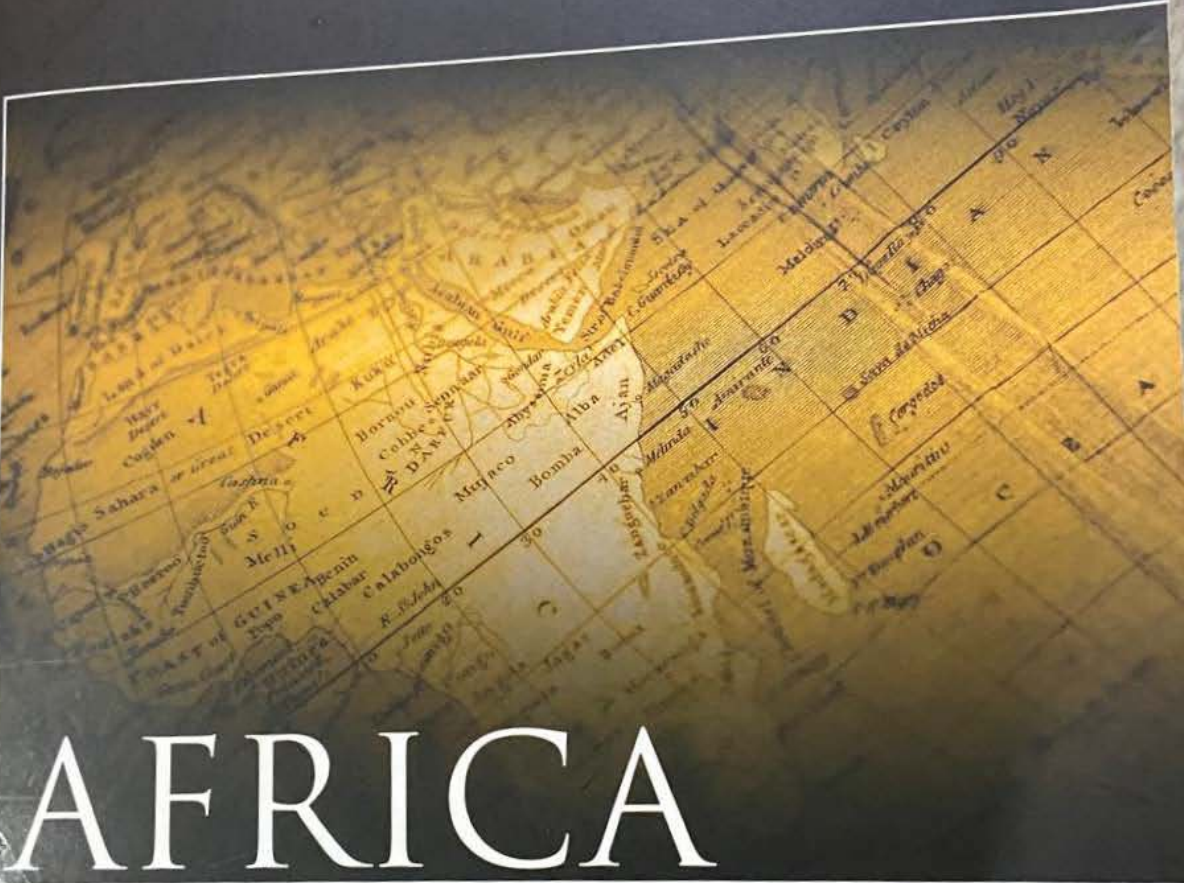


PUBLIC

Annex B

edited by

JEREMY I LEVITT



AFRICA

*Mapping New Boundaries
in International Law*

STUDIES IN INTERNATIONAL LAW

2

Customary African Approaches to the Development of International Criminal Law

PACIFIQUE MANIRAKIZA

I. INTRODUCTION

CRIME IS A phenomenon inherent to each community, and each community adopts mechanisms to prevent and, if necessary, suppress crime. Some communities, however, are unable to stop its downward spiral; hence there has been an unfortunate increase in the number of grotesque international crimes committed in weak states including genocide, crimes against humanity and war crimes.¹ Societies confronted with such massive atrocities often find it difficult to tackle the issues and pull themselves out of these crises. The international community therefore intervenes, offering to help them engage in peace and national reconciliation processes. In most cases, the international community initiates or ensures the mediation of peace negotiations. At the same time, it supports state criminal justice systems or sometimes participates in the implementation of judicial mechanisms aimed at bringing to justice those individuals who bear the greatest responsibility for committing serious crimes; thereby ending impunity.² State or international criminal justice systems based on individual responsibility, however, do not address or curb the most serious crimes nor provide an

¹ This was the case in Rwanda, former Yugoslavia, Sierra Leone, Burundi, Colombia, etc.

² See, for example, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) (the ICTY Statute was adopted on 25 May 1993 by the UN Security Council acting under Chapter VII of the Charter of the United Nations, Doc S/RES/827 (1993)); the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for other such violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994 (ICTR) (the ICTR Statute was adopted on 8 November 1994 by the UN Security Council acting under Chapter VII of the Charter of the United Nations, Doc S/RES/955 (1994)).

approach to avoiding them in the future. Moreover, international criminal mechanisms are often very costly³—since they operate at a distance far away from the victims and communities affected by international crimes. In view of the inaccessibility of international criminal justice and the inefficiency of state judicial apparatuses, their true contribution to the national reconciliation process is limited. This justifies, therefore, the search for new mechanisms ensuring a justice that is more transparent and that has a broader impact.⁴

This chapter aims to examine African approaches to contending with serious violations of international humanitarian law and human rights law in post-conflict environments. It will evaluate their merit in the struggle against impunity and the development of international criminal law by briefly highlighting the workings of the International Criminal and Reconciliation Commission and more fully scrutinising the traditional justice system in Rwanda.

II. TRANSITIONAL JUSTICE MODELS: SOUTH AFRICA AND RWANDA

Rwanda and South Africa have gone through exceptionally challenging times. As genocide devastated Rwanda, a tiny and impoverished African country, in 1994, South Africa was emerging from the throes of the apartheid system. Both countries had to draw from the throes of their respective cultures to confront these human tragedies. South Africa adopted a form of accountability, both collective and individual, through the Truth and Reconciliation Commission, while Rwanda invested the traditional judicial institutions with the power to prosecute those most responsible for committing serious international crimes.

A. The South African Truth and Reconciliation Commission

For several decades, the political and legal system in place in South Africa was oppressive and justified the systematic suppression of human rights of black South Africans and other ethnic minorities living in the country. In the 1990s, following the liberation and election of Nelson Mandela as President, the African National Congress and other political stakeholders

UN Doc S/RES/955 (1994)); Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, in *Report on the Planning Mission on the Establishment of the Special Court for Sierra Leone*, UN Doc S/2002/246, 8 March 2002, Annex II.

³ For example, the ICTR costs from 1995 to the end of 2007 are estimated at 1,032,692,000 US dollars; see Fondation Hirondelle, 'Cost of the ICTR to Reach One Billion USD by the End of 2007', 9 May 2006.

⁴ 'Justice must not only be done but it should be seen to be done.'

instituted a national reconciliation process, headed by the Truth and Reconciliation Commission (TRC), under the leadership of Archbishop Desmond Tutu.⁵ The Commission presented itself as a non-judicial alternative seeking new bases of cohabitation and social harmony. Indeed, in a society confronted with massive and complex conflict leading to serious violations of universal values and serious social upheavals, the sole resort to classical mechanisms, such as criminal justice, would be of little assistance to correct the situation.⁶ In South Africa, what was necessary was a body that could provide a neutral and impartial historical account of the atrocities committed during apartheid,⁷ contribute to the fight against impunity, hear the complaints of victims and attempt to resolve them—in part or in whole, whenever possible—and, finally, formulate recommendations regarding appropriate measures to prevent further atrocities of the same sort.⁸ Victims would then meet their offenders in a non-confrontational context, and could relate their suffering to a compassionate audience. Noticeably, hearings began with prayers and were punctuated with emotional and tearful moments, from victims as well as the President and other members of the Commission. As Archbishop Tutu now affirms, with some hindsight, the Commission was a 'forum where victims of the most egregious violence were given not just a national, but an international stage to tell of their experiences under the apartheid regime'.⁹

The South African Commission was not only interested in individuals but in state institutions, or civil society, as well. It sought to determine their respective responsibility in anchoring this system of serious and systematic human rights violations. The TRC therefore examined violations from a broader perspective, taking into consideration the whole historical, social, cultural and political picture, since this in fact is the context ensuring the proper environment and conditions for the perpetration of crime.¹⁰ Without this situational framework, it is practically impossible to

⁵ The TRC was established pursuant to the Promotion of National Unity and Reconciliation Act, No 34 of 1995.

