanda: A Case Study', essay on development policy, April 2016, p. 7.

¹⁰²⁹ Ibid.

¹⁰³⁰ Ibid., p. 9. See also L. Waldorf, 'Transitional Justice and DDR: The Case of Rwanda', International Center for Transitional Justice, June 2009.

¹⁰³¹ See L. Waldorf, *supra* note 1030, p. 2.

Twenty-eight survivor respondents felt that providing such support to ex-combatants – especially to ex-FAR and Hutu rebels, who most survivors believe are also genocide perpetrators – while no compensation has yet been provided to survivors gives the impression that the government is insensitive to their victimhood or indifferent to their needs and concerns. They feel that the ex-FAR Hutu who inflicted suffering on them are privileged, as they receive special treatment. In the view of these twenty-eight survivor respondents, providing benefits to ex-combatants appears to be rewarding the human rights violations they suffered.

The grievances and feelings of resentment towards the ex-combatants expressed by these twenty-eight survivors reveal the difficulties that impoverished post-conflict states such as Rwanda often face when trying to ensure peace and security while simultaneously attempting to repair the harm caused to the victims.¹⁰³² The scarcity of financial resources pushes states to choose to provide support to ex-combatants through demobilisation and reintegration programmes rather than to provide reparation to the victims of their wrongdoings. The rationale behind this option could be the fact that ex-combatants arguably represent – or at least are more likely to be perceived as – a more serious threat to post-conflict peace and security than the victims; the reintegration support aims precisely at mitigating such threats.

8.4. Victim-survivors' perceptions of the unity and reconciliation of Rwandans in relation to reparations

When asked whether reconciliation is possible in Rwanda, forty-six out of the seventy-nine survivors (fifty-eight per cent), even if they still believe that little has been done to address the harm they suffered, expressly reported that reparations are not a prerequisite for Rwandan reconciliation. According to them, reconciliation has already been achieved despite the lack of adequate reparations.

Contrary to research that concluded that reparations are a prerequisite for reconciliation in post-conflict societies,¹⁰³³ these forty-six survivor respondents reported that reconciliation is a decision someone makes for his or her own good: for the sake of having 'peace of heart'.

This finding seems to corroborate the position of philosopher Howard McGary on whether reparation is an element of reconciliation. According to McGary,

although reconciling with a victim or transgressor is often good for all involved, we should not conclude from this that reparation must be understood as a species of reconciliation. If this were true, cases where it is logically impossible for reconciliation to occur between transgressor and

¹⁰³² See L. K. Bosire, 'Overpromised, under-delivered: Transitional justice in sub-Saharan Africa', (2006) 5 *SUR – International Journal on Human Rights* 70–107.

¹⁰³³ A. Tobie and F. Masabo, 'Healing Fractured Lives: Reconciliation and Reintegration in Rwanda', (2012) *International Alert*.

victim would necessarily be ruled out. I hope to show that mandating reconciliation as a necessary component of reparation minimizes the value that ‘debts of justice’ play in our lives.¹⁰³⁴

Explaining the benefits of reconciliation, McGary argues that achieving it

can have three very positive consequences: (1) it can allow the victims in many cases to move beyond their victimization (2) it can establish or reestablish a positive relationship between victims and wrongdoers, and (3) it makes it more likely that victims and wrongdoers can work together to achieve a common goal.¹⁰³⁵

Thus, the victim-survivors’ decision to reconcile with the perpetrators for the sake of having ‘peace of heart’ allowed them to move beyond their victimisation and to establish new relationships with the perpetrators. As reported to me by these forty-six respondents, this new relationship has been achieved thanks to the government’s unity and reconciliation policies – such as the abolition of ethnicity and the promotion of national unity – which reduced inter-ethnic bias and animosity among Rwandans and thus paved the way to reconciliation.

8.4.1. The abolition of ethnicity and the promotion of national unity

The forty-six survivor respondents who reported that reconciliation has been achieved in Rwanda even in the absence of reparations attribute this reconciliation to the Rwandan policy of abolishing ethnic labels and identification. They all believe that the common national identity promoted by the government paved the way to reconciliation, as it avoided ethnic tensions among Hutu and Tutsi. In their view, the abolition of ethnicity and the installation of national identity restored the social fabric that had been frayed by distrust and betrayal among Rwandans. As one of the survivors whose father and brother were killed in the genocide said,

after the genocide of 1994, living side by side with those who killed our family members was unthinkable. Surprisingly, we now live together without problems. We share everything – sorrow and happiness – we all go to the same church and sing in the same choir. Some have even started to marry one another, as it used to be before the genocide.¹⁰³⁶

The responses of the interviewees suggest that the ethnic conflicts that have characterised the history of Rwanda can partially explain the survivors’ positive perception of the common national Rwandan identity. This positive perception was shared by all the survivors I interviewed.¹⁰³⁷ As one of them remarked,

¹⁰³⁴ H. McGary, ‘Reconciliation and reparations’, (2010) 41(4) *Metaphilosophy* 549.

¹⁰³⁵ *Ibid.*, at. 555–556.

¹⁰³⁶ Interview conducted by the author in Rwanda, October 2018.

¹⁰³⁷ All fifty-eight perpetrator respondents expressed support for the national identity.

when the political parties started in the 90s, politicians used the ethnic card to divide us. After that, I lost many opportunities because I was a Tutsi, and my situation worsened after the shooting down of the presidential plane in April 1994. If removing ethnicity in our daily life can prevent future conflict, I personally do not see why I shouldn't consider myself a Rwandan rather than a Tutsi. After all, Rwandan citizenship is what we have in common.¹⁰³⁸

It is important to note that the abolition of ethnicity for the sake of unity and reconciliation in Rwanda is unique to Rwanda, and differs drastically from other transitional countries, including those with a similar ethnic structure and history of mass ethnic violence such as Burundi.¹⁰³⁹ In contrast to the latter, which institutionalised a power-sharing formula based on the explicit recognition of ethnicity,¹⁰⁴⁰ Rwanda promoted a national identity free of ethnicity labels. The Rwandan decision to abolish ethnicity echoes Herbert Kelman's finding that, insofar as identity is a prime contributor to violent conflicts in divided societies,

identities have to change, at least tacitly, if protracted identity conflicts are to be settled and, certainly, if they are to be resolved in a way that transforms the relationship and opens the way to reconciliation.¹⁰⁴¹

As the Rwandan political scientist Anastase Shyaka has argued,

the foundation of the Rwandan identity can never be reduced to the ethnic particularities of Hutu, Tutsi and Twa. The latter would even weaken it. The Rwandan identity[,] on the other hand, offers a vital structure that lessens conflicts and counteracts the genocidal ideology. Through the promotion of confidence among citizens, and by unifying the collective identity perceptions of Rwandans, the Rwandan identity brings to light an ontological essence of the true roots of Rwandans from a shared 'organic nation' where commonalities and convergences take precedence over differences and divergences.¹⁰⁴²

Comments from forty-six survivor respondents reveal shared positive attitudes towards the government's policy of national identity with the general Rwandan population, but my own

¹⁰³⁸ Interview conducted by the author in Rwanda, October 2018.

¹⁰³⁹ 'No other two societies anywhere in the continent had more in common [than Rwanda and Burundi] ... Minute in size, deeply stratified, held together by popular allegiance to monarchical symbols [and a common colonial heritage, German (1899–1917) and Belgian (1917–1962)], they also share strikingly similar ethnic maps.' Both countries also had a history of ethnic conflict. See R. Lemarchand and M. Niwese, *supra* note 820, pp. 165–189.

¹⁰⁴⁰ See Protocol II of the Burundi Peace and Reconciliation Accords of 28 August 2000: key provisions on power-sharing provide sharing of power between the national assembly and the government on the basis of sixty per cent for Hutu and forty per cent for Tutsi, a senate with an equal proportion of Hutu and Tutsi, and the same proportion in the defence and security forces. At the communal level a slightly more generous quota was reserved for the Hutu majority: sixty-seven per cent against thirty-three per cent for the Tutsi minority.

¹⁰⁴¹ C. K. Herbert, 'The Role of National Identity in Conflict Resolution: Experiences from Israeli–Palestinian Problem-Solving Workshops,' in R. D. Ashmore, L. Jussim and D. Wilder (eds), *Social Identity, Intergroup Conflict, and Conflict Reduction*, Oxford: Oxford University Press, 2001, p. 194.

