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TRANSITIONAL JUSTICE IN INTERNATIONAL LAW: THE CASE OF THE RWANDAN GENOCIDE

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INTRODUCTION

This thesis aims to analyze the theme of transitional justice: its role within the international legal system, its tools, and how it serves the purposes of the international community. To fully understand its potential, its applications, and its capacity the thesis will analyze the case of the Rwandan Genocide, which happened in 1994: one of the first scenarios that saw the need for intervention in a transitioning society.

The thesis will analyze on the one hand both criminal law and transitional justice-related provisions put forward by the international legal community "The International Criminal Tribunal for Rwanda" and the national Transitional Justice experiment of the Gacaca Courts.

The choice of this topic started from the realization of how little the topic of the Rule of Law (the ability of institutions to meet international legal standards: mainly the guarantee of human rights) is acknowledged and discussed in our society. The field of Transitional Justice deals with the consequences of the lack of Rule of Law: acknowledging the dramatic consequences translates into recognizing the role of the UN and even more into the fundamental role that has to be attributed to Transitional Justice. Transitional Justice is fundamental in its capacity to act upon an already perpetrated deed, but also in its preventive property: property, as it will later be highlighted, that is not applied at its maximum capacity. This thesis will analyse how the field was created, what developed into, its applications, and what its future might become. I personally think that understanding the role and the potential of Transitional Justice is fundamental, not only for scholars but for each individual as well: now more than ever seen the reappearance of war in the Western paradigm. Seen the impact that the work of the UN on previous cases should bring Transitional Justice and a possible bigger role within the international system as a central topic of discussion.

The first chapter of the Thesis will so delve into the concept of transitional justice, trying to define it both as an international and non-international practice. This chapter will also explore the relationship of transitional justice with the institutions: more precisely with the UN.

The second chapter will delve into the experience of the International Criminal Tribunal for Rwanda, first by trying to delineate the context and the serious breaches of Human Rights that made it necessary for the community to establish it. Secondly, by analysing the most important articles forming the Statue of the ICTR. Lastly, by taking into account the most important processes conducted by the tribunal. By combining the three spheres of the analysis the chapter will conclude by trying to stress the importance that the ICTR had for the international legal systems, but more importantly for the field of transitional justice. the most important question to which the thesis will try to find an answer to will however remain if the ICTR was also effective and useful for the transitioning Rwandan society.

The third and last chapter will delve into the analysis of the Gacaca courts system. Firstly, the research will try to define exactly what this system is, what is its purpose and why was it first created. Secondly, the chapter will define and stress how the Gacaca courts system do indeed fit within the field of transitional justice, and whether and how much importance shall be attributed to the mechanism. Thirdly, the thesis will try to analyze both the favorable and non-favorable aspects of the mechanism and how these aspects translated into successes and disasters. The chapter will conclude by trying to fully grasp the impact of Gacaca courts on both the international legal system and the transitioning society.

CHAPTER 1: THE CONCEPT AND FORMS OF TRANSITIONAL JUSTICE

This chapter aims to analyze the field of Transitional Justice. Starting from its definition up to grasping its application and the interpretation of its use that is perpetuated in the field of international law and how it relates to domestic law as well. The strengths and the flaws of the field will be highlighted, in the interest of being able to better understand and better analyze the case study of the Genocide of Rwanda.

The first section will analyze the definitions attributed to Transitional justice, both within and outside international law to fully grasp the polydriecity of the field.

The analysis will later focus on the development of the field through time and history, arriving to define in the third section its relation with the UN, both in terms of past and current times.

The fourth section will discuss the fields of international law most interconnected and influencing the field of Transitional Justice, while the fifth and last section will be dedicated to understand the relationship between the international and domestic dimensions of the field.

1.1 Definitions of Transitional Justice

The definition of Transitional Justice has been expressed using several words by different scholars, the definition decided to use as a starting point for the ai, of this thesis' analysis is the following: "Transitional justice refers to a field of activity and inquiry-focused on how societies address legacies of past human rights abuses, mass atrocity, or other forms of severe social trauma, including genocide or civil war, in order to build a more democratic, just, or peaceful future"[1]

1.1.1 Definition Outside the field of international law

Transitional justice refers to the entirety of legal, political, and social processes that a society that just experienced a serious breach in human rights experiences to recuperate and reach a status that allows the population a normal state of living: a condition where democracy, justice, peace, and freedom are granted to the entire population.

[1] The Encyclopedia of Genocides and Crimes Against Humanity, Louis Bickford

These processes can be, and should be, also carried out at a national level for several different reasons, within which the most important is that after years of experience, it has been demonstrated that the most effective transitional justice should always include several measures that complement one another.[2]

This statement can be very well understood firstly, when taken into consideration the perception of the population and secondly, when considered the more technical aspect of the mechanism and so the efficiency of having the national contribution to the restauration of the peaceful state.