⁶ For Snyder and Vinjamuri, 'trials do little to deter further violence and are not highly correlated with the consolidation of peaceful democracy'; see Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2003-04) 28(3) *International Security* at 17. For Professor Scharf, 'criminal prosecutions ... which by their nature focus on individual liability, ... fail to tell the whole story of abuses'; see Michael P. Scharf, 'The Case for a Permanent International Truth Commission' (1997) 7 *Duke Journal of Comparative & International Law* 375 at 400.

⁷ TRCs differ from the Commissions of historians: a TRC establishes the facts without consideration or interpretation; historians analyse and interpret the facts. That is why their truth is neither neutral nor transparent.

⁸ Scharf, note 6 above, at 379.

⁹ Desmond M. Tutu, 'Reflections on Moral Accountability' (2007) 1 *The International Journal of Transitional Justice*, vol 6 at 6.

¹⁰ Martti Koskeniemi, 'Between Impunity and Show Trials', *Guest Lecture Series of the Office of the Prosecutor*, The Hague, ICC, 5 August 2004, at 12-13.

38 *Pacifique Manirakiza*

grasp the truth fully and truly render justice to victims. The Commission therefore chose to confront the South African people and their institutions with their past, to draw lessons therefrom outside of the formal judicial framework, which at any rate was judged inadequate to understand the full breadth of the problem and to find appropriate solutions. The results were good, as stated by the TRC President recently: 'South Africa today stands as a model of merciful justice; of what can be achieved when enemies choose dialogue over violence.'¹¹

B. *Gacaca* Courts and the Prosecution of International Crimes

There exists in Rwanda a traditional forum—*Gacaca*—where internal conflicts between family and community members are resolved with the aim of maintaining the cohesiveness and social harmony essential for the smooth functioning of all human communities. The elders of the hill, commonly called *Inyangamugayo*,¹² either of their own initiative or following a complaint, summon the wrongdoer and the victim of wrongdoing in order to settle the issue amicably. Originally, the *Gacaca* court had jurisdiction to hear local disputes over lands, pastures, family or contracts issues,¹³ in short, to hear civil and criminal affairs of lesser importance, which were not complex in nature.¹⁴ It should be pointed out, however, that criminal issues under modern law were treated as civil affairs.¹⁵ Remedies owed to the victim by the guilty party are in kind or equivalent nature, but where a remedy is impossible, the victim is asked to forgive the wrongdoer. Moreover, the wrongdoer is generally required to pay a fine, often consisting of jugs of beer. To celebrate the recovered social peace, all members of the community, including the wrongdoer, his or her family, the *Inyangamugayo* judges, the victim and his or her relatives, share this beer.

Important criminal affairs were decided by customary tribunals under the jurisdiction of the *Mwami* (the King) or his subordinates, the *Abagamba*

Customary African Approaches to International Criminal Law 39

(the princes). When customary jurisdictions were abolished to implement modern written law in the context of a reform introduced by the Belgian administration in 1948,¹⁶ the *Gacaca* retained its jurisdiction over civil affairs, but criminal affairs were attributed to township tribunals. The *Gacaca* therefore is not a tribunal per se, but rather a conciliatory dispute resolution forum. This was confirmed by the Lawyers Committee on Human Rights in one of its reports on Rwanda: 'A traditional system of justice known as *Gacaca* covers land disputes, family matters and small commercial disagreements; its purpose is to resolve problems while promoting reconciliation.'¹⁷ According to Rusagara, the *Gacaca* 'is a conflict management strategy by means of restorative justice, and plays a historical role in facilitating unity and cohesiveness in society'.¹⁸

However, in 2001, the Rwanda legislator decided to create a new version of *Gacaca* jurisdictions, with power to prosecute the most serious crimes committed in Rwanda between 1 October 1990 and 31 December 1994.¹⁹ The institution of the *Gacaca* tribunals and their involvement in the control of international crimes satisfy the Rwanda government's concern, on the one hand, to speed up proceedings in respect of the crime of genocide and international crimes and unclog overpopulated prisons and, on the other hand, to ensure the population's participation in the administration of justice.

i. *Unclogging of the Classic Justice System and Acceleration of Judicial Proceedings*

When judicial proceedings of cases arising from the atrocities first started in Rwanda in 1994, prisons were overcrowded. In 1995, there were 61,210 detainees.²⁰ By the end of 1996, the number had escalated

¹⁶ The organisation of ordinary courts was dictated by a decree of 5 July 1948, see *Bulletin Officiel*, 1948, at 856.

¹⁷ Lawyers Committee for Human Rights, *Prosecuting Genocide in Rwanda: the ICTR and national trials*, July 1997.

¹⁸ Frank K Rusagara, 'Gacaca as a Reconciliation and Nation-building Strategy in Post-genocide Rwanda' (2005) 2 *Conflict Trends Magazine* 20 at 20 <<http://www.accord.org.za/ct/2005-2FR.htm>>.

¹⁹ Organic Law No 40/2000 of 26/01/2001 setting up 'Gacaca Jurisdictions' and organising prosecutions offences constituting the crime of genocide or crimes against humanity, committed between October 1, 1990 and December 31, 1994, see JORR No 14 of 15 July 2001 at 15. This Law has been amended several times; the latest version dates back to March 2007: see Organic Law modifying and complementing Organic Law No 16/2004 of 19/06/2004 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 October 1, 1990 and December 31, 1994, in JO No 5, 1 March 2007.

²⁰ 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, UN Doc E/CN.4/1996/68, 29 January 1996, para 89, at 27.

¹¹ Tutu, n 9 above, at 7.

¹² *Inyangamugayo* means people who repel dishonour. Literally translated, it refers to people of integrity and honesty (author's translation).

¹³ Charles de Lespinay, *Valeurs traditionnelles, justice de proximité et institutions (Rwanda et Burundi)*, online: <<http://droit.Francophonie.org/acct/rfj/actu/11Lepin.htm>>. See also Jean Bosco Iyakaremye, 'Les juridictions "Gacaca" ou un pis-aller à l'insoluble problématique de la répression du génocide au Rwanda' (2003) 1(3) *Le courrier juridique* 1 at 2-3.

¹⁴ Professor Ntampaka maintains that 'traditional laws do not distinguish between public and private law or between criminal and civil law'; see Charles Ntampaka, 'Le gacaca: une juridiction pénale populaire', online: <<http://droit.Francophonie.org/acct/rfj/actu/11Lepin.htm>>.

¹⁵ Felip Reyntjens, 'Le gacaca ou la justice du gazon au Rwanda' (1990) 40 *Revue politique africaine* 31, 'Le droit et ses pratiques' at 36.

40 *Pacifique Manirakiza*

to 120,000²¹ and went up to 150,440 in 1999. Of this number, 135,000 (or 89.7%) of detainees were accused of genocide. In 2001, the number of detainees was estimated at more or less 150,000,²⁴ depending on the sources, while Rwandan prisons could only accommodate 18,000 detainees.²⁵ The Rwandan population was estimated at approximately 6 million in 2001, meaning that for every 40 persons, one was incarcerated.

The classic justice system made it simply impossible to deal with many cases within a reasonable time. The government therefore had to turn to *Gacaca* courts, as stated below in the summary of motives for law on the *Gacaca* courts:

The strategy and the efforts the government and the legal institutions made to improve and accelerate the pre-trial investigation and trial of cases to produce results that met the specific needs for justice caused by the number of genocide cases in addition to the usual common law litigation marked slowness and delay in trying these threatened to impede the undertaken to reconcile Rwandans. Consequently, it then seemed necessary to re-examine the difficulties that impeded trying these cases.²⁶

ii. *Community Participation in the Administration of Justice*

In addition to unclogging overcrowded prisons and accelerating judicial proceedings, the *Gacaca* courts that were instituted served two purposes: national reconciliation through active involvement in the judicial process of people who had witnessed the events, and participation of the Rwandan population in the disposal of claims arising out of the Rwandan genocide. This is also reflected in the summary of motives for the law:

²¹ F Nzirabatinyi, 'Prosecuting Crimes: Preventive Detention versus the Presumption of Innocence: Contradiction or Complementarity?' (author's translation—original in French) *Le Verdict*, No 2, 15 March 1999, at 19.

²² Félicien Kamashabi, 'Genocide Trials Progress' (author's translation—original in French) in *Le Verdict*, No 15, 15 March 1999, at 3.

²³ Ligue rwandaise pour la promotion et la défense des droits de l'homme (LIPRODHOR), *Evidence Administration in Genocide Trials: Is the Imminent Creation of Gacaca Courts a Precondition for the Prosecution of Genocide Trials?* (Kigali, Information and Documentation Centre on Genocide Trials, June 2000) [LIPRODHOR Report] at 50.

²⁴ Rally for the Return of Refugees and Democracy in Rwanda (RDR), Press release 03/2000, 25 September 2000; see also Claudien Ndobahariye, *Gacaca Courts, a Reconciliation Division Tool?* (author's translation—original in French), <http://mitglied.lycos.de/ED/nouvelles/juridictions_gacaca.html>.