¹⁰⁴² A. Shyaka, cited in C. Kanazayire et al., 'Does Identification with Rwanda Increase Reconciliation Sentiments between Genocide Survivors and Non-Victims? The Mediating Roles of Perceived Intergroup Similarity and Self-Esteem during Commemorations', (2014) 2(1) *Journal of Social and Political Psychology* 490.

personal assessment of the survivor respondents' responses suggests that their attitudes are based on two radically different – though still related – motivations. On the side of the victim-survivors (i.e. Tutsi community), their adherence to or acceptance of national identity derives from their need to get rid of the ethnicity for which their relatives were killed. On the side of the perpetrators of the genocide (i.e. Hutu community), they are motivated by the need to restore their self-esteem by getting rid of the ethnicity in the name of which the genocide was committed.

Put another way, the Tutsi genocide survivors' fear of being re-victimised in the future because of their ethnicity¹⁰⁴³ and the uncomfortable feeling of collective culpability among the Hutu population made the national identity an acceptable alternative to all (Tutsi and Hutu) and thus facilitated their daily coexistence.

The acceptance of national identity as an alternative to ethnic identification corroborates Samuel L. Gaertner and John F. Dovidio's theory, according to which

changing the nature of categorization from ingroups and outgroups (e.g., on the basis of race) to one more common, inclusive identity (e.g., university affiliation or nationality) can harness the cognitive and motivational forces of ingroup favoritism and redirect them to reduce bias. This process, described by the Common Ingroup Identity Model, not only produces more positive intergroup attitudes and more inclusive and generous standards of justice and fairness, but also increases positive and trusting intergroup behaviors such as helping and personal disclosures.¹⁰⁴⁴

Similarly, as argued by various scholars, goal relations and group interactions,¹⁰⁴⁵ perceptions of a common task or fate,¹⁰⁴⁶ or simply making a superordinate¹⁰⁴⁷ can all reduce the cognitive differentiation between ingroups and outgroups, and thus improve intergroup relations. In the words of Gaertner and Dovidio:

We view the recategorization of different groups into one group as a particularly powerful and pragmatic strategy for combating subtle forms of bias. Creating the perception of a common ingroup identity not only reduces the likelihood of discrimination based on race but also increases the likelihood of positive interracial behaviors.¹⁰⁴⁸

¹⁰⁴³ The genocide against the Tutsi was, at a certain level, a result of the ethnic conflicts (targeting the Tutsi community) that have marked the history of Rwanda. For details, see *supra* note 350.

¹⁰⁴⁴ S. L. Gaertner and J. F. Dovidio, 'Reducing intergroup bias: The common ingroup identity model', *Essays in Social Psychology*, New York: Psychology Press, 2000.

¹⁰⁴⁵ H. Tajfel and J. C. Turner, 'The Social Identity Theory of Intergroup Behavior', in J. T. Jost and J. Sidanius (eds), *Political Psychology: Key Readings*, New York: Psychology Press, pp. 276–293.

¹⁰⁴⁶ R. Brown and D. Abrams, 'The effects of intergroup similarity and goal interdependence on intergroup attitudes and task performance', (1986) 22(1) *Journal of Experimental Social Psychology* 78–92.

¹⁰⁴⁷ R. J. Crisp and M. J. Farr, 'Moderation of intergroup memory bias via crossed categorization', (2004) 9(9) *Current Research in Social Psychology* 124–134.

¹⁰⁴⁸ S. L. Gaertner and J. F. Dovidio, *supra* note 1044, p. 7.

Gaertner and Dovidio further highlight that transforming people's cognitive representations of themselves and others from being members of separate groups to being members of a single more inclusive group – i.e. from 'us' (Tutsi or Hutu) and 'them' (Hutu or Tutsi) to a more inclusive 'we' (i.e. Rwandan) – means that positive feelings, equal moral standards and cooperative behaviour among the former enemies are more likely to prevail.¹⁰⁴⁹

It can therefore be reasoned that the current peaceful coexistence between Tutsi and Hutu and the stability in Rwanda can be attributed to the reduction of the subtle historical bias between Tutsi and Hutu, which in turn increased interaction between the groups. However, and contrary to what my interviews suggest, some scholars believe that the draconian methods used by the government to impose the national identity have made ethnicity more salient at the same time as driving it underground,¹⁰⁵⁰ a situation which has made taboo any discussion about ethnicity issues in Rwanda. In response to this criticism, one might cite the following remark by Gaertner and Dovidio:

Recategorization does not necessarily require members to forsake their earlier group identities because it is possible to maintain a 'dual' representation in which both superordinate and original group identities are salient simultaneously.¹⁰⁵¹

Therefore, even though the national identity paved the way to reconciliation, since most people think of themselves primarily as Rwandans, ethnic identity is still an important factor in Rwanda's politics and society.

Furthermore, the reconciliatory role attributed to the abolition of ethnic identities in Rwanda expressed by forty-six of the survivor respondents is corroborated by other research showing that reconciliation 'involves social and psychological processes that engage former enemies in challenging and redefining the antagonistic identities and belief systems that motivated past violence'.¹⁰⁵² On this point, Herbert Kelman emphasises that

¹⁰⁴⁹ Ibid., pp. 15–17.

¹⁰⁵⁰ L. McLean Hilker, 'Everyday ethnicities: Identity and reconciliation among Rwandan youth', (2009) 11(1) *Journal of Genocide Research* 81–100; B. Ingelaere, 'Peasants, power and ethnicity: A bottom-up perspective on Rwanda's political transition', (2010) 109(435) *African Affairs* 273–292.

¹⁰⁵¹ S. L. Gaertner and J. F. Dovidio, *supra* note 1044, p. 7.

¹⁰⁵² N. T. Aiken, 'Rethinking reconciliation in divided societies: A social learning theory of transitional justice', in S. Buckley-Zistel et al. (eds), *Transitional Justice Theories*, London: Routledge, 2014, p. 42. See also H. C. Kelman, 'Conflict Resolution and Reconciliation: A Social Psychological Perspective on Ending Violent Conflict between Identity Groups', (2010) 1(1) *Landscapes of Violence* 1–8; D. Bar-Tal and G. H. Bennink, 'The Nature of Reconciliation as an Outcome and as a Process', in Y. Bar-Siman-Tov, *From Conflict Resolution to Reconciliation*, Oxford: Oxford University Press, 2011; J. P. Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies*, Washington DC: United States Institute of Peace Press, 1997.

changes in identity over the course of a protracted conflict come about through a combination of changed perceptions of the *necessity* and the *possibility* of resolving a conflict that has become increasingly costly to the parties.¹⁰⁵³

The cost of the ethnic conflicts that characterised the history of Rwanda and culminated in the genocide against the Tutsi, in which around one million individuals were killed, created the ‘necessity’ of suppressing ethnic identification. The prior existence of a shared common identity of Rwandans and the victim-survivors’ need to get rid of the ethnicity for which they were often targeted as well as the need among the Hutu to restore their self-esteem by getting rid of the ethnicity in the name of which the genocide was committed made the change of ethnic identities into national identity *possible*, in turn helping to prevent future ethnic conflicts. Still, as discussed below, the abolition of ethnicity and the adoption of national identity, though crucial, has not been sufficient to achieve full reconciliation.

8.4.2. *The lack of sincere and genuine apology and remorse*

Thirty-three survivor respondents (forty-one per cent) expressed concerns about the lack of genuine apologies and expressions of remorse from perpetrators. In their view, this lack jeopardises reconciliation. They claim to have forgiven the perpetrators – even those who did not apologise – for the sake of having peace of mind or heart. However, some of them wondered why during the commemorations of the genocide against the Tutsi, they are the only ones giving testimonies about what happened to them. As voiced by one respondent,

I am always surprised that I often have to give testimony on what happened to me and to my family, as if I had killed my family members. There are people who know what happened but they do not testify during the commemorations.¹⁰⁵⁴

Another survivor expressed a similar feeling of disenchantment and wondered why survivors always have to share their traumatic experiences with the audience during the genocide commemorations, while those who committed the genocide or whose lives were not in danger – perpetrators’ family members and bystanders – are there but unwilling to testify about what they did or saw others doing:

During the commemoration week, every afternoon we all meet at the burial site in our village to remember the Tutsi killed in 1994 but personally I have never seen anyone except survivors being asked to testify about what happened in our village. None volunteered either. It is as if we killed our loved ones.¹⁰⁵⁵

¹⁰⁵³ H. C. Kelman, ‘The Role of National Identity in Conflict Resolution: Experiences from Israeli–Palestinian Problem-Solving Workshops’, in R. D. Ashmore, L. Jussim and D. Wilder (eds), *Social Identity, Intergroup Conflict, and Conflict Reduction*, Oxford and New York: Oxford University Press, 2001, p. 195.

¹⁰⁵⁴ Interview conducted by the author in Rwanda, November 2018.

¹⁰⁵⁵ Interview conducted by the author in Rwanda, November 2018.