National strategies to overcome past human rights abuses, find in fact their strength in the foundations and knowledge regarding the specifics of the local context. The proximity and the strong relationship tying the national legal system and the social system victims of the abuse can contribute to accountability, to increase the perception and the effective end of impunity (on the one hand the population can in fact perceive the higher number of the prosecutions as a true punishment, because directed to all the figures involved in the breach of human rights and not only to the key figures associated with it; on the other hand the cooperation between the national and international legal systems can practically allow a great majority of persecutions), to the reconstruction of state-citizen relationship, and finally to the effective construction of new or improved democratic institutions.[3]

Transitional justice outside the field of international law can moreover not only apply to national legal systems but also to all the social and political projects that do not have a legal aim that can be bot promoted by international and local entities: it is in fact important to stress that "above all, transitional justice is about victims".[4]

"It focuses on their rights and dignity as citizens and human beings and it seeks accountability, acknowledgment, and redress for the harms they suffered. By putting victims at the center and their dignity first, transitional justice signals the way forward for a renewed social contract in which all citizens are included and everyone's rights are protected."[5]

[2] International center for Transitional Justice, "What is Transitional Justice?", 2009
[3] The Encyclopedia of Genocides and Crimes Against Humanity, Louis Bickford
[4] ICTJ, "What is Transitional Justice?", https://www.ictj.org/what-transitional-justice
[5] Ibidem

1.1.2 Definition within the field of International Law

As already aforementioned transitional justice is a complex field, in which the layout is composed of legal and non-legal tools to apply. The aim of transitional justice is to overcome the consequences of large-scale abuse: transitional justice is so intended as both judicial and non-judicial processes and mechanisms, it is however fundamental that any and each of the transitional justice mechanisms chosen is carried out and developed in compliance with international legal standards and obligations.[6]

International law becomes so the paradigm within which transitional justice is built and developed: a paradigm that clearly set some boundaries, but that is also able to offer fundamental tools to improve and advance the mechanisms introduced in the transitioning societies.

International law has influenced transitional justice, and transitional justice on the other hand had the power to influence the birth and development of different fields of international law; the main one being international criminal law.

Transitional justice was moreover identified in the 2016 resolutions[7] in the comprehensive approach to sustaining peace as critical to the consolidation of peace and stability and the Human Rights Council similarly affirmed so in its resolution 42/17 of September 2019 by stat combatting impunity and the implementation of transitional justice processes can prevent the recurrence of human rights violations and abuses, and contribute to sustainable peace and development.[8]

Transitional justice has so been identified as fundamental not as mean to restore and repair past abuses; but as a fundamental tool to prevent and secure peace and stability in the future.[9]

[6] Guidance Note of the Secretary-General, " United Nations Approach to Transitional Justice", March 2010
[7] S/RES/2282 and A/RES/70/262 adopted respectively by the Security Council and by the General Assembly in April 2016
[8] OCHR Thematic Paper, " peacebulding, sustainable peace and transitional justice", 2020 Review of the UN Peacebuilding Architecture
[9] Ibidem

It is also important to state that in populations that just suffered gross violations of human rights sustainable peace and development are more easily reached and maintained after the population actively and effectively perceives justice for those violations.[10]

1.2 Historical Phases of Transitional Justice

1.2.1 Relationship Between Transitional Justice, International Relations, and Historical Context

Considering so Transitional Justice as a practice covered and carried out by several fields and structures of international law it must be considered that the development and concretization of the Transitional Justice program and process depend strongly also on the context in which it is structured. Transitional Justice must in fact consider different elements composing the situation one population has suffered before restoring Justice. Transitional Justice is in fact said to have a holistic approach: a practice that focuses on the whole person and the whole of the problem with the aim of finding a more healthy and sustainable solution to legal problems.[11]

Which parameters and criteria should Transitional Justice so consider? Which actors have an impact and influence on the situation and the population's well-being status and restoration?

The political context, both within the State's borders and in its internationality, to which Transitional Justice refers to is mainly determined by elements of international relation, as the political and State are as well determined by the elements aforementioned.

Transitional justice possesses the ability to vary and to adapt, following and morphing the characteristics of the historical time in which it was developed and the international relations-related trend happening in the same time slot.

It is so possible to identify three different periods of Transitional Justice in History, each of them exactly characterized by the time of their happening and of their development,

[10] "On Solid Grounds: Building Sustainable Peace and Development After Massive Human Rights Violations", Working Group on Transitional Justice and SDG16+
[11] Inglesia Martell, Law Firm, PLLC, "HOLISTIC LAW2, https://iglesiamartell.com/holistic-law/

the analysis of the categorization of the three phases of Transitional Justice has been proposed by several scholars, the division taken into consideration within this thesis is the analysis of Ruti Teitel.[12]

1.2.2 First Phase of Transitional Justice

The start of the first phase of Transitional Justice can be situated in history in the period after the end of the First World War. The first phase of Transitional Justice really grew in its application after the end of the Second World War, after the atrocities that the world was forced to face, resulting in finishing soon after the resolution of the world conflict with the beginning of the Cold War. The sudden change in the international relations world assets resulted in a fast change also in the conception and interpretation of the concept of Transitional Justice.

The main characteristic of Transitional Justice throughout the first phase was its internationalism.[13] The first phase is in fact characterized by interstate cooperation, war crimes trials, and sanctions[14]: These elements all together reflect the importance and the centrality of transitional law attributed to transitional justice in the international dimension. Transitional justice was in fact considered to be one of international aims and purposes.[15]

The extraordinary and urgent character and role that Transitional was invested in during the first phase of its existence has to be attributed to the very extraordinary conditions that the two world wars brought to the world, especially to Europe.