²⁵ Amnesty International, *Gacaca: A question of justice*, Index AFR 47/007/02 (London, November 2002), AI [AI Report AFR 47/007/02] at 9.

²⁶ Organic Law No 8/96 of 30 August 1996 organising prosecutions of the crime of genocide or other crimes against humanity, committed from October 1, 1990, see JORH No 11, September 1996.

Customary African Approaches to International Criminal Law 41

The establishment of such a legal system is justified by the fact that offences that constitute the crime of genocide or crimes against humanity were committed publicly in full view of the population. This nondissimulation resulted from the fact that the public authorities, whose role is to plot the course for the population to follow, themselves incited the population to commit crimes in order to generalize participation in them and thus be able to leave no survivors. This inspired the population, manipulated by the politicians, not even to attempt to conceal its criminal actions, since it was confident it was following the path indicated by the very persons who should have apprehended the population. For that reason, it is essential that all Rwandans participate on the ground level in producing evidence, categorizing the perpetrators of the offences by taking into consideration the role they played, and establishing their punishments without applying the classic system of repression of offences, but instead, re-establishing peace and the return of citizens who were manipulated to commit crimes to the right path. As a result, the population who witnesses the atrocities committed shall achieve justice both for the victims and the persons suspected of being perpetrators of offences, a justice based on evidence and not passion. This justice shall be implemented within the framework of the *Gacaca* jurisdictions, meeting at the cell, sector, commune, and prefecture level and composed of honourable persons appointed by their neighbours.

Indeed, since these most serious violations were committed publicly, the population must relate the facts, reveal the truth, and participate in the prosecution and judgment of presumed culprits.²⁷ This participatory form of justice²⁸ gives the people a voice in the characterisation and suppression of genocide and associated crimes.²⁹ It is a means of deterring the criminality anchored in Rwanda's society.³⁰

In an interview given to the bimonthly *Le Verdict* in August 2000, President Kagame again justified the project, confident in its efficiency:

The role of the new *Gacaca* jurisdictions will be to decide cases of genocide taking into account the level of responsibility. This popular form of justice is especially well suited given that the genocide was committed in full sight of the population and everywhere in the country. People can more easily testify if trials are held in villages rather than in courthouses. This procedure can only hasten the reconciliation process.³¹

Contrary to the South African model, the *Gacaca* model is a formal justice system with a broad involvement of the local population.

²⁷ Law 40/2000, n 19 above, Preamble.

²⁸ Interview with Justice Minister, M Jean de Dieu Mucyo, in *Le Verdict*, No 15, 15 March 1999, at 7.

²⁹ *Le Verdict*, No 15, 15 March 1999, at 17.

³⁰ LIPRODHOR Report, n 23 above, at 51.

³¹ *Le Verdict*, No 17, August 2000 (author's translation—original in French).

iii. *Implication of Involving Traditional Courts in the Prosecution of International Crimes and its Legality in International Law*

Given the recognised judicial role of traditional Gacaca courts in the specific field of international criminal law, the question arises whether international law can, in some way, provide a legal basis for the intervention of traditional or local institutions in the prosecution of international crimes. In my view, the answer is yes. Indeed, states are habilitated and even obliged by international law conventions to prosecute justice individuals suspected of committing the most serious international crimes. For example, on the issue of war crimes, the Geneva Conventions provide:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a 'prima facie' case.³²

With respect to the crime of genocide, Article VI of the Genocide Convention states that: 'Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed.'³³ Similarly, the Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity stipulate that 'Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be

³² Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, UNTS, 1950, No 970 at 32, Art 49; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, UNTS, 1950, No 971 at 86, Art. 50; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, UNTS, 1950, No 972 at 136, Art. 129; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, UNTS, 1950, No 973 at 288, Art 146; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, UNTS, 1979, No 17512 at 271, Art. 85. These international humanitarian law instruments can be found online on the ICRC website at <<http://www.icrc.org/ihl>>.

³³ Convention on the Prevention and Punishment of the Crime of Genocide (agreed and proposed for signature and ratification or accession by General Assembly Resolution 260 A (III) of 9 December 1948, entry into force 12 January 1951, in accordance with Article XIII), Art VI.

subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes.'³⁴

Although the aforementioned principles are not per se legally binding on states, Belgian³⁵ and French³⁶ courts recognise their imperative nature based on the normative formulation ('must') of section 1 of Resolution 3074 (XXVIII) establishing the practice for states willing to comply with what amounts to a legal rule.³⁷ This jurisprudence therefore confirms the positive evolution of the law by recognising the customary character of this Resolution, thereby, arguably, creating an obligation for all states.³⁸

Furthermore, the Rome Statute establishing the International Criminal Court (ICC) grants states judicial priority in the prosecution of crimes it prohibits, according to the fundamental principle of complementarity of the ICC to state courts.³⁹

These international instruments clearly indicate that state courts have solid judicial foundation in international law for the suppression of international crimes.⁴⁰ Moreover, it should be noted that international law does not create distinctions in the judicial hierarchy of a given state: that is, it does not favour modern states' tribunals over traditional or community tribunals—where the latter exist—or vice versa. It rather encourages

³⁴ Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, 3 December 1973, UN Doc A/RES 3074 (XXVIII), principle 5.

³⁵ Justice Vandermeersch considers that 'there exists a customary rule or even a *ius cogens* rule that recognises universal jurisdiction allowing national authorities to prosecute and try, in any case, persons suspected of having committed crimes against humanity' (author's translation—original in French); see Tribunal de première instance (Bruxelles), Instruction Judge's Office, Order No 216/98, (1999) 2 *Rev de dr pén et de crim* 286 at 288.

³⁶ See Javor *et al*, case as summarised in M Sassoli and AA Bouvier, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (Geneva, ICRC, 1999) at 1252. In this case, Justice Gatti holds: 'Contrary to the prosecution position, Principles of international co-operation in the detection and punishment of persons guilty of war crimes are binding and have a Convention effect' (author's translation—original in French).

³⁷ Order No 216/98, n 35 above, at 288.

³⁸ It should be noted that this jurisprudence on the binding force of this Resolution may find a solid foundation in the ICJ Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*. In this Advisory Opinion, the Court notes:

General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.

See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, at para 70.

³⁹ ICC Statute, Art 1.

⁴⁰ State courts should base their jurisdiction on the territoriality principle. As C Beccaria, a proponent of territoriality, suggests: 'the place of punishment should necessarily be where the crime was committed, since it is there, and not elsewhere, where a duty to prosecute

state-wide action to ensure that war criminals do not enjoy impunity. Consequently, it is my view that the implication of community and traditional jurisdictions in the suppression of international crimes and traditional law, in principle at least. The question therefore arises: 'What role, if any, should traditional or community justice mechanisms play in the prosecution of international crimes?' I will address this question in the sections that follow.

III. ADVANTAGES AND DISADVANTAGES OF RESORTING TO TRADITIONAL JUSTICE MECHANISMS IN THE FIGHT AGAINST INTERNATIONAL CRIMES

A. Advantages of Traditional Justice Mechanisms

The utilisation of traditional justice mechanisms to combat impunity has several advantages for states emerging out of conflict. The use of traditional justice mechanisms in the suppression of heinous crimes is beneficial to all stakeholders and interested parties, including the international community. This system is attractive because of its proximity to the population, its ability to accommodate or allow victims to actively participate, its sensitivity to socio-cultural factors, and its inherent protection of community interests, since such mechanisms typically complement national and international efforts to prosecute those responsible for egregious international crimes.

i. Proximity Justice

Traditional structures, where they exist and still function, are advantageous because proceedings are held in proximity of the victims and the location where crimes were perpetrated. The accused are tried in their own milieu by judges to whom they are accustomed and who are familiar with their language and culture. Victims are not required to move elsewhere to relive their pain in a setting that may be uncompassionate⁴¹ or to participate in unexpected and often invasive proceedings.⁴² Justice is therefore rendered in proximity to the parties to the proceedings and is very accessible in all respects. The impact or deterring effect of judgments rendered by citizen-judges is greater. This compares advantageously

exists in order to defend public order' (author's translation—original in French: see C. Beccaria, *Des délits et des peines* (Geneva, Droz, 1965) ch. XXIX at 55.

⁴¹ ICTR judges laughed during the rigorous cross-examination of a prosecution witness who was a rape victim.