For these thirty-three survivor respondents, such behaviour displays a certain degree of indifference towards their suffering and shows a lack of remorse. In the absence of an apology and/or of a genuine expression of remorse, they explained that their forgiveness of the genocide perpetrators was due to their need to peacefully coexist with the perpetrators and to heal their wounds. This is in line with the findings of the philosophers Carse and Tirrell, according to whom

the demands of peaceful cohabitation and national reunification pressure many Tutsi survivors, who are a minority within a minority in Rwanda, to strive to forgive their former neighbors who perpetrated slaughter, rape and wanton destruction against them.¹⁰⁵⁶

The survivors' constant reference to their need for peace of mind – or heart – as the main reason for their forgiveness echoes their need to avoid perpetuating the suffering and self-destructive effects of holding on to pain and consuming hatred. Paraphrasing the words of Rabbi Harold Kushner, genocide survivors forgave not because the perpetrators deserved it but because survivors did not want to turn themselves into bitter, resentful people.¹⁰⁵⁷

In a country such as Rwanda, where recourse to professional psychological assistance is not traditionally common – and in certain instances not affordable to all – the survivors' option to forgive the perpetrators without prior apologies seems to be the best alternative.¹⁰⁵⁸ Furthermore, in the context of Rwanda, where survivors and perpetrators continue to live together in close proximity, the survivors' choice to forgive is part of their own personal and social path to healing and reconciliation. As also identified by Martha Minow, survivors' forgiveness plays an important role in the reconciliation process:

The act of forgiving can reconnect the offender and victim and establish or renew a relationship; it can heal grief; forge new, constructive alliances; and break cycles of violence.¹⁰⁵⁹

Similarly, Hartwell claims that forgiveness may be one of the 'least understood but potentially necessary acts for a society to fully break a cycle of violence'.¹⁰⁶⁰

¹⁰⁵⁶ A. L. Carse and L. Tirrell, 'Forgiving Grave Wrongs', in C. R. Allers and M. Smit (eds), *Forgiveness in Perspective*, The Hague: Brill, 2010, p. 44.

¹⁰⁵⁷ See H. S. Kushner, *How Good Do We Have to Be: A New Understanding of Guilt and Forgiveness*, Boston: Little Brown, 1996, p. 107.

¹⁰⁵⁸ See A. Kubai, '"Confession" and "Forgiveness" as a strategy for development in post-genocide Rwanda', (2016) 72(4) *HTS Teologiese Studies/Theological Studies* 1–9; P. Gobodo-Madikizela, 'Remorse, Forgiveness, and Rehumanization: Stories from South Africa', (2002) 42(1) *Journal of Humanistic Psychology* 7–32; P. Gobodo-Madikizela, 'Trauma, forgiveness and the witnessing dance: Making public spaces intimate', (2008) 53 *Journal of Analytical Psychology* 169–188.

¹⁰⁵⁹ M. Minow, *supra* note 917, p. 14.

¹⁰⁶⁰ M. B. Hartwell, 'The Role of Forgiveness in Reconstructing Society after Conflict', (1990) *Journal of Humanitarian Assistance* 1.

The responses given by all the survivors I interviewed show that their forgiveness of the perpetrators does not replace or remove their need for justice and punishment. They have only changed how the survivors feel about the perpetrators, which does not release the perpetrators from their legal accountability. As explained by Murphy and Hampton, survivors' forgiveness does not conflict with their persistent need for justice and punishment:

Because I have ceased to hate the person who has wronged me it does not follow that I act inconsistently if I still advocate his being forced to pay compensation for the harm he has done or his being forced to undergo punishment for his wrongdoing – that he, in short, get his just deserts.¹⁰⁶¹

According to Nicholas Wolterstorff, although 'forgiveness is the overcoming of hatred for the wrongdoer, it is not the overcoming of feelings of resentment and indignation over what was done to one'.¹⁰⁶² Therefore, while levels of relative mutual interaction may have grown, this has not necessarily translated into a change in hostile mindsets and relationships, which is indispensable for full reconciliation. While the abolition of ethnicity and the promotion of national unity have reduced inter-ethnic bias and animosity, the lack of sincere apology and remorse on the part genocide perpetrators – as perceived by over forty per cent of the survivors I interviewed – undermines the process towards full reconciliation.

8.5. Conclusion

This chapter focused on the victim-survivors' insight on reparation and reconciliation. It shows that the need of the victim-survivors and of society as a whole to heal from the wounds of the genocide against the Tutsi had to be balanced against Rwanda's post-conflict needs.

As discussed in this chapter, genocide survivors feel strongly that there still needs to be reparation for the harm they suffered, especially the loss of their loved ones who were killed in the genocide. They all feel that only material harm has been acknowledged so far. However, despite feeling that the harm they suffered has not yet been fully addressed, this feeling does not necessarily mean that their needs and concerns have been overlooked. The government's efforts to support the neediest survivors were acknowledged. As recognised by both the victims and the government, even though the social benefits provided to the neediest genocide survivors through the FARG should not be equated with reparations for the harm they suffered, they nevertheless have a reparative effect.

Most importantly, this chapter has demonstrated that the lack of reparations for the deaths of the victims of the genocide against the Tutsi has not been an obstacle to reconciliation. Survivors expressed satisfaction with the various national reconciliation policies and believe that they have

¹⁰⁶¹ J. G. Murphy and J. Hampton, *supra* note 904, p. 33.

¹⁰⁶² N. Wolterstorff, *Justice in Love*, Cambridge: Eerdmans Publishing, 2015, p. 165.

paved the way to their current peaceful coexistence with the perpetrators and/or their families – a peaceful coexistence that the survivors regard as reconciliation.

CHAPTER NINE

GENERAL CONCLUSION

'In a society emerging from conflict, the context determines the timing and sequencing of transitional justice processes in any given situation. There is no "one-size-fits-all"'.¹⁰⁶³

This study set out to address and answer the following question: 'To what extent has the right to reparations of the victims of the 1994 Rwandan genocide against the Tutsi been materialised?' It began by exploring whether victims of gross human rights violations and international crimes have a right to reparations, before determining what obligations states have to address and repair the harm done to these victims. Against this background, Rwanda's obligations towards the victims of the 1994 genocide against the Tutsi were detailed, and the question of whether and to what extent the government of Rwanda has indeed addressed the harm caused to the victims of the genocide against the Tutsi was explored.

To enable a systematic examination of these research questions, the study was structured into two parts comprising eight chapters. While part I thoroughly examined the development of the victims' rights to reparations and the various legal, judicial and political mechanisms put in place by the government of Rwanda to address the consequences of the genocide against the Tutsi, part II discussed the findings of my empirical research into the genocide victim-survivors' perceptions and experiences of the mechanisms put in place to address the harm they suffered.

Chapter one, serving as a background for the subsequent chapters, provided the historical and contextual information needed to explore how the post-genocide government of Rwanda dealt with the consequences of the genocide against the Tutsi. It began with a brief overview of the history of ethnicity and ethnic conflicts in Rwanda that culminated in the genocide against the Tutsi in April 1994. It was especially interesting to note that not only was the genocide committed against an ethnic group and *in the name of ethnicity*, but it also caused a substantial death toll – estimated to be between 800,000 and one million – and resulted in hundreds of thousands of survivors – orphaned, wounded, disabled, widowed, HIV/AIDS-positive – who needed reparations.

Since answering the first sub-question, '**To what extent do victims of gross human rights violations have a right to reparations?**', requires us to understand how scholars, treaty monitoring bodies and courts have defined or interpreted the contours of the concept of victims'

¹⁰⁶³ Annah Moyo, 'Any "One-Size-Fits-All" Approach to Transitional Justice Is Doomed to Fail', 20 December 2018, available at <https://peacelab.blog/2018/12/any-one-size-fits-all-approach-to-transitional-justice-is-doomed-to-fail>, accessed on 24 November 2020.

right to reparations, chapter two analytically reviewed the core literature and the monitoring bodies' and courts' case law on the development of victims' right to reparations in international human rights law, and considered what influence this had on the shift in international criminal law towards recognition of victims' right to reparations. Drawing on a critical analysis of the development of victims' rights to reparations in international criminal law, it was remarkable to note that even though victims' rights to reparations have gained recognition in international criminal law, especially with the establishment of the ICC, the full enforcement of these rights – i.e. undoing the harm suffered by the victims in ways that bring the parties back to the *status quo ante* – remains a challenging, if not impossible, task in international criminal justice. As the findings indicate, the enormity of the harm caused by genocide, crimes against humanity and war crimes, the high number of victims affected and the lack of resources to respond effectively to victims' needs limit the ability of courts to effectively address legal claims for reparations for victims of mass atrocities.