The beginning of the Cold War brought several political changes and a lot of shifts in the distribution of power in the World: the Cold War did in fact install a balance of power system and consequently a relative political equilibrium that resulted in a stalemate for transitional justice[16]. It is however important to stress how in this phase the result of the

[12] Ruti Teitel, "The Law and Politics of Contemporary Transitional Justice", Cornell International Law Journal 38,no.3 (2005)
[13] Ruti Teitel, "The Law and Politics of Contemporary Transitional Justice", Cornell International Law Journal 38,no.3 (2005)
[14] Ibidem
[15] Ibidem
[16] Ibidem

outcomes of the Second World War, criminalizing severe actions of States, had such an impact that it resulted in outlining the basis of modern universal Human Rights.[17]

1.2.3 Second Phase of Transitional Justice

The second phase of Transitional Justice occupies the last portion of the twentieth century, and, following the collapse and disintegration of the Soviet Union that resulted in a political transition the Phase taken into analysis was strongly characterized by a wave of democratization[18]. The transition towards democratization was supported by the strong instauration of a liberal perspective in international relations: in the years after the end of the Second World War and throughout the entire process of the Cold War, the main theory that found its life was the one of democratic peace: a theory born from the Kantian idea of perpetual peace, reachable only through, exactly, the step of democratization. Accordingly through the theory of democratic peace in fact the instauration of conflict within a democratic regime and/or between two democratic regimes is significantly less likely to happen.

The withdrawal of Russian guerrilla forces forced the end of military rule and forced the restoration and so needed accompaniment in transitioning in several countries, especially in South America.[19] This international scenario raised of course the opportunity for Transitional Justice to shift towards all of those scenarios affected in the previous years, re-establishing the rule of law, allowing so self-determination, and re-establishment of well-working institutions able to comply with international standards.
It is important to stress that however the happenings of these years have been identified as singular and independent developments many cases had been supported by international power politics.[20]

[17] Ibidem
[18] Ibidem
[19] Ibidem
[20] Ibidem

1.2.4 Third Phase or Current Phase of Transitional Justice

The third Phase is the Phase that involves also the current time; the end of the conditions put forward by the Cold War raised the question of whether the structure of Transitional Justice should return to the strong internationalism that strongly defined the first phase afore described. However, the conditions that strongly defined the period right after the end of the Second World War were at the beginning of the third phase well behind the perspective of the majority of the international arena's actors.

The third phase of Transitional Justice is in fact described in Teitel's work as Global Transitional Justice, associated not only with the rise of nation-building but also, as it concerns dynamics happening infra State, more complex and competing aims.[21]

The third phase of transitional justice is in fact more oriented towards the understanding of diversity, allowing so the possibility of seeing and presenting different typologies of rules of laws, each characterized and defined by the political and cultural asset in which they are developed. It could so be said, that in the third phase the approach that was developed left behind the idea of standardization of the model, but rather it looked at each situation as an extraordinary situation, without the concept of a possible one-fitt all solution. With this evolution, it is possible to affirm that the end of a globalized approach to transitional justice so ended. Transitional justice, translated so to being the norm, constituting a new paradigm of the rule of law[22], or so what is needed for a State to be able to fully complete its legal entity. Teitel does in fact say that "in the contemporary phase, transitional jurisprudence reflects the normalization of an expanded juridicized discourse of humanitarian law associated with pervasive conflict*" [23]*.

Another important trait characterizing the current phase of Transitional Justice is the cooperation installed between the international and national actors, a dimension that becomes central to the application and resolution of Transitional Justice in the current conflicts. This dimension will also be central in the analysis carried out by this thesis and will be further analysed in the next sections of this work.

[21] Ibidem
[22] Ibidem
[23] Ibidem

1.3 The relationship between Transitional Justice and the UN

1.3.1 The UN: the legal authority within the field of Transitional Justice

The relationship between the UN and transitional justice has been developing over time, up to the point where the UN is now the main authority within the field. Over the years, the United Nations has acquired significant experience in developing the rule of law and pursuing transitional justice and reconciliation, and consolidating peace in the long term necessitates the establishment of an effective governing administrative and justice system founded on respect for the rule of law and the protection of human rights.[24]

Rule of law entails a system within which individuals, institutions, and the state itself takes accountability and are processable for their own actions, a durable system of laws, institutions, norms, and community commitment that delivers four universal principles: accountability, just law, open government, and accessible and impartial justice.[25]

The rule of law has been defined by the UN in the 2004 Report of the secretary-general as:

*"*The rule of law is a concept at the very heart of the Organization's mission.