⁴² In international proceedings, for example, victims appearing as prosecution witnesses are cross-examined by defence counsel; however, it is debatable whether or not cross-examination, although it is a legal and relevant tool, is appropriate when dealing with people who are genocide survivors or victims.

to international tribunals sitting far away from both the actual location where the crimes were committed and the principal interested parties and stakeholders reside.⁴³

Moreover, parties to the proceedings are familiar with the system headed by citizen-judges who, in fact, are their 'natural' judges. Traditionally these judges are tribal chiefs, ethnic or religious leaders, or elders of a certain age who know the customs of their community and have significant experience in dispute settlement. At present, because the control and moral authority of traditional leaders is being supplanted by state authority and due to a lack of judicial infrastructure, citizen-judges are generally local elected officials.⁴⁴

ii. Cultural Sensitivity of Citizen-judges

The proximity of local structures implies both a factual knowledge and cultural sensitivity often absent in the context of international criminal proceedings. The lack of sensitivity on the part of international judges impacts negatively on the receptivity of their decisions and tarnishes the reputation of the international judicial system. It should be noted that experts and politicians usually welcome international decisions with greater enthusiasm than populations directly affected by the conflicts.⁴⁵

Serious crimes are often committed in a particular social, historical, political, and cultural context that present subtleties frequently not obvious to foreigners.⁴⁶ In my opinion, all attempts at social recovery that do not consider these factors are likely to fail. This is why traditional mechanisms constitute a more appropriate forum for the settlement of claims related to genocide, war crimes or crimes against humanity. The decisions they render are expected to have a positive impact on the peace and reconciliation process, a factor at present largely neglected in the sentencing process by international tribunals.

iii. Expeditionness of Proceedings

In addition to proximity and socio-cultural sensitivity factors of traditional and community justice mechanisms, it is important to highlight

⁴³ Chandra Lekha Sriram, 'Universal Jurisdiction: Problems and Prospects of Externalizing Justice', (2001) 12 *Finnish Yearbook of International Law* at 47–70.

⁴⁴ This is the case in Uganda, Rwanda and several other African countries.

⁴⁵ In Sierra Leone, the population strongly criticised the decision to arrest and prosecute Mr Hinga Norman, who created and organised the Civil Defence Force (CDF) in order to protect the population from the brutal atrocities of Foday Sankoh's Revolutionary United Front.

⁴⁶ In the *Akayesu* case, the ICTR emphasised the difficulties in understanding Rwandan language and culture, through which witnesses and accused persons explain themselves; see *The Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, at 155–6 (ICTR, Chamber I).

46 *Pacifique Mantrakiza*

that proceedings held before local justice institutions are dealt with swiftly. In general, depending on the seriousness of the case, a verdict is rendered within a day or two. Proceedings are rapid because they are greatly simplified. There are neither adversarial debates nor lawyers attaching extreme importance to rules of procedures, which normally will slow down proceedings. Rules of evidence are also simplified because facts are more or less well known by the majority of people since they were present at the time the crimes were committed.⁴⁷ As in other restorative justice mechanisms, little time is spent in establishing facts and guilt. The main focus is on sentencing.⁴⁸

The procedural expeditiousness is a definite plus for the future of the society—disputed claims are dealt with in a matter of days and to the advantage of all stakeholders: the accused, victims and the community as a whole. Horrible pages of history are turned rapidly, allowing the community to focus on reconstruction and development. The importance of this procedural expeditiousness comes out clearly in light of the slow progress in international criminal justice, where it is commonplace for an international proceeding to go on for more than five years.⁴⁹ This constitutes a serious handicap in social reconciliation and rebuilding the Damocles' sword remaining dangling over individuals' heads, not allowing them to plan for the future with a positive and outgoing outlook.

iv. *Permanent Willingness to Protect Social Interests*

The Western concept of criminal justice focuses on individual rights in an attempt to determine a winner and a loser. This concept, inherited from colonial times, has been maintained by classic African states' tribunals. However, where customary law and written law tribunals co-exist, the focus is on collective, conciliatory and restorative justice.⁵⁰ Traditional jurisdictions favour reconciliation, group interests and conflict conciliation.⁵¹ Their objective is social harmony and the settlement of disputes.

⁴⁷ Rwanda is an exceptional case, since people who are involved in the Gacaca process came from foreign countries, after the Rwandan Patriotic Front (RPF) victory, where they were refugees at the time genocide occurred.

⁴⁸ Kathleen Daly, 'Revisiting the Relationship between Retributive and Restorative Justice', Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999, at 6.

⁴⁹ The *Nyiramasuhuko et al* case, in the ICTR, started in June 2001 but is still under way in trial chambers six years later. This case is not exceptional; the trial of *Bagesora* is now in its fourth year, etc. In addition, the time spent in pre-trial detention is usually four years or more.

⁵⁰ Mutoy Mubiala, *Le système régional africain de protection des droits de l'homme* (Bruxelles, Bruylant, 2005) at 7; TW Bennet, *A Sourcebook of African Customary Law in Southern Africa* (Cape Town, Juta, 1991) at 54.

⁵¹ RBG Choudree, 'Traditions of Conflict Resolution in South Africa' (1999) 1(1) *African Journal on Conflict Resolution* 9 at 10–11.

Customary African Approaches to International Criminal Law 47

among opposing members of a given community. In all African conflict resolution procedures the focus is put on the protection and promotion of community values and interests as the community forms a part of the law irrespective of its form (clan, tribe, and so on). This concept reinforces the solidarity between members of the same community.⁵² Similarly in communities founded on the *Ubuntu*⁵³ value:

a dispute between fellow members of a society is perceived not merely as a matter of curiosity with regard to the affairs of one's neighbour; but in a very real sense an emerging conflict is seen to belong to the whole community. According to the notion of *Ubuntu*, each member of the community is linked to each of the disputants, be they victims or perpetrators.⁵⁴

The objective of reinstating cohesiveness and social harmony is achieved by ricochet, by dealing with interpersonal conflicts. The African concept of collective justice was even enshrined in the African Charter on Human and Peoples' Rights, a Charter that protects both individual and collective rights,⁵⁵ with no equivalent in the Western world.

v. *Appropriate Forum to Compensate Victims*

The current growing concern over the fate and place of victims in criminal proceedings justifies the active involvement of local institutions and populations in the suppression of the most serious crimes. Traditionally, especially in common law countries and in international criminal proceedings for hideous crimes, the administration of justice places focus on the protection of society in general and the rights of the accused in particular, namely on the right to a fair trial. Victims are not, as such, taken into consideration by criminal courts; they have no standing before international ad hoc tribunals, except as witnesses for the prosecution. Nevertheless, the present tendency recognises victims as part of the proceedings and not just as passive parties (witnesses). Today, several international legal instruments and judicial doctrine recognise that victims can benefit from international protection.⁵⁶ Despite this formal acknowledgement of

⁵² Keba M'Baye, 'The African Concept of Human Rights', (1996) 6(3) *African Human Rights Bulletin* 1 at 3. (author's translation—original in French).

⁵³ The concept *Ubuntu* is difficult to translate; it relates to a 'very high sense of humanity'. This value is promoted in most Bantu societies scattered in various Central and Southern African countries.

⁵⁴ Tim Murithi, 'African Approaches to Building Peace and Social Solidarity' (2006) 6(2) *African Journal on Conflict Resolution* 9 at 19.

⁵⁵ African Charter of Human and Peoples' Rights (adopted in Nairobi, 27 June 1981, entered into force 21 October 1986), OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982).

⁵⁶ See eg Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc A/Res/40/34, 29 November 1985; see also the ICC Statute, Arts 75 and 79, UN Doc A/CONF. 183/9; Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious

victims' rights at the international level, the latter still have difficulty in convincing international judges of their victim status; this occasionally produces preliminary judicial quarrels before the examination of the merits of the motions for remedy.⁵⁷

The advantage of traditional justice mechanisms is that their knowledge of local crises allows them to proceed without much delay. The system is conceived so that victims have a near-automatic status as a party to the proceedings. They can, as such, present their claims and have a solution the same day or within a few days. Generally, material assets confiscated are restored quickly and other remedies for other crimes are also executed through compensation granted by the citizen-judges themselves and not by another external body. The victims' situation is clarified within a few days, which enables them to focus on their survival and their future.

vi. Complementarity of National and International Criminal Justice Efforts

The breadth of international criminality surpasses the capacity of national and international judicial structures to respond adequately. In fact, tribunals in post-conflict states are generally in ruins, preventing them from functioning correctly,⁵⁸ and usually form part of the infrastructure to be built or rebuilt in the aftermath of massive and systematic conflict-related atrocities. Nearly all international tribunals have been conceived to prosecute a small minority of alleged war criminals—those most responsible for committing international crimes.⁵⁹ Consequently, the paralysis of the state judicial system as well as the inability of the international system

violations of international humanitarian law, UN Doc A/RES/60/147, December 2005, see also Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr Theo van Boven pursuant to Sub-Commission decision 1995/117, UN Doc E/CN.4/Sub.2/1996/17, para 1 at p 4.