In light of the above, even though chapter two concluded by highlighting the limits of international criminal justice to address victims' right to reparations, it nevertheless acknowledged that victims of gross human rights violations, such as those suffered by the genocide victims in Rwanda, have a right to reparations.

The findings of chapter two provided an important theoretical legal framework for chapters three to five to answer the second sub-question: **'How did the Rwandan government address the harm caused to the victims of the genocide against the Tutsi?'** These chapters analysed and discussed various programmes and mechanisms put in place by the government of Rwanda to address the harm suffered by the victims of the genocide against the Tutsi.

As the findings of chapters three to five indicate, to deal with the legacy of the genocide against the Tutsi, the government of Rwanda adapted international reparation standards to the specific context of local realities and experiences. Instead of using the usual one-size-fits-all approach, the Rwandan government opted for a plurality of home-grown mechanisms tailored to the underlying causes of the genocide against the Tutsi, to the genocide against the Tutsi itself and to its devastating impact on Rwandan society.

Along with addressing the immediate need to prosecute genocide suspects, the government of Rwanda combined various measures – such as memorialisation, outlawing ethnic identification, adopting anti-denial laws and promoting unity and reconciliation policies – to deal with the legacy of the genocide against the Tutsi.

The appropriateness of the government's reparation mechanisms was assessed in terms of their contribution towards promoting and ensuring the satisfaction and rehabilitation of the genocide survivors, as well as towards guaranteeing the non-repetition of similar atrocities in the future. The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation served as a

yardstick because, as explained in detail in chapter two, they not only define the elements of reparations as consisting of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, but also 'identify mechanisms, modalities, procedures and methods for the implementation of existing [state] legal obligations'¹⁰⁶⁴ to provide an effective remedy and adequate reparations to victims.

Similarly, since in the process of dealing with past atrocities and human rights violations societies have to search for the truth about the past (T); ensure accountability of the perpetrators (A); provide some form of reparation to the victims (R); and promote reconciliation (R), the TARR model provided an important framework for analysing the genocide victims' attitudes and opinions regarding the government's responses to the consequences of the genocide against the Tutsi, as discussed in chapters seven and eight.

With regards to prosecution as an element of reparation, the government of Rwanda excluded any recourse to amnesty and opted for maximum individual accountability by promulgating the 1996 Genocide Organic Law, as discussed in chapter three. Specialised Chambers across the country were established to investigate, prosecute and punish the perpetrators of the genocide against the Tutsi. Genocide suspects/perpetrators were also put into four categories (reduced to three by the 2004 Gacaca Organic Law) in accordance with their degree of participation. This categorisation of genocide perpetrators reflects an implicit recognition that, even though many individuals were involved in the genocide against the Tutsi, and to some extent shared the same intentions, they nevertheless played different roles of varying severity and thus should not incur the same penalty.

Specialised Chambers mainly relied on testimonial evidence since most, if not all, victims were forced into hiding and thus could not directly witness criminal acts related to the genocide. Substantial reduction of penalties was accorded to genocide perpetrators in exchange for confessions, guilty pleas and expressions of remorse. This approach also made it possible to overcome the major problem of collecting evidence, and thus to establish the truth concerning the genocide against the Tutsi.

As the classic judicial system was found to be incapable of dealing with the large number of genocide perpetrators, the Specialised Chambers were abolished and replaced by the ordinary courts, which inherited the responsibility to prosecute perpetrators placed in the first category. The remaining cases in other categories were transferred to the Gacaca courts established in 2001. According to de Brouwer and Ruwebana, by 2001 only 6,000 out of 120,000 detainees (i.e. five per cent) had been tried by the Specialised Chambers.¹⁰⁶⁵ This perceived incapacity of the Chambers to effectively speed up the genocide trials pushed the government of Rwanda into seeking other alternative solutions. The traditional Rwandan methods of conflict resolution

¹⁰⁶⁴ See UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, preamble, para. 7.

¹⁰⁶⁵ See A. L. M. de Brouwer and E. Ruwebana, *supra* note 41, p. 939.

known as ‘Gacaca’ were therefore reinvented to try genocide perpetrators. The Gacaca system, which inherited some of the key elements of the 1996 Genocide Organic Law (namely, the categorisation of genocide perpetrators and the procedure where a guilty plea could be given in exchange for a reduced penalty), created over 12,000 Gacaca courts, which processed about 1.9 million cases in just ten years.

As the findings indicate, by contrast with the Specialised Chambers and the ICTR, the Gacaca system brought the genocide trials to the scene of the crimes. It involved members of the community who were affected, i.e. the accused and their families, victims and their families, bystanders and witnesses. Although the Gacaca system can be rightly criticised for not having upheld certain standards of fair trials, my empirical analysis of the victim-survivors’ perceptions of the Gacaca system indicates that Gacaca not only empowered the victims to speak out and confront their aggressors, but gave the opportunity to the affected population or community to collectively shed light on the circumstances of the genocide against the Tutsi. Most importantly, the victim-survivors I interviewed all reported that Gacaca gave a voice to the rage, anger and hatred that had been eating them up inside.

Moreover, the interviewed victim-survivors also acknowledged that punishing those responsible for the genocide against the Tutsi paved the way to heal the wounds of the past and laid the ground for the reconciliation and peaceful cohabitation of Rwandans. They attributed this, among other things, to the fact that the process helped to acknowledge and confirm the harm they had suffered, and permitted the truth (in its multiple dimensions) about the genocide against the Tutsi to emerge. For the victim-survivors, the government’s decision to prosecute those responsible for the harm they suffered ended a long period of dehumanisation that they had endured since the 1959 Hutu revolution.

With regards to compensation and restitution as elements of reparations, the findings indicate that the first genocide law in Rwanda, the 1996 Genocide Organic Law, was normatively rich in terms of victims’ rights provisions. Genocide victims were granted the status of civil parties in all criminal proceedings and authorised to seek reparation for both material and moral harm. Furthermore, not only could the victims initiate criminal proceedings¹⁰⁶⁶ and be granted free access to courts,¹⁰⁶⁷ but the public prosecution was also entrusted with the status of legal representative for all the victims who had no legal capacity. Most importantly, joint civil liability of all the masterminds of the genocide, i.e. those placed in the first category, for all the harm caused all over the country was established. The 1996 Genocide Organic Law contemplated the establishment of a Victims Compensation Fund to manage all reparations issued by the Specialised Chambers, including those issued to victims not yet identified.

¹⁰⁶⁶ 1996 Genocide Organic Law, article 29(2) and (4).

¹⁰⁶⁷ *Ibid.*, article 29(3) and (5).

As discussed, all these features raised hopes among the genocide victims that they would see their right to reparations materialised, but these hopes proved to be illusory when the Gacaca system that was established progressively side-lined the victims' right to reparations by limiting it to looted property.

In practice, as far as the third sub-question (**'To what extent have the victims of the genocide against the Tutsi been given access to court to claim reparations for the harm they suffered?'**) is concerned, findings indicate that genocide victim-survivors were not allowed to claim reparations on the basis of the individual mental and bodily harm they had suffered. This harm was supposed to be addressed by the Victims Compensation Fund, which, however, is yet to be established.

Only a few genocide survivors, who managed to file their claims under the principle of universal jurisdiction in Europe and under the 1789 Alien Tort Claims Act and the 1991 Torture Victim Protection Act in the USA, have been granted reparations. It should also be highlighted that, due to the insolvency of the genocide perpetrators, only a few of the reparation awards issued by foreign domestic courts were enforced.

It is worth noting that the normatively rich victims' provisions of the 1996 Genocide Organic Law can be attributed to the sympathy of the post-genocide government (dominated by Tutsi returning from exile) for the Tutsi survivors' cause. The government's shift in position can be attributed to its acknowledgement of the complexity of judicial reparations in cases of mass victimisation and – most importantly – to the fact that a large number of perpetrators were practically indigent and could therefore not afford to pay pecuniary reparations to their victims.

Indeed, meeting all the expectations associated with the concept of reparation would have generated budgetary impossibilities. Moreover, even if we suppose that the government could have afforded to grant individual reparations, the risk of undermining its reconciliation efforts was high, as reparations would have been provided to the members of the Tutsi community whereas victims of alleged RPF crimes would have been left without reparations.

Therefore, to avoid such complexity and risks, the government shifted from individual reparations to 'non-legal pecuniary' reparation mechanisms, putting great efforts into addressing the causes of the genocide against the Tutsi and into materially assisting the neediest genocide victim-survivors to improve their lives.