It refers to a principle of governance in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency*."*[26]

[24] Guidance Note of the Secretary-General, "United Nations Approach to Transitional Justice", March 2010

[25] World Justice Project, "What is the Rule of Law?", https://worldjusticeproject.org/about-us/overview/what-rule-law , William H.Neukom

[26] Report of the Secretary-General, "The rule of law and transitional justice in conflict and post-conflict societies",2004

It is a given that in a society that suffered a gross violation of human rights, the rule of law, the foundation for healthy communities of justice, opportunity, and peace[27], is non-existent, the role of the UN is so to temporarily intervene in the situation and re-establish the rule of law within the transitioning society also by providing justice for the past abuse. By striving to address the spectrum of violations in an integrated and interdependent manner transitional justice can in fact contribute to achieving the broader objectives of prevention of further conflict, peace building, and reconciliation.[28]

The United Nations must ensure that its transitional justice support is norm-compliant, promoting transitional justice processes as opportunities for societies to reaffirm the validity and centrality of human rights and other international norms and standards that protect people's dignity, and to strive for justice.[29]

The normative foundation for the work of the UN in advancing transitional justice is the Charter of the United Nations along with four of the pillars of the modern international legal system: international human rights law, international humanitarian law, international criminal law, and international refugee law**.**[30]

As already mentioned in the first section of the thesis transitional justice is set within the boundaries of international law, both states and international transitional justice have so to respond to legal obligations that the international system has set itself.

These obligations pertain, inter alia, to the fulfillment of rights of truth, justice, and reparation, and the prevention of recurrence.[31] The research will later delve into the roots of these obligations to be found within international law.

Based on these obligations a wider notion of justice has been advanced in the field of of transitional justice; this new definition has given birth to four interrelated dimensions: truth-seeking, criminal justice, reparation, and guarantees of non-recurrence.[32]

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[27] World Justice Project, "What is the Rule of Law?", https://worldjusticeproject.org/about-us/overview/what-rule-law, William H.Neukom
[28] Guidance Note of the Secretary-General, "United Nations Approach to Transitional Justice", March 2010
[29] 2023 Secretary-General Guidance Note, "A Strategic Tool for People, Prevention and Peace"
[30] Guidance Note of the Secretary-General, "United Nations Approach to Transitional Justice", March 2010
[31] 2023 Secretary-General Guidance Note, "A Strategic Tool for People, Prevention and Peace"
[32] 2023 Secretary-General Guidance Note, "A Strategic Tool for People, Prevention and Peace"

The United Nations stands so for a holistic approach to transitional justice, meaning that the four dimensions aforementioned are all part of a comprehensive policy.[33]

It is however important to note that the previous approach has usually denoted more attention toward those mechanisms that fall under the category of international criminal law while undergoing those mechanisms labeled as soft instruments of justice.[34] the distinction between hard and soft international law is quite easy to make: while hard instruments of international law arise from legal obligations set out in formal sources of international law such as custom, operative parts of international conventions, and general principles of law recognized by civilized nations; soft laws usually entail a lower degree of obligations and present a delegation of authority to states to implement and interpret their content.[35]

In the 2010 Secretary General Guidance Note it was given a list of principles that the UN has to reiterate when developing transitional justice mechanisms:

1. Support and actively encourage compliance with international norms and standards when designing and implementing transitional justice processes and mechanisms

2. take account of the political context when designing and implementing transitional justice processes and mechanisms

3. base assistance for transitional justice on the unique country context and strengthen national capacity to carry out community-wide transitional justice processes

4. Strive to ensure women's rights

5. support a child-sensitive approach

6. ensure the centrality of victims in the design and implementation of transitional justice processes and mechanisms

7. coordinate transitional justice programmes with the broader rule of law initiatives

[33] 2023 Secretary-General Guidance Note, "A Strategic Tool for People, Prevention and Peace"
[34] United Nations University Centre for Policy Research, "UN Security Council and Transitional Justice", Dr Rebecca Brubaker, 2020
[35] Nordic Journal of International Law, "Transitional justice, international law and the United Nations", Leena Grover, 2019

8. encourage a comprehensive approach integrating an appropriate combination of transitional justice processes and mechanisms

9. strive to ensure transitional justice processes and mechanisms take account of the root causes of conflict and repressive rule, and address violations of all rights

10. engage in effective coordination and partnership[36]

These guiding principles make the relationship between transitional justice and the several fields of international law clear and self-explained. It is however important to understand how the international legal community developed this clear affirmation of relation with transitional justice.

1.3.2 Phases of Transitional Justice according to the relationship with the UN

The relationship between transitional justice and the UN evolved through time; according to the work of Leena Groover[37], it is possible to identify three distinct phases defining the arriving point mentioned in the first paragraph of this section.

Throughout the first phase, the UN wasn't invested in an active role, but rather it had an observer position, Transitional Justice was in fact considered to be an independent field, associated with and concerning mainly national phenomena, the role of the UN was so only to certificate that the national activities did not violate international legal obligations.

The position that the UN took in the first phase entails neither insignificance in international transitional justice nor incapability to enact upon matters weighing on communities. It is in fact important to stress how the UN's work on Human Rights severely affected the field of Transitional Justice, the impact that the UN's work was indirect: the content of the international legal standards to maintain did not aim to set the standards specifically for the Field of transitional Justice, however the two fields are

[36] Guidance Note of the Secretary-General, "United Nations Approach to Transitional Justice", March 2010

[37] Leena Groover, Transitional Justice, International Law and the United Nations, Nordic Journal of International Law, n.88, 2019

nowadays strongly tied together and Human Rights are a constituent pillar of the Field of Transitional Justice, as it will later in the thesis further be explained.