⁵⁷ *Situation in Uganda in the Case of The Prosecutor v Joseph Kony, Vincent Otti, Othman Raska Lukwiya, Dominic Ongwen*, Case No ICC-02/04-01/05 (ICC, Chambre préliminaire II), Decision on legal representation, appointment of defence counsel, protective measures and time-limit for the submission of observations on applications for participation, a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0122/06, 1 February 2007, paras 1–3; ICC Statute, Art 68(3); CPI (RPP), r 89, para 2.

⁵⁸ Hansjörg Strohmeyer, 'Collapse and reconstruction of a judicial system: the United Nations Mission in Kosovo and East Timor' (2001) 95 AJIL 1 at 48; Hon J Lachapelle and WASHabas, *Pour un système de justice au Rwanda*, Revised Report of an Exploratory Mission in Rwanda, 27 November to 6 December 1994 (Montreal, Rights and Democracy, 1994).

⁵⁹ Kriangsak Kittichaisaree, *International Criminal Law* (Oxford, Oxford University Press, 2001) at 326. Art 1 of the Nuremberg Charter was clear about the Court's jurisdiction. The Tribunal was established for 'a just and prompt trial and punishment of major war criminals of the European Axis'. Likewise, the UN Security Council took 'note of the position expressed by the International Tribunals that civilian, military and paramilitary leaders should be tried before them in preference to minor actors': UN Doc S/Res/1329 (2000), November 2000 at para 7 of the preamble. Moreover, in his Report on the Special Court

to suppress all crimes committed result in a large majority of criminals residing in a zone of impunity that can only be revealed by community judicial institutions. Although the relations between states' tribunals and the International Criminal Court are regulated by the complementarity principle underlying the Statute of the Court, the relationship between the latter and local institutions is not clear.

Thus, the recourse to local justice mechanisms in prosecuting heinous crimes attributes a capital importance to both the protection of victims' interests and those of the society in general. Nevertheless, the entire system is not perfect and is subject to criticisms by some international legal scholars who believe that some of these characteristic features can undermine its credibility.

B. Criticism of Traditional Justice Mechanisms

Community involvement in suppressing war crimes has its drawbacks and presents several dangers that can compromise its impact or its chances of success. These drawbacks are in reference to certain international judicial guarantees regarding a just and fair trial as it is known in international criminal law, as well as to the male-dominated composition of the tribunals. Moreover, proceedings are characterised by the absence of a legal representation system for the accused, the double status of citizen-judges acting as prosecutors and judges at the same time, the risk of selective prosecutions and the risk of local judges being subject to political pressure from officials. However, the system also includes corrective measures that minimise the negative impact of these drawbacks.

i. Risk of Infringement of the Right to Legal Counsel while facing Charges

Formal legal representation is not a feature of most traditional judicial systems.⁶⁰ This raises important constitutional questions because most countries' constitutions recognise the right to legal counsel for any judicial proceedings. Nevertheless, this shortcoming is inherent to the customary nature of the courts, which are typically recognised by state constitutions, and to the law applicable before them. It is justified by the

Sierra Leone, the Secretary-General of the United Nations extends the term of 'persons most responsible' to include not only the political or military leadership but also other persons in command authority down the chain of command considering the severity of the crime or its massive scale: see Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc ONU S/2000/915, 4 October 2000, paras 29–31.

⁶⁰ 'In traditional African society, every man was his own lawyer, and his neighbours too, in the sense that litigation involved whole communities, and all the local men could and did take part in forensic debate': see Abbie Sachs, *Justice in South Africa* (Berkeley, University of California Press, 1973) at 96–7.

absence of procedural formality as well as by the concern to preserve the equality between the parties.⁶¹ In fact, poor people can confront the rich without the latter being able to tap into their fortune in order to secure a defence lawyer. In South Africa, for example, the National Development and Restoration of Traditional Customs Forum, an organisation of traditional chiefs, holds that 'no legal representation is necessary as the procedure is so uncomplicated that anyone can prosecute and defend a case'.⁶² These institutions are generally considered more as a forum for dispute arbitration than true courts of justice.⁶³ It follows that, even in countries where traditional courts have criminal jurisdiction, their main goal is rather aimed at re-establishing social harmony. This is affected by pursuing, as far as possible, the restoration of the pre-crisis situation, which ultimately excludes the adversarial character found in formal legal proceedings.

Granting traditional courts the jurisdiction to prosecute international crimes would appear to be incompatible with the right of legal representation that characterises the traditional and community judicial system. This 'omission' arguably collides with the international law principle that all alleged perpetrators are entitled to a fair trial, a basic facet of international human rights law.⁶⁴ In my view, the nature and aim of proceedings in traditional justice systems (that is, reconciliation, restoration of social harmony, protection of community interests) justifies this dichotomy. It therefore seems acceptable to conduct prosecutions without the accused being assisted by lawyers, especially when they do not run the risk of severe criminal sanction and when there is no confrontation between parties. The moral integrity, the good judgement, the wisdom and the inherent equity of local judges as well as the people's participation should suffice to guarantee a just and fair trial that aims to restore social harmony by ways of dispute mediation. Incidentally, the procedure before these traditional tribunals is considered to be 'substantially informal and less intimidating, with the people who utilise these courts being more at ease in an environment that is not foreboding'.⁶⁵

⁶¹ Bennet, n 50 above, at 80.

⁶² South African Law Commission, *The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders*, Project 90, May 1991, at 10.

⁶³ *Ibid* at 6.

⁶⁴ South African Law Commission, n 62 above, at vii, para 2: 'These communities should aim at reconciling the disputants and establishing harmony in the community.'

⁶⁵ *The Prosecutor v Hinga Norman, Fofana et Kondewa*, SCSL-04-14-T, Decision on the Application of Samuel Hinga Norman for Self-representation under Article 17(4) of the Statute of the Special Court (8 June 2004) at para 23 (Special Court for Sierra Leone (SCSL), Trial Chamber); see also *The Prosecutor v Slobodan Milosevic*, IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel (22 September 2004) at para 32 (ICTY, Trial Chamber).

⁶⁶ Choudree, n 51 above, at 13.

ii. Local Judges as Prosecutors

In traditional judicial proceedings, judges also serve as prosecutors: they both prosecute and judge parties. However, this form of justice is not without controversy, especially when political and/or ethnic tensions arise when judges are representatives—even in appearance—of an ethnic group and/or a political wing rival to that of others.⁶⁷ In this case, the risk of perverted justice is high. However, I must emphasise that this risk is not as great as it appears. In fact, the appearance of exorbitant powers is counterbalanced by the people's participation during the entire proceedings: ordinary citizens of a certain age and social rank interrogate and cross-examine the parties; they may participate in deliberations if they have passed the initiation tests required to sit as a citizen-judge, and so on.⁶⁸ In several African countries adults possess the right to interrogate the parties and/or witnesses and, if need be, give their perspective on the legal issues and ensure that the system does not fail. As such, the tribunal does not depend solely on judges but also on the community, which monitors and limits abuses of the judicial process.

iii. Risk of Selective Prosecutions

The way traditional judicial mechanisms function is very critical to their legitimacy as well as their credibility. In fact, if local judges exercise broad discretion like international prosecutors and distinguish victim groups from perpetrator groups while criminals and victims can be found on both sides, this is likely to perpetuate conflict and violence even though the purpose of criminal prosecutions is to put an end to them. This has been the case in Rwanda, where the *Gacaca* courts only prosecute genocide suspects.⁶⁹ In this context, 'genocidals' are identified as members of the Hutu ethnic group, while victims belong to the Tutsi ethnic group. In so doing, Tutsi war criminals go unpunished. This is a sad reality for Hutu victims given that not a single Tutsi has been prosecuted before the ICTR for war crimes despite the existence of criminal evidence that would underwrite Tutsi prosecutions.⁷⁰ Therefore, Hutu victims of the Rwandan genocide

⁶⁷ In Rwanda, for example, the judiciary is dominated by Tutsi and specifically, members of the RPF. That is what Professor Cousineau refers to as the judiciary 'tutsification', see Marc Cousineau, 'L'établissement de l'état de droit au Rwanda: un but irréalisable' (1996-97) 28 *Ottawa Law Review* 171 at 183.

⁶⁸ I would mention here, eg the initiation ceremony called *Ukavirwa*, in force in Burundi, where the assembly of wise people recognise and publicly confer upon candidates the quality of persons of integrity (UMUSHINGANTAHE). They can then sit and take part in deliberation meetings on completion of public hearings.

⁶⁹ See the explicit title of the Organic Law, n 19 above.