To preserve the memory of the genocide against the Tutsi, the government of Rwanda established not only the memorial sites and annual national, regional and international commemorations, but also promulgated anti-denial laws. Similarly, the government of Rwanda implemented a number of legal reforms and various strategies addressing the preconditions that occasioned the genocide against the Tutsi. Most importantly, as there is no doubt that ethnicity

was the source of social and political division, the government eliminated the ethnicity label from Rwandan identity cards and promoted unity and reconciliation around a 'Rwandan identity'. There is empirical evidence that all these measures have so far stabilised the country and substantially limited the risk of similar violations. Indeed, as reported by the genocide victim-survivors, memorialisation has an important symbolic value and constitutes an essential part of their satisfaction. Doing away with ethnic divisions, adopting anti-denial laws and promoting unity and reconciliation among Rwandans have proved to be the best way to resolve the perennial problem of ethnic conflicts in the country.

Furthermore, in recognition of the fact that some of the victims of the genocide against the Tutsi were left poorer than they were before the genocide, the FARG empowered and contributed to the socio-economic development of the neediest genocide victim-survivors, and took affirmative action to improve their social welfare.

Therefore, with respect to the fourth sub-question, **'Is the assistance provided by the Rwandan government through the *Fonds de soutien et d'assistance aux rescapés du génocide* (FARG) a form of reparation to victims of genocide?'**, the findings indicate that, even though victim-survivors and the government of Rwanda do not regard the FARG packages as a form of reparation but rather as humanitarian assistance, the nature of the FARG programmes and their effect on the lives of the genocide victim-survivors could fit the concept of rehabilitation, and could thus be considered a form of reparation. These programmes do satisfy two main features of reparations: not only was the victim -survivors' eligibility to the programmes exclusively linked to having been victimised by the genocide against the Tutsi, but the genocide victim-survivors also acknowledged that the FARG allowed them to recover their self-determination and enabled them to live with dignity and hope for a brighter future.

Overall, in light of the above-mentioned findings, answering the main research question of whether the victims of the genocide against the Tutsi have fully materialised their right to reparations either positively or negatively would be to overlook the fact that the concept of reparation developed in international law – as discussed in this study – is overloaded with expectations that are difficult to achieve and to some extent impossible to realise in a post-conflict society such as Rwanda. Having reached this conclusion, it should, however, be recognised that, except for individual compensation for mental and bodily harm suffered by victims, the measures put in place by the government of Rwanda to address the consequences of the genocide against the Tutsi do fit within the scope of the measures of restitution, rehabilitation and satisfaction, as provided in international law.

With respect to Rwandan reparative justice, the empirical analysis indicated that, although some victim-survivors believe that reparation is still very much needed – due to the fact that they received no compensation for mental and bodily harms – the significant efforts Rwanda has made over the course of twenty-seven years are admirable, and the lessons to be learned

immeasurable. This study has exposed the shortcomings of the internationalised standards of victims' right to reparations, and thus underlined the need to adapt such standards to local realities and experiences.

As the Rwandan case shows, successfully dealing with the consequences of mass atrocities requires not just retributive responses – although they are necessary and should never be ignored – but also a comprehensive understanding of the dynamics underlying the distinctive nature of each instance of mass atrocity. Since each conflict and post-conflict society has unique needs, reparative mechanisms must pay attention to the conflict's historical, political, social and cultural background as well as to the economic conditions of the country where the conflict took place, and should be tailored accordingly.

On the basis of the above conclusions, this study will hopefully complement existing academic research on victims' right to reparations in cases of mass human rights violations resulting from international crimes by filling the gap observed in the implementation of the reparations standards defined in international law.

This is by no means to say that Rwanda's reparative justice system is above criticism, or that there can ever be a 'one-size-fits-all system' for all post-conflict societies. However, I do believe that Rwandan best practices can be consulted for guidance, and possibly borrowed and adapted to the particularities of any new situation that arises.

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ENGLISH SUMMARY

This research focuses on the right of the victims of international crimes to reparations, with the aim of determining ‘*To what extent has the right to reparations of the victims of the 1994 Rwandan genocide against the Tutsi been materialised?*’. To answer this main research question, this research is accordingly articulated around four sub- research questions:

- To what extent do victims of gross human rights violations have a right to reparations?
- How did the Rwandan government address the harm caused to the victims of the genocide against the Tutsi?
- To what extent have the victims of the genocide against the Tutsi been given access to court to claim reparations for the harm they suffered?
- Is the assistance provided by the Rwandan government through the *Fonds de soutien et d'assistance aux rescapés du génocide* (FARG) a form of reparation to victims of genocide?

To systematically address these questions, this research is structured into two parts consisting of nine chapters in total, including the general conclusion. It employs a method of comparative analysis focused on extensive review of domestic legal instruments and practice in comparison with the rules and practices of international criminal justice systems. In this regard, the TARR (Truth, Accountability, Reparation, and Reconciliation) Model provided an important analytical framework, whereas the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation constituted a significant yardstick for this research.

Creating the foundation for analysis, chapter one explained – in form of general introduction - the context, research question, objective, sources and structure of the research and Part I - which starts from chapter two to chapter five - analysed the development of the victims’ rights to reparations and discussed different legal, judicial and political mechanisms put in place by the government of Rwanda to address the consequences of the genocide against the Tutsi. Specifically, whereas chapter two examined the theoretical legal framework of the right of the victims of the genocide against the Tutsi to reparations by looking at its development within international criminal law, chapters three, four, and five analysed the different measures taken by the government of Rwanda to address the consequences of the genocide against the Tutsi.

As discussed in chapter two, although victims’ right to reparations has gained recognition, the major challenge continues to be the implementation of this specific right. This becomes particularly obvious when looking at how the concept of reparations has been developed in international criminal law. As argued in chapter two, the *ad hoc* Tribunals, i.e. the ICTY and the ICTR, largely overlooked victims and their rights as they were only considered as witnesses. The failure of these *ad hoc* tribunals to uphold the victims’ rights constituted an important step towards the recognition of the victims’ rights to reparations in the ICC legal framework. In

particular articles 75 and 79 of the ICC Statute provide an indisputable recognition of the victims' rights to reparations in international criminal law. However, despite such recognition, I demonstrate that it is still difficult to fully enforce the victims' right to reparations in case of mass atrocities.

As enlightened in chapter two, due to the particular characteristics of the harm caused by international crimes - such as those which took place in Rwanda - undoing the harm suffered by the victims in ways that bring the parties to the *status quo ante* is generally not among the range of possibilities. The reparation legal standards inherited from international human rights law were not intended to address massive numbers of victims in conflict situations. This chapter concludes by observing the limits of the international criminal system in addressing the victims' rights to reparations.

Chapter three looked at how the government of Rwanda dealt with the prosecution of the genocide perpetrators. It showed that in order to avoid perpetuating the culture of impunity that had characterized the history of ethnic conflicts in Rwanda and led to the genocide against the Tutsi in Rwanda in 1994, the government opted for maximal individual judicial accountability. The chapter identified that such accountability not only acknowledged and confirmed the harm suffered by the victims but also permitted the truth – in its multiple dimensions - about the genocide against the Tutsi to emerge and thus paved the way for healing wounds. Most importantly, through confessions, genocide perpetrators publicly acknowledged the wrongful nature of what they had done. This chapter has also demonstrated that – contrary to the ICTR and ordinary courts in Rwanda – Gacaca courts not only allowed the victims to come together and tell the stories of their own sufferings and of that of their family members, but also gave the opportunity to the victims to confront their aggressors. As reported by the genocide survivors (see chapter 7), the accountability of the genocide perpetrators acted as a kind of foundation stone of healing and reconciliation.

In chapter four, it was noted that, contrary to the well-recognized victims' rights – both under international law and Rwandan law - to access to court or judicial processes that can appropriately and commensurately address the harm suffered, the victims of the genocide against the Tutsi have not been given access to the courts or to any other mechanism capable of granting reparation for the harm they suffered, other than property related harm. As it was discussed in this chapter, meeting all the expectations associated with the concept of reparation would have generated budgetary impossibilities and been potentially harmful to the government effort towards reconciliation. Therefore, on one hand, the Rwandan government's shift from individual legal /judicial reparations to collective and administrative reparations can be explained by the its realization of the complexity of judicial reparations in cases of mass victimization but also by the fact that a large number of perpetrators were practically indigent and could not afford to pay pecuniary reparations to their victims. On the other hand, and even if the government had been financially able to provide for individual reparations, the risk of undermining its effort towards

reconciliation was high as reparations would have been provided to the members of Tutsi community whereas victims of the alleged RPF crimes would have been left without reparations. To mitigate this potential risk and to remain realistic, the government efforts were put in 'non-legal pecuniary' reparation mechanisms as discussed in chapter five.