It is also fundamental to stress that the reason behind the position taken by the UN was taken because international law, at that time, was not perceived as having the possibility for an effective response to large-scale abuse, the main idea behind this was that street protests, public debate, election, and referenda could grasp the willingness of the population and of the victims in a much more effective way, having the ability to consider all the political factors and the interests of the population itself. All these maneuvers had the prerogative to maintain national law as the benchmark for the legality of the actions and of the rebuilding plan for the future. The most important documents were considered constitutional provisions, martial laws on jurisdiction and due obedience, amnesty laws, and limitations clauses.[38]

During the second phase, the UN started to proactively study international law and how it was well intersected with the field of Transitional Justice, specifically taking into consideration all of those cases that were blocked at a national level but that could have reached a positive outcome with the support of the international legal system[39].

The aim of the UN during this phase was to set a strategic framework, without having yet the capabilities to become the main authority within the field of Transitional justice. the position of the UN shifted from being a passive observer to being an active observer and student of the dynamics concerning Transitional Justice.

The tools applied throughout the second phase were so mainly soft laws, and the position that the UN adopted is described by the author Leena Groover as Liquid authority.

Soft laws denote agreements, principles, and declarations that are not legally binding and are usually adopted by international actors[40]. A liquid authority is instead defined as an authority characterized by a higher level of dynamism and typically driven by informality

[38] Leena Groover, Transitional Justice, International Law and the United Nations, Nordic Journal of International Law, n.88, 2019

[39] Ibidem; in this part of her work Leena Groover is referring to the work of D. Orentlicher, "Settling Accounts' Revisited: Reconciling Global Norms with Local Agency', 1 International Journal of Transitional Justice (2007)

[40] European Center for Constitutional and Human Rights https://www.ecchr.eu/en/glossary/hard-law-soft-law/

and institutional multiplicity, affecting the mechanism through which it might be made accountable and legitimate, and of course, its relation to law, which is usually a soft law production[41].

The UN during this phase approached Transitional Justice as a field whose content was shaped by international and non-international actors; by both political and legal actors[42].

The third phase of the relationship between the UN and Transitional Justice saw the consolidation of the second phase, and consequently the UN resulted in being in a position of active regulator in the content of Transitional Justice, pursuing international legal standards and obligations. As it will later explained, nowadays Transitional Justice is understood as a union of of hard laws accompanied by the importance of embracing a comprehensive approach sustained by a dense network of soft laws[43].

Hard laws include international obligations, soft laws are instead UN principles, resolutions, and reports, as well as a series of OHCHR technical toolkits, grounded in international human rights law and contain lessons learned and best practices from United Nations field operations[44].

1.3.3 Main documents defining the relationship between transitional justice and the UN

The history of the UN and the history of transitional justice have traversed two parallel paths; it can in fact be said that the very roots of both of the two fields can be found in the post-World War Two events.

Transitional justice has in the following years developed its interdisciplinarity with the fields of international criminal law and human rights law.

The relationship between the UN has been enshrined by four main documents: the 2004 UN Secretary-General Report entitled "The Rule of Law and Transitional Justice in

[41] Krisch N., Liquid Authority in Global Governance, Internationa Theory, 9 (2), 2017
[42] Leena Groover, Transitional Justice, International Law and the United Nations, published in the Nordic Journal of International Law, n.88, 2019
[43] Ibidem
[44] Ibidem

Conflict and Post-conflict Societies", the 2006 Report of the UN Secretary-General "Uniting our Strengths: Enhancing United Nations support for the rule of law", the 2009 Security Council Resolution 1894, and the 2010 Guidance note of the Secretary-General "United Nations Approach to Transitional Justice".[45]

The 2004 report gave a clear definition of transitional justice directly and officially linking the field with human rights law and international criminal law, the definition claimed that transitional justice comprehends all processes and mechanisms associated with a society's attempts to come to terms with a legacy of massive human rights abuses and large-scale violence.[46]

In the 2006 report the UN officially declared transitional justice to be an integrated fundamental character of the UN's peace operations: maintaining and preserving the peace in the World the fulcrum of the mission of the Security Council, the two entities were directly and effectively linked to one another.[47]

In 2009, it was for the first time officially mentioned that the UN had a holistic approach toward the issue of fighting impunity for serious violations of international law.[48]

Finally, in 2010 the Guidance Note of the Secretary General called "United Nations Approach to Transitional Justice" was published. This Guidance Note contains all the main important details describing the approach of the UN towards the field of transitional Justice.

In the following years a lot of works and studies developing and delving into the relationship between The UN and the field of transitional justice were published, the main institutional organ to which the growth and elaboration of this relationship is entrusted is the OHCHR. The OHCHR is invested in maintaining the UN aligned with all the practices

[45] United Nations University Centre for Policy Research, "UN Security Council and Transitional Justice", Dr Rebecca Brubaker, 2020
[46] Ibidem, this passage of Dr Rebecca Burbaker takes into account a quotation belonging to the 2004 UN Secretary-General Report, "The rule of law and transitional justice in conflict and post-conflict societies"
[47] Ibidem
[47] Ibidem, this passage of Dr Rebecca Burbaker takes into account a quotation belonging to the 2006 Report of the Secretary-General "Uniting our strengths: Enhacing United Nations support for the rule of law"
[48] Ibidem
[48] Ibidem, this passage of Dr Rebecca Burbaker takes into account a quotation belonging to the 2009 Securitily Council Resolution 1894

concerning transitional justice on the one hand, and on the other hand, the OHCHR also has the duty to support the Special Rapporteur concerning the theme of transitional Justice.[49]

1.3.4 The UN Charter

As already mentioned there is a strong connection between the histories of transitional justice, the national legal system and so of the UN are strongly connected since their beginnings. In this section, the thesis aims to find the links between the two worlds within the UN Charter through the analysis of some of the articles considered fundamental for this purpose.