⁷⁰ Report on the situation of human rights in Rwanda submitted by Mr René Degni-Ségui, n 20 above; Tumba Tutu-De-Mukose, 'Rwanda Genocide: Why Carla Del Ponte was toppled from the ICTR by the UNO' (author's translation—original in French), *Afrique*

will not receive justice before international bodies nor before local Gacaca courts. This situation creates societal resentment among unrecognized victims and presents a potential risk for long-term peace, reconciliation and social stability.⁷¹ In such situations of selective prosecutions based on discriminatory criteria which are unlawful under international law, the principle of complementarity of the ICC could, where applicable, be set in motion to correct a potential drift of local institutions.

iii. Lack of Legitimacy and Risk of Manipulation of the Local Process by Government Authorities

One objection to the legitimacy of local and community institutions can reasonably be raised. If their purpose is mainly to maintain social harmony, why were they unable to prevent society from collapsing? In my opinion, this objection is not valid enough to deny local and community institutions jurisdiction to prosecute perpetrators of international crimes. In fact, during societal conflict most local institutions are not spared, as the shock waves of conflict are felt in every sphere of the society, with few layers or social institutions being exempt.⁷² In most cases, traditional justice institutions cannot withstand being impacted by deadly conflict; hence, just as the validity of the ICTR was not questioned on the sole ground that the international community failed to prevent or to stop the Rwandan genocide (even though it anticipated genocide), community justice institutions possess legitimacy to take part in the national recovery.

Moreover, the impartiality and the independence of the citizen-judges make traditional judicial institutions more credible; indeed, judges know that only the law and the facts dictate their behaviour, not governmental instructions or orders. Thus, any interference by public authorities in the operation of these mechanisms will be likely to have side-effects on the respect and status they enjoy within the community. Yet this risk is not at all remote, because post-conflict society leaders often have a societal

Education, No 195-196, 1-30 January 2006, see online: <<http://www.afriqueeducation.com/archive/sommaire/article.php?id=298&version=195-196>>; A Guichaoua, 'Rwanda: Intimidated Justice: Under Rwandan Government's pressure, diplomacy slows down the ICTR' (author's translation—original in French), *Libération*, 23 May 2006.

⁷¹ In one of its reports, the Gacaca Courts Department concluded that obstacles to war crimes prosecutions include the persistence of a genocidal ideology, and the intimidation and terrorist acts towards genocide survivors and witnesses: see online: <[http://www.inkiko-gacaca.gov.rw/Ppt/Realisation et perspectives.ppt](http://www.inkiko-gacaca.gov.rw/Ppt/Realisation%20et%20perspectives.ppt)>.

⁷² In Uganda, for example, 'local systems have broken down over the course of the conflict, raising concerns about the neutrality and capacity of elders and cultural leaders to adapt local approaches to crimes committed during the conflict': see Erin K Baines, 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda' (2007) 1 *The International Journal of Transitional Justice* 91 at 97.

vision that they seek to mould. The reconciliation aspect is particularly interesting to them as they hope to influence its achievement in their preferred direction. The fact that citizen-judges are locally elected and sometimes representative of intellectuals who are more often driven by material benefits rather than by real concern for righteousness and the restoration of social harmony⁷³ is likely to have a great influence on the independence of the local courts. Indeed, these educated participants are likely to monopolise the floor and intimidate the non-educated witnesses and other judges.

v. The Risk of Trivialising Justice for Community Sanctions

The law applicable before national courts adjudicating war crimes matters also appears to be problematic. In fact, citizen-judges apply a flexible customary law and procedure. This law is known to all lay judges as to most other community members of a certain age since it follows customs and local practices relevant to peaceful dispute resolution. As the South African National Development and Restoration of Traditional Customs Forum confirms, 'the procedure is so uncomplicated that anyone can prosecute and defend a case'.⁷⁴

Community sanctions differ from formal criminal sanctions recognised by the international criminal law, namely imprisonment as the main⁷⁵ or the exclusive⁷⁶ sanction. Community sanctions are primarily designed to allow the convicted to amend and to promote their reintegration into society. In Rwanda, the law on Gacaca courts provides only for civil remedies to property offences;⁷⁷ criminal sanctions or community services⁷⁸ are possible in other cases. The latter sanctions are carried out in public or by private host institutions.⁷⁹

⁷³ Baines, n 72 above, at 95.

⁷⁴ South African Law Commission, n 62 above, at 10.

⁷⁵ The ICC can apply monetary sanctions in addition to imprisonment: see ICC Statute, Art 77.

⁷⁶ ICTR Statute, Art 23 (1): 'The penalty imposed by the Trial Chamber shall be limited to imprisonment.'

⁷⁷ Organic Law No 40/2000, n 19 above, Art 71; Organic Law No 16/2004 of 19/6/2004 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 October 1, 1990 and December 31, 1994.

⁷⁸ Community service is an alternative form of punishment for genocide or crimes against humanity rather than imprisonment because unpaid work serves the general interest or public welfare. See Presidential Decree No 26/01 of December 10, 2001 relating to community services as sanctions alternative to prison (author's translation—original in French), section 2, in JORR No 3, 1 February 2002, at 92; see also Penal Reform International, *Monitoring and Research Report on the Gacaca: Community Service (TIG)—Areas of Reflection* (London, March 2007).

⁷⁹ Organic Law No 40/2000, n 19 above, Art 2, para 2.

54 *Pacifique Marirakiza*

Even if imprisonment is not an option, I do not believe that any process of accountability that builds on community sanctions would trivialise the essence of justice. In fact, imprisonment is not the only form of public sanction. Local courts resort to other forms of punishment, namely victim compensation, community work, requests for forgiveness, expressions of remorse and withdrawal of the right to participate actively in meetings aimed at settling disputes. Thus, community sanctions, even if they differ from classical criminal sanctions, constitute a full criminal accountability and not an alternative to punishment.⁸⁰ So, 'rather than being softer on accountability than courts, [these mechanisms] deliver a differently textured accountability by moving beyond overly proceduralized forms of adversarial justice as adjudications of individual guilt toward a more complex account of individual, communal and institutional accountability'.⁸¹

In terms of effectiveness, these community sanctions can sometimes be tougher and more humiliating than foreign prisons, since the condemned must serve their sentences in their communities under the direct surveillance of their relatives and their victims. Thus, the deterrent effect of sanctions on the convicted and their peers will be more effective than an imprisonment pronounced by an international tribunal and enforced abroad. Similarly, their rehabilitation or their reintegration is made easier since the sentence is served in the community. Finally, it should be noted that traditional and community courts shall also take into account the gravity of the crimes to determine the applicable sentence. Thus, sanctions other than imprisonment do not constitute a kind of an amnesty but rather another form of accountability for criminal acts. In the end, the main goal of international criminal justice is to avoid the impunity of serious crimes. This can be done through local, state or international judicial institutions.

vi. Challenges of Traditional Justice Mechanisms

In many African countries, it is worth noting that traditional judicial bodies are strongly influenced by the patriarchal system and are too often discriminatory against women. The latter cannot actively participate in traditional justice trials.⁸² Thus, they cannot sit as judges; they can attend

⁸⁰ This is also the position of Antony Duff, 'Alternatives to Punishment—or Alternative Punishments?', in W Cragg (ed), *Retributivism and Its Critics* (Stuttgart, Franz Steiner, 1992) at 44–68; see also Daly, above n 48 at 11–12.

⁸¹ Paul van Zyl, 'Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission' (1999) 52 *Journal of International Affairs* 647–67; Christine Bell and Catherine O'Rourke, 'Does Feminism Need a Theory of Transitional Justice? An Introductory Essay' (2007) 1 *The International Journal of Transitional Justice* 23 at 40.

⁸² In Uganda, women are not associated with decision-making or with Acholi, traditional mediation forums, see eg, Baines, n 73 above, at 107.

Customary African Approaches to International Criminal Law 55

hearings but they have no right to ask questions unlike their fellow men.⁸³ They do not take part in the deliberations; in short, they are not involved in the process of judicial settlement of social conflicts. Besides the lack of a strong legal argument backing this exclusion, such a situation seems to be unacceptable given the current social place of women, as I will discuss below.

In short, in spite of its multiple advantages, the traditional system of justice also presents critical disadvantages as enumerated above. Nevertheless, these are not fatal for the system. On certain occasions, I noted that the system comprises self-regulating elements. Therefore, given the long experience of local courts in the peaceful settlement of disputes, they are undoubtedly a forum to which one can also resort in an attempt to complement national and international justice efforts. For this reason, the *Gacaca* system may prove beneficial for states emerging from deadly conflict.

IV. AFRICAN CONTRIBUTIONS TO THE CONCEPTION OF INTERNATIONAL CRIMINAL JUSTICE

In this final part of the chapter, I will examine the impact of traditional justice mechanisms on the development of international criminal law, and suggest ways to improve the system. African conceptions have influenced theory and practice on the role of traditional judicial structures in the adjudication of international crimes.