Next to the measures aiming at the genocide perpetrators' prosecution, truth seeking and public disclosure discussed in chapter three and measures of victims' compensation or restitution discussed in chapter four, chapter five examined different non-pecuniary government programs, projects and policies put in place to deal with the legacy of the genocide against the Tutsi and assessed whether they actually served the purpose of reparation in terms of satisfaction, guarantees of non-repetition and rehabilitation.

The fifth chapter showed that due to the particularities of the genocide against the Tutsi and the characteristics of the Rwandan post-genocide society, the government of Rwanda combined various measures - such as memorialization, prohibition of ethnic identification, adoption of anti-denial laws and promotion of unity and reconciliation policies - in dealing with the legacy of the genocide against the Tutsi.

The government of Rwanda not only preserved the memory of the genocide against the Tutsi through memorial sites and national, regional and international commemorations but also eliminated ethnicity – which is a source of social and political division - from the Rwandan identity cards and implemented a number of legal reforms and different strategies addressing the pre-conditions that have occasioned the genocide against the Tutsi. Recognizing that some of the victims of the genocide against the Tutsi were left poorer than they were before the genocide, the social welfare of the neediest survivors of the genocide against the Tutsi has been improved through FARG affirmative actions. The FARG empowered genocide survivors and contributed to their socio-economic development. It was observed however, that although the assistance provided through FARG to the neediest survivors of the genocide against the Tutsi is admittedly more philanthropic and does not necessarily entail any individual right, it is nevertheless linked to the genocide victimhood status and its rehabilitative effect thus cannot be overlooked. This chapter concluded – and this was confirmed by my empirical research findings - that memorialization holds an important symbolic value and constitutes an essential part of the victims' satisfaction. Doing away with ethnic divisions, adopting anti-denial laws and promoting unity and reconciliation among Rwandan have been deemed the best the guarantee of non-repetition of ethnic conflicts. All these measures have so far stabilized the country and substantially limited the risk of similar violations.

Part II – which is composed of chapters six, seven, and eight - discussed the findings of the empirical research into the perception and experiences of the victims of the genocide against the Tutsi. As noted in chapters seven and eight, even though the survivors of the genocide against

the Tutsi still believe that reparation is yet to come, they nevertheless expressed gratitude to the government efforts in addressing the harm they suffered.

By way of introduction to part II, chapter six explained how the field research in Rwanda was conducted, how respondent-survivors were identified and how their statements were used. Following this, chapter seven provided insight into how genocide survivors experienced justice through truth-telling, truth-seeking and perpetrators' accountability and into how the Gacaca process assisted them to heal the wounds of the genocide against the Tutsi. The victims appreciated the government's decision to prosecute those responsible for the harm they suffered as it ended a long period of dehumanization that they had suffered since the 1959 Hutu revolution. Genocide perpetrators' accountability was viewed by the interviewed survivors as an admission of the wrongful acts committed against them and a recognition of the pain and losses they suffered. They all reported that the Gacaca system which addressed the majority of the genocide cases gave a voice to the rage, anger and hatred that had been internally consuming them and allowed them to get otherwise unobtainable information about their family members and belongings.

Chapter eight discussed the victims' perception of the reparative measures made available to them and their impact on reconciliation. As it was presented in this last chapter, the survivors' statements revealed not only a general sentiment of gratitude toward the government's efforts in addressing the consequences of the genocide against the Tutsi but also a certain sentiment of regret as they all believe that the harm suffered was only partially recognized and addressed. Interestingly, although they have the feeling that the harm suffered has not yet been fully addressed, they expressly reported that such feeling has not been an obstacle to reconciliation because reconciliation through forgiveness is a decision they made for their own good, i.e. for the sake of having 'peace of heart'. Having 'peace of heart' allowed them to move beyond their victimization and to establish new relationships with the perpetrators and/or their families.

Chapter nine concluded by emphasizing that answering positively or negatively whether the victims of the genocide against the Tutsi have fully materialized their right to reparations would be overlooking the fact that the concept of reparations as developed in international law and discussed in this research is overloaded with expectations that are difficult to achieve and, to some extent, impossible to realize in a post-conflict society such a Rwanda.

Having concluded so, it should however be recognized that, except for individual compensation for moral and bodily harm suffered, measures put in place by the government of Rwanda to address the consequences of the genocide against the Tutsi fit within the scope of the measures of restitution, rehabilitation, and satisfaction, as provided in international law. Most importantly, the Rwandan experience teaches us that there is no one-size fits all post-conflict societies, and that the reparation measures thus need to be designed in response to context-specific societal needs.

NEDERLANDSE SAMENVATTING

Het recht op herstelbetalingen van slachtoffers van internationale misdrijven in de nasleep van de genocide van 1994 tegen de Tutsi's in Rwanda

Dit onderzoek richt zich op het recht van slachtoffers van internationale misdrijven op herstelbetalingen, met als doel vast te stellen "In hoeverre is het recht op herstelbetalingen van de slachtoffers van de Rwandese genocide tegen de Tutsi's van 1994 gematerialiseerd?". Om deze hoofdvraag te beantwoorden, is dit onderzoek opgebouwd rond vier deelvragen:

- In hoeverre hebben slachtoffers van grove schendingen van de mensenrechten recht op herstelbetalingen?
- Hoe heeft de Rwandese regering de schade aangepakt die de slachtoffers van de genocide tegen de Tutsi's is berokkend?
- In hoeverre hebben de slachtoffers van de genocide tegen de Tutsi's toegang gekregen tot de rechter om herstelbetalingen te eisen voor de schade die zij hebben geleden?
- Is de door de Rwandese regering via het *Fonds de soutien et d'assistance aux rescapés du génocide* (FARG) verleende steun een vorm van genoegdoening voor de slachtoffers van de genocide?

Om deze vragen systematisch te beantwoorden, is dit onderzoek opgesplitst in twee delen die in totaal uit negen hoofdstukken bestaan inclusief de algemene conclusie. Er wordt gebruik gemaakt van een methode van vergelijkende analyse die is toegespitst op een uitgebreid onderzoek van de nationale rechtsinstrumenten en praktijken in vergelijking met de regels en praktijken van internationale strafrechtssystemen. In dit verband vormde het TARR-model een belangrijk analytisch kader, terwijl de Grondbeginselen en richtsnoeren van de VN inzake het recht op herstel en schadeloosstelling een belangrijke maatstaf voor dit onderzoek vormden.

Als basis voor de analyse werden in hoofdstuk één - in de vorm van een algemene inleiding - de context, de onderzoeksvraag, de doelstelling, de bronnen en de structuur van het onderzoek uiteengezet, en in deel I - dat bestaat uit de hoofdstukken twee tot en met vijf - werd de ontwikkeling van het recht van slachtoffers op herstelbetalingen geanalyseerd en werden verschillende juridische, gerechtelijke en politieke mechanismen besproken die door de regering van Rwanda zijn ingesteld om de gevolgen van de genocide tegen de Tutsi's aan te pakken. Terwijl in hoofdstuk twee het theoretische juridische kader van het recht van de slachtoffers van de genocide tegen de Tutsi's op herstelbetalingen werd onderzocht door te kijken naar de ontwikkeling daarvan binnen het internationale strafrecht, werden in de hoofdstukken drie, vier en vijf de verschillende maatregelen geanalyseerd die de regering van Rwanda heeft genomen om de gevolgen van de genocide tegen de Tutsi's te adresseren.

Zoals besproken in hoofdstuk twee, is het recht van slachtoffers op herstelbetalingen weliswaar erkend, maar blijft de uitvoering van dit specifieke recht de grootste uitdaging. Dit wordt vooral duidelijk als we kijken naar de wijze waarop het begrip herstelbetalingen in het internationale strafrecht is ontwikkeld. Zoals in hoofdstuk twee is betoogd, hebben de ad-hoc tribunalen, d.w.z. het ICTY en het ICTR, de rechten van de slachtoffers grotendeels over het hoofd gezien, omdat zij alleen als getuigen werden beschouwd. Het feit dat deze ad-hoc tribunalen er niet voldoende in slaagden de rechten van de slachtoffers te beschermen, vormde echter wel een belangrijke stap in de richting van de erkenning van de rechten van slachtoffers op herstelbetalingen in het rechtskader van het ICC. Met name de artikelen 75 en 79 van het Statuut van het ICC vormen een onbetwistbare erkenning van het recht van slachtoffers op herstelbetalingen in het internationale strafrecht. Ondanks deze erkenning toon ik echter aan dat het nog steeds moeilijk is om het recht van slachtoffers op herstelbetalingen in geval van massale gruweldaden volledig af te dwingen.