The first interesting aspect to which the link between the UN Charter and Transitional Justice can be traced is the period in which the UN Charter was created, signed, and became effective. The UN Charter was in fact signed in 1945, a year known to all for the end of World War Two: after World War Two the entire world was for the first time consciously facing the happening of serious breaches of human rights[50]; for this reason, it could be said that the UN Charter was created in a period when the majority of Europe and of the World was a transitioning society. It could also be said that the UN was born to assist the transitioning society and with the aim to avoid the happening of such inhumane breaches of humanitarian law and human rights.

The first interesting passage to take into consideration is the declaration found at the beginning of the beginning of the UN Charter:

WE THE PEOPLES OF THE UNITED NATIONS

DETERMINED

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and

[49] United Nations University Centre for Policy Research, "UN Security Council and Transitional Justice", Dr Rebecca Brubaker, 2020

[50] The world Genocide is intentionally left out of the paragraph since it was coined in 1944 by a polish lawywer, and was recognized as an independent category of crime after the conclusion of the International Convetion on Genocide, 9th December 1948 (https://www.un.org/en/academic-impact/origins-genocide)

small, and
to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS
to practice tolerance and live together in peace with one another as good neighbors, and
to unite our strength to maintain international peace and security, and
to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS
TO ACCOMPLISH THESE AIMS.
Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.[51]

It is interesting to notice how the connections between transitional justice and the UN are strongly present from the first phrases declaring the intent and the purposes of the United Nations: the most important sentences to highlight are contained in the first paragraph of the declaration. The UN Charter states that the people of the United Nations are determined to save succeeding generations from the scourge of war; from this sentence already it is possible to identify a strong connection with one of the pillars of transitional justice: the goal of non-recurrence. The goal of non-recurrence is identified as one of the central purposes of transitional justice: restabilize the rule of law in such a manner that is so guaranteed that the serious breaches just experienced by the population will not repeat themselves in the future.

[51] UN Charter, 26th June 1945

The second statement “we the peoples of the United Nations determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of national large and small” ties the operating of the UN to the respect and maintenance of the UN; human rights become so a fundamental pillar within all the operation of the UN, being part of its foundations, part of its structure, of its content and its aim. As already stated before human rights are also fundamental in the field of transitional justice, the absence of the guarantee of human rights or a serious breach of the latter stands at the basis of the existence of transitional justice, the restoration of the guarantee of those rights and the reparation for the suffered breaches constitute a pillar in the purposes of the field.

The last declaration of intent contains the will to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom. This statement contains within itself the definition of the concept of rule of law, which as it was well expressed in the previous section of the thesis, composes the conditions under which international and national transitional justice actors are enabled to act.

Another strong link forming the relationship between the UN and Transitional Justice is contained in the first chapter of the UN Charter “PURPOSES AND PRINCIPLES”, more specifically in Article 1:

The Purposes of the United Nations are:
1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
(…)
3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and

encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common ends[52]

The first comma of the first article of the UN Charte, declaring the purposes of the organization contains per se the definition of transitional justice, containing the purposes and the operation of the field.

In the third comma, it is possible to find a declaration that contains the main components and elements of transitional justice: economic, social, cultural, and humanitarian rights (referring to the two covenants); the respect, repristination, and maintenance of human rights and fundamental freedoms without distinction as to race, sex, language, and religion.

It is also important to highlight the fourth comma: where the focus is centred on the importance of the cooperation that needs to stand within the national and international spheres.

The purposes of the UN stated in the first chapter of the UN Charter are reaffirmed in the sections of the Charter describing the different organs composing the biggest international organization. More specifically, the purposes are evidently repeated and stressed in the articles concerning the General Assembly and the Security Council.

Article 13

1. The General Assembly shall initiate studies and make recommendations for the purpose of :

a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification;

b. promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

2. (...)[53]

[52] Article 1, UN Charter, 26th June 1945

[53] Article 13, UN Charter, 26th June 1945

Article 14

Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations,
including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.[54]

Article 23

1. The Security Council shall consist of eleven members of the United Nations.(…) in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.
2. (…)[55]

Another important link between the UN and transitional justice is enshrined by Article 29 of the UN Charter:

The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.[56]

This article establishes the possibility for the UN Security to enact all the measures concerning Transitional Justice: within which the possibility to institute the creation of international criminal tribunals.

The relationship between the international legal system and transitional law blooms not only through the ties found in the UN purposes but also in several fields of international law: mainly international humanitarian law, human rights law, international criminal law, and refugee law. The thematics of these fields are embedded in the core and foundations of transitional justice, and in the case of international criminal law constitute part of the mechanism that constitutes the international dimension of the transitional justice field.

[54] Article 14, UN Charter, 26th June 1945
[55] Article 23, UN Charter, 26th June 1945
[56] Article 29, UN Charter, 26th June 1945

The thesis will continue analyzing each field and highlighting the connections and the apports they bring to the field of transitional justice.