A. The South African Model and the Development of International Criminal Law

The South African model of a TRC has recently been adopted by many countries emerging from cyclic crises. The TRC Chairman, Archbishop Desmond Tutu, is proud of its global expansion. Indeed, even if South Africa was not the first country to develop such a Commission, Tutu maintains that it was 'the first country to employ public hearings for victims in a belief that public truth, through its delivery of both knowledge and acknowledgement, serves as a form of justice in and of itself'.⁸⁴ He adds that: 'South Africa today stands as a model of merciful justice of what can be achieved when enemies choose dialogue over violence. In the years since our TRC process, other countries emerging from civ

⁸³ In some countries, like Pakistan, only men can sit in traditional judicial panels call *jirgas*; women do not appear before tribal courts, either as accused, complainants witnesses, or even as mere spectators. Amnesty International, *Pakistan—The Tribal Justice System*, ASA 33/024/02, London, August 2002, at 14.

⁸⁴ Tutu, n 9 above, at 6.

56. *Pacifique Mantrakiza*

conflict have embarked upon their own such commissions.⁸⁵ South Africa has made a monumental contribution to the field of transitional justice through its own experience including the 'expansion of the concept to include mechanisms designed to address "truth" and the incorporation of wider social concepts such as reconciliation, memory and identity, religious ideas like forgiveness, and perspectives from political science, sociology that consider the relationship of transitional justice to state-building, democracy, and institutional change'.⁸⁶

Another obvious and positive sign of the success of the South African experience and its overall impact can be witnessed at the United Nations (UN) practice level. Currently, UN bodies such as the Security Council are encouraging states emerging from cyclic crises to consider both a process of judicial accountability as well as truth and reconciliation commissions. In its Resolution of 31 March 2005 by which the UN Security Council decided to refer the situation in Darfur to the ICC Prosecutor, the Council

emphasizes the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore longstanding peace, with African Union and international support as necessary.⁸⁷

Not only has the General Assembly adopted a resolution that recognises the importance of protecting the rights of victims,⁸⁸ but several Reports of the Secretary-General to the UN highlight the importance of community justice initiatives to bring about long-term peace, security, reconciliation and the rule of law.⁸⁹

A well-designed TRC system offers another viable alternative to criminal prosecutions, which are no longer seen as the only way to hold persons responsible for committing international crimes or for delivering justice. At best, to the extent that TRCs engage societies in the search for solutions to their problems; they appear to be complementary to the efforts of classic judicial institutions and tend to contribute to real justice considered in this context as a profound transformation of a state's social

⁸⁵ *Ibid.*

⁸⁶ Editorial note, (2007) 1 *The International Journal of Transitional Justice* 1 at 2.

⁸⁷ Resolution 1593 (2005) (adopted by the Security Council at its 5158th meeting, 31 March 2005) at para. 5.

⁸⁸ See 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 Doc A/RES/60/147, 21 March 2006.

⁸⁹ See *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, Report of the Secretary-General, UN Doc S/2004/616, 23 August 2007; Diane Orentlicher, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc E/CN.4/2005/102/Add.1, 8 February 2005.

Customary African Approaches to International Criminal Law 57

political and legal order.⁹⁰ This helps to achieve the wider objectives of peace, justice and national reconciliation. As Diane Orentlicher states:

If societies that have descended into the abyss of inhumanity bear a special burden of reckoning with their past, the work of highly respected truth commissions can facilitate a broader and more complex understanding of the machinery of mass atrocity than the circumscribed verdict of a criminal proceeding can do. At their best, moreover, truth commissions can advance a process of social inclusion and empowerment of previously marginalized—even brutalized—sectors of society, who may figure prominently in the work of a commission.⁹¹

Finally, TRCs provide a supplementary and sometimes more effective forum than national judicial systems to redress victims.⁹² Indeed, it can be extremely difficult or impossible for victims to obtain compensation before such courts. Victims are sometimes not able to identify those responsible for their injuries. Moreover, even when perpetrators can be identified there is no guarantee that a remedy will be forthcoming. In this case, the TRC mechanism can fill these gaps in the judicial system and decide a general compensation system for all identified victims. This has been done in South Africa, for example.

Therefore, TRCs not only bring some semblance of criminal accountability for perpetrators of international crimes but also signal the need for collective and moral responsibility on the part of the whole society and its institutions.

B. The Rwandan Model and the Development of International Criminal Law

The *Gacaca* tribunal in Rwanda is serving as an example for other states such as Uganda where the Acholi ethnic group is eager to resort to traditional justice systems to deal with war criminals of the Lord's Resistance Army (LRA). Indeed, although this ethnic group is the victim of various atrocities committed by the warring parties (the LRA and the Ugandan Defense Forces), the Acholi leaders are insisting that the ICC withdraw charges against LRA leaders so that they can be dealt with through traditional mechanisms of justice.⁹³ In Sudan, the authorities are also

⁹⁰ Kader Asmal, 'Stopping Crimes through Negotiations: The Case of South Africa', Guest Lecture Series of the Office of the Prosecutor, 14 March 2006, at 12.

⁹¹ Diane Orentlicher, 'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency' (2007) 1 *The International Journal of Transitional Justice* 10 at 16. She adds that 'Truth commissions can, moreover, speak to the future through their recommendations for institutional reform'; *ibid.*

⁹² See Resolution 60/147, n 88 above.

⁹³ Kasaija Phillip Apuuli, 'Amnesty and International Law: The Case of the Lord's Resistance Army Insurgents in Northern Uganda', (2005) 5(2) *African Journal on Conflict*

considering traditional judicial institutions to curb crimes committed by the Janjaweed militias. Rwandan *Gacaca* courts are therefore a model for community involvement in the administration of international criminal justice. Even though the *Gacaca* courts have faced some challenges, the concept itself is attractive, and countries emerging from conflict can resort to and benefit from it. Ideally, traditional judicial mechanisms will produce positive results if they are not overwhelmed by, for example, being granted exorbitant subject-matter jurisdiction that is beyond their capabilities or being required to apply complex international rules as is the case with the *Gacaca* courts.

The merit of the African experience is to have considered other forms of justice outside of the conventional legal system with its specific sentencing goals. In so doing, African state practice has spawned academic reflection on the current opportunity and the legitimacy of traditional and community judicial mechanisms.⁹⁴ This reality is captured and recognised in the editorial of a new international journal on transitional justice:

[T]he impact of non-Western cultures and different beliefs about justice have forced us to re-examine the mechanisms that have emerged; we have begun to ask ourselves about local practices of justice and the ways in which these may interrelate with the idea of universal jurisdiction and resistance to impunity.⁹⁵

Some authors consider traditional justice mechanisms as indispensable to conventional justice mechanisms. Referring to the case of Uganda, Diane Orentlicher believes that an approach 'toward the LRA that is rooted in local culture is inherently more likely to be meaningful to victims—and in other important respects to "work"—than prosecutions that seem alien to Acholi culture'.⁹⁶ However, she expresses some reservations on the general amnesty measures because they would perpetuate a culture of impunity already present on the African continent. On this issue, Jackson Maogoto asserts that beyond the criminal prosecutions conducted before the ICTR and the Rwandan courts, public inquiries should be

conducted to identify structural and systemic institutional weaknesses.⁹⁷ He argues that

the ICTR's almost exclusive focus on concrete entities, perceiving the individual actor as a building block of the genocidal reality, distorts and obscures the structural reality that converted tens of thousands of Hutus into a mass of killers.⁹⁸

By doing so, the Rwandan genocide is characterised as 'an event' and not as 'a state of affairs'.⁹⁹ The ICTR's approach of focusing on individual defendants has been criticised by Maogoto, who suggests that one should combine this method with a collective perspective centered on systemic and structural failures.¹⁰⁰ This explains the relevance of using mechanisms other than conventional courts to deal with the reality of massive atrocities.¹⁰¹ Hence, this would enable the promotion of international law

that truly permeates the human populace not stopping at the gates of State but bridging the gap between collective and individual actors better than it has done before. The key condition for such a change is consciousness and more sensitivity to the actor-structure relationship.¹⁰²

Despite its unquestionable contribution, the African idea of international criminal justice is not perfect, as noted above.¹⁰³ In order to maximise its potential, some improvements could strengthen its foundation and its respectability.

C. Suggestions for Improvements to the Traditional and Community African System

The community justice system could be improved to ensure female representation and compliance with certain minimum standards of procedural fairness, and by the provision of legal assistants (see further below). Likewise, distorting the system by imposing international criminal law or heavy material jurisdiction should be avoided.

⁹⁴ Resolution 33 at 36. IRIN News, 'Acholi Leaders in The Hague to meet ICC over LRA Probe', Kampala, 15 March 2005; Bishop Baker Ochola, 'Uganda: The Acholi Traditional Justice is Enough for Kony', *New Vision*, 28 August 2006, Opinion.

⁹⁵ *International Journal of Transitional Justice*, vol 1(1). For example, Diane Orentlicher has been advocating for criminal prosecutions for years; now, she is questioning her position: 'Does justice inevitably entail prosecutions or does its meaning instead turn upon each society's historically and culturally specific experiences?': see Orentlicher, n 91 above, at 10.