Zoals in hoofdstuk twee is uiteengezet, behoort het ongedaan maken van de door de slachtoffers geleden schade op een wijze die de partijen terugbrengt tot de status quo ante, vanwege de bijzondere kenmerken van de schade die wordt veroorzaakt door internationale misdrijven - zoals die welke in Rwanda hebben plaatsgevonden - over het algemeen niet tot de mogelijkheden. De rechtsnormen voor schadeloosstelling die van de internationale mensenrechtenwetgeving zijn geërfd, waren niet bedoeld om het hoofd te bieden aan grote aantallen slachtoffers in conflictsituaties. Dit hoofdstuk besluit met de vaststelling dat het internationale strafrechtelijk systeem zijn grenzen heeft wat betreft de rechten van slachtoffers op herstelbetalingen.

In hoofdstuk drie wordt nagegaan hoe de regering van Rwanda is omgegaan met de vervolging van de daders van de genocide. Om te voorkomen dat de cultuur van straffeloosheid die de geschiedenis van de etnische conflicten in Rwanda had gekenmerkt en die tot de genocide tegen de Tutsi's in Rwanda in 1994 had geleid, zou blijven voortbestaan, koos de regering voor maximale individuele strafrechtelijke aansprakelijkheid. In het hoofdstuk wordt vastgesteld dat deze verantwoordingsplicht niet alleen de door de slachtoffers geleden schade erkent en bevestigt, maar ook de waarheid - in al haar facetten - over de genocide tegen de Tutsi's aan het licht laat komen en zo de weg vrijmaakt voor het helen van wonden. Het allerbelangrijkste is dat de daders van de genocide door middel van bekentenissen publiekelijk erkenden dat zij onrecht hadden gepleegd. Dit hoofdstuk heeft ook aangetoond dat - in tegenstelling tot het ICTR en de gewone rechtbanken in Rwanda - de Gacaca-rechtbanken de slachtoffers niet alleen de mogelijkheid boden samen te komen en de verhalen van hun eigen lijden en dat van hun familieleden te vertellen, maar de slachtoffers ook de kans boden daders te confronteren met hun daden. Zoals gerapporteerd door de overlevenden van de genocide (zie hoofdstuk 7), fungeerde het ter verantwoording roepen van de daders van de genocide als een soort eerste stap tot genezing en verzoening.

In hoofdstuk vier is vastgesteld dat de slachtoffers van de genocide tegen de Tutsi's, in tegenstelling tot de algemeen erkende rechten van de slachtoffers - zowel volgens het internationale recht als volgens het Rwandese recht - op toegang tot de rechtbank of gerechtelijke procedures die op passende en evenredige wijze de geleden schade kunnen aanpakken, geen toegang hebben gekregen tot de rechtbanken of tot enig ander mechanisme waarmee herstel kan worden geboden voor de schade die zij hebben geleden, afgezien van eigendomsschade. Zoals in dit hoofdstuk is besproken, zou het voldoen aan alle verwachtingen die aan het concept van herstelbetalingen zijn verbonden, budgettaire onmogelijkheden hebben opgeleverd en mogelijk schadelijk zijn geweest voor het streven van de regering naar verzoening. De verschuiving van de Rwandese regering van individuele gerechtelijke herstelbetalingen naar collectieve en administratieve herstelbetalingen kan dus enerzijds verklaard worden door het besef dat gerechtelijke herstelbetalingen in gevallen van massaal slachtofferschap ingewikkeld zijn, maar ook door het feit dat een groot aantal daders praktisch onvermogen waren en niet in staat waren hun slachtoffers geldelijke herstelbetalingen te geven. Anderzijds, en zelfs als de regering financieel in staat was geweest om in individuele herstelbetalingen te voorzien, was het risico groot dat haar streven naar verzoening zou worden ondermijnd, aangezien herstelbetalingen zouden zijn verstrekt aan de leden van de Tutsi-gemeenschap, terwijl de slachtoffers van de vermeende misdaden van de RPF geen herstelbetalingen zouden hebben ontvangen. Om dit potentiële risico te verkleinen en realistisch te blijven, zette de regering in op "niet-juridische, geldelijke" herstelmechanismen, zoals besproken in hoofdstuk vijf.

Naast de in hoofdstuk drie besproken maatregelen gericht op vervolging van de daders van de genocide, waarheidsvinding en openbaarmaking, en de in hoofdstuk vier besproken maatregelen voor schadeloosstelling of teruggave aan de slachtoffers, zijn in hoofdstuk vijf verschillende niet-geldelijke regeringsprogramma's, -projecten en -beleidsmaatregelen onderzocht die zijn opgezet om de erfenis van de genocide tegen de Tutsi's te verwerken, en is beoordeeld of zij daadwerkelijk het doel van genoegdoening in de zin van genoegdoening, garanties dat de slachtoffers niet opnieuw worden vervolgd en rehabilitatie hebben gediend.

Uit het vijfde hoofdstuk blijkt dat de Rwandese regering, vanwege de bijzondere kenmerken van de genocide tegen de Tutsi's en de kenmerken van de Rwandese samenleving na de genocide, verschillende maatregelen heeft gecombineerd - zoals herdenking, verbod op etnische identificatie, aanneming van ontkenningswetten en bevordering van eenheids- en verzoeningsbeleid - bij het omgaan met de erfenis van de genocide tegen de Tutsi's. De Rwandese regering is zich bewust van het feit dat de Tutsi's in het verleden het slachtoffer zijn geweest van de genocide.

De regering van Rwanda heeft niet alleen de herinnering aan de genocide tegen de Tutsi's levend gehouden door middel van gedenkplaatsen en nationale, regionale en internationale herdenkingen, maar heeft ook etniciteit - een bron van sociale en politieke verdeeldheid - geschrapt van de Rwandese identiteitskaarten en een aantal wettelijke hervormingen en

verschillende strategieën ten uitvoer gelegd om de randvoorwaarden aan te pakken die de genocide tegen de Tutsi's hebben veroorzaakt. In het besef dat sommige slachtoffers van de genocide tegen de Tutsi's armer zijn achtergebleven dan vóór de genocide, is het sociale welzijn van de meest behoeftige overlevenden van de genocide tegen de Tutsi's verbeterd door positieve acties van de FARG. De FARG heeft de overlevenden van de genocide mondiger gemaakt en bijgedragen tot hun sociaaleconomische ontwikkeling. Er werd echter opgemerkt dat, hoewel de via de FARG verleende hulp aan de meest behoeftige overlevenden van de genocide tegen de Tutsi's meer filantropisch van aard is en niet noodzakelijkerwijs een individueel recht met zich meebrengt, deze hulp toch gekoppeld is aan de status van slachtoffer van de genocide en dat het rehabilitatie-effect ervan dus niet over het hoofd mag worden gezien. In dit hoofdstuk werd geconcludeerd - en dit werd bevestigd door mijn empirische onderzoeksbevindingen - dat herdenking een belangrijke symbolische waarde heeft en een essentieel onderdeel vormt van de genoegdoening van de slachtoffers. Het opheffen van etnische tegenstellingen, het aannemen van wetten tegen ontkenning en het bevorderen van eenheid en verzoening onder Rwandezen worden beschouwd als de beste garantie dat etnische conflicten zich niet herhalen. Al deze maatregelen hebben het land tot dusver gestabiliseerd en het risico van soortgelijke schendingen aanzienlijk beperkt.

In deel II - dat uit de hoofdstukken zes, zeven en acht bestaat - worden de bevindingen besproken van het empirisch onderzoek naar de perceptie en de ervaringen van de slachtoffers van de genocide tegen de Tutsi's. Zoals in de hoofdstukken zeven en acht werd opgemerkt, zijn de overlevenden van de genocide tegen de Tutsi's weliswaar van mening dat genoegdoening nog op zich laat wachten, maar toonden zij zich niettemin dankbaar voor de inspanningen van de regering om iets te doen aan de schade die zij hebben geleden.

Ter inleiding van deel II wordt in hoofdstuk zes uiteengezet hoe het veldonderzoek in Rwanda is uitgevoerd, hoe de respondenten-overlevenden zijn geïdentificeerd en hoe hun verklaringen zijn gebruikt. Daarna werd in hoofdstuk zeven inzicht gegeven in hoe de overlevenden van de genocide gerechtigheid hebben ervaren door waarheidsvinding en het ter verantwoording roepen van de daders, en in hoe het Gacaca-proces hen heeft geholpen om de wonden van de genocide tegen de Tutsi's te helen. De slachtoffers waardeerden het besluit van de regering om de verantwoordelijken voor hun leed te vervolgen, omdat daarmee een einde kwam aan een lange periode van ontmenselijking die zij sinds de Hutu-revolutie van 1959 hadden ondergaan. Het ter verantwoording roepen van de daders van de genocide werd door de geïnterviewde overlevenden gezien als een erkenning van de onrechtmatige daden die tegen hen waren begaan en een erkenning van de pijn en verliezen die zij hadden geleden. Zij meldden allen dat het Gacaca-systeem, dat het merendeel van de genocidezaken behandelde, een stem gaf aan de woede, boosheid en haat die hen van binnenuit hadden verteerd en hen in staat stelde om anders onbereikbare informatie over hun familieleden en bezittingen te verkrijgen.