The normative foundation for the work of the UN in advancing transitional justice lies in fact in the Charter of the United Nations, as just highlighted by this analysis, as well as in the four of the pillars of the modern international legal system: international human rights law, international humanitarian law, international criminal law, and refugee law. Specifically, various UN instruments enshrine rights and duties relative to the right to justice, the right to truth, the right to reparations, and guarantees of non-recurrence of violations (or duty of prevention). In addition, treaty bodies and court jurisprudence, as well as a number of declarations, principles, and guidelines have been instrumental in ensuring the implementation of treaty obligations[57].

1.4 The Legal Fields of International Law Influencing and Cooperating with the Field of Transitional Justice

1.4.1International Humanitarian Law

International Humanitarian Law determines the international crimes, the behaviors violating the conduct to be maintained in conflicts. International Humanitarian law allows to individuate situations for Transitional Justice in which the intervention of a transitioning process to restore a society is needed.

International Humanitarian law regulates armed conflicts and warfare; it does not regulate whether the State is entitled to use force. The conduct to be maintained in war has always been regulated throughout history by religious beliefs and customs. The regulation aims to find a balance between humanitarian concerns and the military requirements of States[58]. The field of Humanitarian Law become so fundamental to finding and highlight the limitations that a state has in its military power. The state is limited in its possibility of actions, according to what it is considered human and respectful towards humanity, in accordance with the aim of the state.

[57] Guidance Note of the Secretary-General United Nations Approach to Transitional Justice, March 2010
[58] ICRC, Advisory service on international humanitarian law, "what is international humanitarian law?",2004

International humanitarian law applies only when an armed conflict is in act: international humanitarian law protects those who do not take part in the fighting, such as civilians and medical and religious military personnel; it also covers with protection those who have ceased to be a part of the conflict: wounded, shipwrecked and sick combatants, and prisoners of war[59].

International humanitarian law lays out the responsibilities of state and non-state armed groups during an armed conflict. These responsibilities, in addition to what aforementioned, include the rapid and unimpeded passage of humanitarian aid during armed conflicts, and the freedom of movement for humanitarian workers in conflict areas.[60]

Compliance with or violations of international humanitarian law during an armed conflict undoubtedly influences the conduct of the judiciary, the situations of the victims, and the correlation of forces in the post-conflict society[61].

There is in fact a strong link between the way the parties act during an armed conflict and the chances of achieving peace and reconciliation while restoring the rule of law once the hostilities have ended[62].

International Humanitarian Law can be taken into consideration as an influence over the processes of Transitional Justice, in two different perspectives given by the time of consideration taken into analysis.

The first important period to consider is individuated in the time before the outbreak of the conflict when international humanitarian law is considered to have a prevention capability[63]. As expressed in Art. 1 of the Geneva Convention[64], each State has an

[59] ICRC, Advisory service on international humanitarian law, "what is international humanitarian law?", 2004
[60] European Civil Protection and Humanitarian Aid Operations: https://civil-protection-humanitarian-aid.ec.europa.eu/what/humanitarian-aid/international-humanitarian-law_en
[61] International Review of the the Red Cross: 'Reflections on International Humanitarian law and Transitional Justice: lessosns to be learned from the Latin American experience', Elizabeth Salmòn G., p.327
[62] Ibidem
[63] International Review of the Red Cross: 'Reflections on International Humanitarian law and Transitional Justice: lessosns to be learned from the Latin American experience', Elizabeth Salmòn G., p.328
[64] The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

obligation to ensure national implementation of International Humanitarian Law, which will contribute to preventing serious violations of its provisions during a conflict, making the transition process after the hostilities have ended much more viable[65].

The second important time to consider is after the end of the conflict has occurred, called the transitional phase. The focus throughout this period is on the punitive character of International Humanitarian Law, which establishes the obligation to suppress all violations of International Humanitarian Law and to search for and prosecute those who have committed serious breaches of those laws in international conflicts[66]. These obligations are expressed in Articles 49, 50, 129, and 146 of the Geneva Convention.

There is also a duty under customary law to prosecute those people who are accused of serious breaches of International Humanitarian Law in non-international armed conflicts: this possibility is recognized through the process of criminalization of these acts in international customary law[67].

1.4.2 International Criminal Law

International Criminal Law is strictly connected with International Humanitarian Law, being the field that holds the perpetrators of international crimes accountable for their actions.

The term criminal refers to those laws that aim to find punishment for crimes committed within a system with legislation. International Criminal Law is the set of laws defining the punishment for international crimes.

This field of international law was so born from the debate concerning the destiny of those people guilty of committing and perpetrating the Genocide.

In 1945 the London Agreement was signed, in which for the first time the idea of a possible international criminal tribunal was created; and so the Nuremberg trials started.

[65] International Review of the Red Cross: 'Reflections on International Humanitarian law and Transitional Justice: lessosns to be learned from the Latin American experience', Elizabeth Salmòn G., p.328
[66] ibidem
[67] ibidem

This Declaration was stated to be without prejudice to the case of major criminals whose offenses have no particular geographical location and who will be punished by the joint decision of the Governments of the Allies[68].

The Nuremberg trials influenced International Law by generating two main shifts in the criminal field of international law.