⁹⁶ Editorial note, n 86 above, at 2; Baines, n 2 above, at 96.

⁹⁷ Orentlicher, n 91 above, at 21.

⁹⁸ Jackson Nyamuya Maogoto, 'The International Criminal Tribunal for Rwanda: A Distorting Mirror; Casting Doubt on its Actor-oriented Approach in Addressing the Rwandan Genocide', (2003) 3(1) *African Journal on Conflict Resolution* 55 at 84.

⁹⁹ *Ibid* at 70.

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid* at 84.

¹⁰² In Rwanda, for example, 'the international justice process must not erase the fact that the inter-ethnic conflict, while not genetically inbred, is firmly embedded in the socio-cultural and subconscious mind of the Rwandese society, and thus addressing these structural defects is a part of the process of deterrence': see *ibid* at 68.

¹⁰³ *Ibid* at 84.

¹⁰⁴ *Ibid* at 19–23.

60 *Pacificque Manirakiza*

I mentioned above that traditional and community institutions sometimes discriminate against women. However, I believe that the system would gain tremendously by reviewing the gender-biased way in which judges are selected to ensure some degree of gender equity. In fact, it is untenable to pretend that righteousness, the sense of fairness and the knowledge of customs are restricted only to men. Beyond mainstreaming women into traditional justice systems, women should also participate in the design of these mechanisms so that they adequately reflect their needs.¹⁰⁴

The traditional African system should also provide the accused with legal representation, or at the least permit criminal defendants to employ legal counsel. As previously noted, the right to a fair trial is a fundamental tenet of justice to which, according to human rights law, every human being is entitled. The position is also supported by the principles of the African Commission on Human and Peoples' Rights, which has determined that 'as a minimum, to all proceedings before traditional courts [there is] an entitlement to seek the assistance of and be represented by a representative of the party's choosing in all proceedings before the traditional court'.¹⁰⁵ For the Commission, 'an accused person ... has right to choose his or her own legal representative at all stages of the case'.¹⁰⁶ This right is so important that the Commission decided to extend it to procedures that take place before traditional courts. In order to avoid professional lawyers from yielding undue influence or intimidating traditional judges, it is suggested that the rules of practice should be simplified to safeguard the independence of lay judges as well as their freedom to resolve disputes or adjudicate crimes amicably.

In this specific context of serious crimes, it is essential that traditional and community courts are assisted in carrying out their duties by a body of people equipped with legal training in law and customary procedure. These legal assistants would notably take records of the proceedings and prepare brief reports of the hearings. For instance, the South African Law Commission maintains that

trained para-legals should be appointed by the Ministry of Justice to assist traditional courts as clerks of court. This would help the courts to assess and

Customary African Approaches to International Criminal Law 61

avoid decisions that might be in violation of the Constitution or the law or that are beyond the jurisdiction of the court.¹⁰⁷

This proposal should apply a fortiori to situations where lay judges are faced with heinous, systematic and widespread crimes. Rwanda implemented this through Law 40/2000, which provides that *Gacaca* courts can, if needed, resort to the assistance of legal advisors appointed by the *Gacaca* Department of the Supreme Court.¹⁰⁸ For that purpose, teaching customary laws in law schools should have a significant place in order to get a better understanding of the socio-cultural roots of the legal rules applicable before traditional judicial institutions.

In the case of traditional institutions such as *Gacaca* that are being conferred with jurisdiction to prosecute international crimes, I believe that their material jurisdiction should be limited to low-level criminals rather than senior military and political officials, since high-ranking criminals would not go unpunished, as state courts or international criminal courts would retain the right to prosecute them. Traditional courts could also deal with children who committed crimes in the course of widespread atrocities. Indeed, traditional and community lay judges are best able to understand the conditions that produce child soldiers and to assist them. Traditional judicial institutions can therefore provide an ideal forum for the rehabilitation and re-socialisation of children who committed egregious acts during armed conflict.

As for the law applicable before local judicial mechanisms, it is important that local courts apply customary laws and procedures that they understand. Customary rules are not set in stone; their flexibility allows them to reach effective and fair solutions in all situations.¹⁰⁹ In this way social harmony, the main goal for procedures before local institutions, can be easily achieved. Again, local institutions are not best suited to apply complex international criminal rules because lay judges are not trained in international law. In addition, international criminal law has no socio-cultural foundation; it consists of an importation of legal principles and concepts whose maturation occurred in other cultures, namely Western culture. It is, therefore, to some extent, out of touch since it inadequately meets the needs of African societies that have experienced cyclic crises. That is the central reason why the *Gacaca* system has had difficulty: lay judges have been asked to interpret and apply international criminal law with no legal training whatsoever.

¹⁰⁴ Bell and O'Rourke, n 81 above, at 31. See also Orentlicher, n 89 above, principles 6, 7, 32 and 35.

¹⁰⁵ *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, African Human and Peoples Rights Commission, Doc OS(XXX)247 [African Commission Principles], para Q(b)(8), at 22 (emphasis added).

¹⁰⁶ *Ibid.*, para H(d) at 7; see further where it is asserted that 'the accused has the right to choose his or her counsel freely. This right begins when the accused is first detained or charged. A judicial body may not assign counsel for the accused if a qualified lawyer of the accused's own choosing is available', para N(2)(d) at 14.

¹⁰⁷ South African Law Commission, n 62 above, at para 5.7.

¹⁰⁸ Law 40/2000, n 19 above, Art 29.

¹⁰⁹ For Mr Choudree, 'traditional courts have a major advantage in comparison with the other types of courts in that their processes are substantially informal and less intimidating, with the people who utilise these courts being more at ease in an environment that is not foreboding': see Choudree, n 51 above, at 13.

Traditional justice institutions are not national court systems and should not be treated as such, especially when applying international and classic criminal sanctions. Such approaches confuse lay justice with professional justice, undermine the credibility and the reputation of local mechanisms, and are not suitable for the administration of post-conflict justice. The application of international criminal law should be restricted to states and international tribunals staffed by professional judges with solid international law training and experience. Empowering lay judges to adjudicate international law creates misunderstanding, as is currently the case between the ICC and the Acholi people of Uganda.¹¹⁰ The problem is not yet solved. As Katherine Southwick points out,

the Rome Statute does not appear to have contemplated such a potential clash of approaches to justice reflected in the statute are seen to be unresolvable. It raises basic questions of when and how the former must compromise with the latter.¹¹¹

Consequently, it is likely that the ICC will set up some guidelines defining its own relationships with local mechanisms. It would not be constructive if the court decided to affirm the legitimacy, the importance and the complementarity of these other conflict resolution mechanisms.

Thus, despite the international nature of crimes they deal with, citizen-judges cannot apply international criminal law that governs serious offences. This law is not accessible to them as they do not possess the necessary basic legal training to understand and apply it. They continue to apply customary law, which includes rules prohibiting homicide, manne behaviour, and where international criminal law must be applied, the principles which underpin it should be packaged for lay judges in a digestible form.

V. CONCLUSION

Africa is not simply an object of international criminal law; it actively participates in its development and its maturation. In opting for the involvement of traditional institutions in the prosecution of serious crimes, African countries have demonstrated that criminal proceedings before classic states courts do not necessarily provide adequate

responses to problems emerging from massive and systematic criminal phenomenon. This new thinking allows community members to engage in the settlement of problems which have shaken societal foundations. It is therefore important that everyone play a part in the healing process. Conversely, community involvement should not be a form of disguised formal justice. That would exceed the capacity of traditional and community courts and could even undermine their legitimacy. Nevertheless, traditional mechanisms are not a panacea; they complement other mechanisms, namely national or international courts, which can greatly benefit from traditional mechanisms in the management of conflict. Therefore, instead of having suspicions about traditional institutions, the international community should respect and accept them as complementary judicial mechanisms. African models of transitional justice are far less expensive, arguably more effective, and certainly more participatory than international tribunals.

In this sense, the South African Truth and Reconciliation model and *Gacaca* system represent clear examples of the critical role non-traditional and traditional institutions can play in ending impunity and restoring the rule of law. They represent the best examples of the application of international law from below, and evidence that even at the most local level African states, institutions and peoples are shaping and evolving international law.

¹¹⁰ See n 93 above.

¹¹¹ Katherine Southwick, 'Investigating War in Northern Uganda: Dilemmas for the International Criminal Court', (Summer/Fall 2005) *Yale Journal of International Law* 113-14.

¹¹² Hans Hendrik Brydensholt, 'Peace, Justice and the Challenge of Amnesia', 16 *Crim LF* at 385 (book review of Jeremy Sarkin, *Carrots and Sticks: the TRC and the African Amnesty Process* (Antwerp/Oxford, Intersentia, 2004)).