Hoofdstuk acht behandelde de perceptie van de slachtoffers van de herstelmaatregelen die hun ter beschikking zijn gesteld en het effect daarvan op de verzoening. Uit de verklaringen van de overlevenden in dit laatste hoofdstuk blijkt niet alleen een algemeen gevoel van dankbaarheid jegens de inspanningen van de regering om de gevolgen van de genocide tegen de Tutsi's aan te pakken, maar ook een zeker gevoel van spijt, omdat zij allen van mening zijn dat de geleden schade slechts gedeeltelijk is erkend en aangepakt. Interessant is dat zij weliswaar het gevoel hebben dat de geleden schade nog niet volledig is aangepakt, maar dat dit gevoel verzoening niet in de weg staat, omdat verzoening door vergeving een beslissing is die zij voor hun eigen bestwil hebben genomen, namelijk om 'vrede in hun hart' te krijgen. Het hebben van "vrede in hun hart" stelde hen in staat verder te gaan dan hun slachtofferschap en nieuwe relaties aan te knopen met de daders en/of hun familie.

Hoofdstuk 9 besloot met te benadrukken dat een positief of negatief antwoord op de vraag of de slachtoffers van de genocide tegen de Tutsi's hun recht op herstelbetalingen volledig hebben verwezenlijkt, voorbij zou gaan aan het feit dat het concept van herstelbetalingen zoals dat in het internationaal recht is ontwikkeld en in dit onderzoek is besproken, overladen is met verwachtingen die moeilijk te verwezenlijken en tot op zekere hoogte onmogelijk te realiseren zijn in een post-conflictmaatschappij als Rwanda.

Nu deze conclusie is getrokken, moet echter worden erkend dat, met uitzondering van individuele compensatie voor geleden morele en lichamelijke schade, de maatregelen die de regering van Rwanda heeft getroffen om de gevolgen van de genocide tegen de Tutsi's aan te pakken, passen binnen de reikwijdte van de maatregelen van teruggave, rehabilitatie en genoegdoening, zoals bepaald in het internationale recht. Het belangrijkste is dat de Rwandese ervaring ons leert dat er niet één maat is voor alle samenlevingen na een conflict, en dat de herstelmaatregelen dus moeten worden ontworpen in antwoord op context specifieke maatschappelijke behoeften.

ABOUT THE AUTHOR

University lecturer at the University of Rwanda since 2007 and member of the Rwanda Bar Association and the East African Law Society (EALS) since 2009, Yves SEZIRAHIGA studied law at the National University of Rwanda (LL.B, 2005). He did his LL.M in International law of Human Rights and Criminal Justice at Utrecht University and graduated *Cum laude* with a specialization in International Criminal Justice in 2010. In April 2016 he started his Ph.D. research on the Right of Victims of International Crimes to Reparations in the Aftermath of the 1994 Genocide against the Tutsi in Rwanda.

Before he started his Ph.D. research at the Faculty of Law, Department of criminal law and criminology of the University of Groningen he served as the Exams Coordinator of the School of Law of the University of Rwanda. From February 2020 he got appointed as the Head of the department in charge of students' industrial attachment in the School of Law.

In addition to his Ph.D. fields of research, he has a particular interest in Judicial Law, Constitutional Law, Alternative Dispute Resolution, and Criminology.

Appendix A: Interview Guide

Thank you so much for agreeing to speak with me. Before we start, I'll give you a little background of my research and the reasons of this interview.

In response to the consequences of the genocide against the Tutsi, the government of Rwanda combined perpetrators accountability with other various measures – such as memorialization, outlawing ethnic identification, adopting anti-denial laws and promoting unity and reconciliation policies.

In order to assess whether these measures lived up to the expectations of the genocide survivors, I decided to carry out interviews with the survivors (victims) of the genocide against the Tutsi in Rwanda.

It is in this context that this interview seeks to hear from the survivors (victims) of the genocide against the Tutsi. It aims at collecting the victims' perceptions of the reparation measures made available to them by the government of Rwanda.

I would like to remind you that this interview is completely voluntary. Also, if you do not want to answer any questions, that is fine. You are free to end the interview at any moment.

Throughout the interview, I will take some notes in my notebook and this interview will last only one hour.

Thank you. Do you have any questions before we begin?

Let us start!

My questions today will mostly focus on your personal experience with the reparation of the harm you suffered due to the genocide against the Tutsi of 1994 and on your perception of justice rendered to you.

Before talking about those, I have a few questions about your life before April 1994.

I. Questions on the victim's situation before and During 1994

1. To start with, could you give me a little information about yourself?
 - **Probes:** Age, marital status, household members before April 1994.
2. Please tell me briefly about your life in the years before 1994?
 - **Probes:** Tell me about your family life? Your level of education? Your occupation?
 - Tell me about your childhood...to the best of your memory, how was it like growing up?; how was your home...as much as you can remember? (*this question is mostly for those who were minors during the genocide against the Tutsi*).
3. Are you comfortable telling me a little bit about what happened to you and/or to your family in what is known as the genocide against the Tutsi?

II. Questions about the victim's life after the Genocide

4. How did your life change in the aftermath of the genocide against the Tutsi?
5. Please tell me how the genocide against the Tutsi affected you?
 - **Probes:** What types of harm have you experienced because of the genocide against the Tutsi?
6. When the genocide against the Tutsi ended, what did you expect to be done to address the harms caused to you?
7. What do you know about the measures taken by the government to address the consequences of the genocide against the Tutsi?
8. What do you know about Gacaca?
 - **Probes:** How did you experience the Gacaca proceedings?
9. Tell me about your life after the closure of the Gacaca trials.
10. What do you know of the reparation mechanisms made available to the victims of the genocide against the Tutsi.
 - **Probes:** Did you claim reparations?
 - If yes, tell me about the outcome of your reparation claim experience?
 - If no, Why?
11. Compared to the harm you suffered, to what extent were you satisfied with the reparation award issued to you?

12. In general, to what extent have you been satisfied by the reparation mechanisms made available by the government?

- **Probes:** Briefly and generally, what do you feel about the justice done to you?

13. What do you think could be the appropriate reparation to the harm you suffered?

I. Questions about the preservation of the genocide against the Tutsi memory

The memorialisation of the genocide against the Tutsi is mainly based on commemoration periods and memorial sites.

14. Tell me about the commemoration of the genocide against the Tutsi in your community?

15. Tell me about your loved ones lost during the genocide against the Tutsi?

- **Probes:** How is life without them?

16. What do the memorialisation of the genocide against the Tutsi represent to you?

II. Questions about Reconciliation

One of the Rwandan policy to deal with the consequences of the genocide against the Tutsi is the promotion of reconciliation.

17. What do you think about reconciliation among Rwandan?

18. How do you live with the families of those who killed your family members?

- **Probes:** Did those who killed your family member(s) asked you pardon?

19. What do you think are the key measures that allowed you to live in vicinity with the families of those who killed the member(s) of your family?

III. Questions about the *Fonds National pour l'Assistance aux Rescapés du Génocide* (FARG) and its impact to survivors life after the genocide

Recognizing its political responsibility, the government of Rwanda established in 1998 the Fonds National pour l'Assistance aux Rescapés du Génocide (FARG) to provide assistance to neediest survivor of the Genocide against the Tutsi.

20. What do you know about FARG?

21. Did you benefit from FARG support?

- If yes. How and when?
- If no. Can you please explain why?

22. What type of assistance did FARG provide to you?

23. Do you think that assistance provided to you (and/or to other survivors) by FARG could replace the reparation due to you?
24. Do you feel that the creation of a victim compensation fund would have been useful to you?

IV. Questions about the victim reparations after the closure of the Gacaca courts

The Gacaca courts issued the reparation for looted properties only and other forms of harm suffered by the victims were to be addressed by a specific law on compensation but 22 years after the first promise of a Victim Compensation Fund (VCF) and six years after the closure of the Gacaca proceedings, harms suffered other than looted property have not yet been addressed.

25. Are you optimistic about future regulation of the reparation of other forms of harm suffered?
26. How do you feel about the current silence on the reparation of the harm suffered by the victims of the genocide against the Tutsi?
27. Is there anything else about your experience with the reparation that I have not asked about or anything else that you would like to say?