The Nuremberg trials did not have a role in shifting the focus of international law on individuals, this revolution happened with the movement of Human Rights Law, whose revolution is dated in 1948.

The crimes perpetrated by the Nazis government were in majority against German citizens; up to that point in history, during the phase of classical international law, the State did not have limitations nor boundaries on the actions it could impose on its citizens; with the happening of Nuremberg Trials for the first time in history international law set a limit to the possibility of actions a Strate could perpetuate to its citizens: this shift put an end to the omnipotence of the State[69].

Article 6 of the London Agreement for the first time set forth the concept of crimes against humanity, while defining the Jurisdiction of the tribunal.

Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals. [70]

The other important milestone of the Nuremberg Trials was they brought about the birth of the field of International Criminal Law. Before these events, the field of Criminal law had always existed in relation to domestic law, at a national level.

For international law to exist there was the necessity to create and define the concept and category of international crimes: acts so inhumane that they need to be criminalized by

[68] London Agreement, August 8th 1945
[69] Robert H. Jackson Center, The Influence of the Nuremberg Trial on International Criminal Law, https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/
[70] Art. 6, London Agreement of August 8th 1945

international law, to guarantee the punishment of severe crimes even in the case in which the punishment wouldn't be reinforced at a national level.

Other steps forward in the field were brought by the creation of the first two International Criminal Tribunals: the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda; respectively founded in 1991 and 1994.

The two ICTs, by applying international criminal law as written in their status, could develop many principles fundamental in the field.

In its current usage, ICL involves the application of international law to determine the individual criminal responsibility of defendants under that law while protecting the rights of the accused against the power of the state, regardless of how that power is institutionalized[71].

The fields of Transitional Justice and International Criminal Law are undoubtedly interconnected; however, it is important to stress how they are not the same field and how they maintain different purposes, as well as various structural characteristics that determine their two separate entities.

The substantive emphasis of TJ should be in fact on justice for human rights violations. The primary emphasis should in fact be laid on subjecting the acts that occurred during the previous regime, structuring the future regime to overcome the reoccurrence of the just happened events. The term contains an aspirational element: that a transition towards justice is possible in line with the political shifts in the wake of a change in regime[72].

For Transitional Justice to enter into action there is no assumption nor denial of the existence of an armed conflict. The potential effects of human rights violations and regime change, may each occur with or without armed conflict. The goals of Transitional Justice are fundamentally tied to the aspiration of transition, both toward justice for past violations and toward the cementing of a new political order[73].

[71] Jens Iverson, Transitional Justice, *Jus Post Bellum* and International Criminal Law: Differentiating the Usages, History and Dynamics, *International Journal of Transitional Justice*, Volume 7, Issue 3, November 2013, Pages 413–433
[72] ibidem
[73] Ibidem

International Criminal Law institutions may be created with political realities and societal transformation in mind, but the proceedings themselves cannot be politicized without degrading the effort and contradicting the basic purpose of International Criminal Law, which is to determine individual criminal responsibility under international law while protecting the rights of the accused. Transitional Justice instead has much more flexibility to focus on and address systematic, nonindividual problems. It can also legitimately address a wider range of human rights violations than the narrow set that may constitute international crimes[74].

After these statements it is important to clarify that International Criminal Law is not just a tool to apply in cases of Transitional Justice, or a step of the mechanism to restore a functional Rule of Law acting under International Legal Standards; various sources of international law obligate State to investigate, prosecute and punish gross violations and abuses of international humanitarian law. This step is fundamental to restoring societal trust and the rule of law. However, in circumstances of post-authoritarian, post-conflict, or other contexts relating to transitional justice, States will often face major complications in holding perpetrators accountable, relating to both willingness and capacity. The holistic transitional justice policy will seek to address such obstacles.[75]

The International Criminal Court and national courts exercising extraterritorial or universal jurisdiction play invaluable roles in difficult contexts. Complementary is a fundamental principle that underpins the work of international criminal court; founding the cooperation with specialized domestic criminal tribunals, chambers, and prosecutorial units[76].

The entire criminal justice structure and capabilities must ensure equal access to justice for all, including access to information and the availability of specialized legal advice, representation, support services, and legal aid. Such capability-building support for structural reform must be accompanied by strategies to address deficits in what may be

[74] Ibidem
[75] Guidance Note of the Secretary-General, Transitional Justice: "A Strategic Tool for People, Prevention and Peace", 2023, p. 16
[76] Ibidem

termed "political will". In addition to amplifying justice demands for victims and communities, including at the grass-roots level.[77]

That said, Transitional Justice is not simply 'International Criminal Law plus,' a view that might be encouraged by the perception of Transitional Justice as a collection of tools, with international criminal tribunals being just one of them. Some International Criminal Law violations may be discrete and small-scale, and some ICL proceedings may not merit the appellation 'Transitional Justice.' [78]

Criminal Justice and Transitional Justice can be described as having different rationales behind them; however, International Criminal Law remains fundamental as a part and supports to the final aim of transitional justice to restore the Rule of Law and the proper functioning of society.

1.4.3 Human Rights Law

Transitional justice is rooted in international human rights law. States have an obligation to provide victims of human rights violations with effective remedy; satisfying their rights to truth, justice, and reparation[79].

International human rights law lays down obligations that States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, protect, and fulfill human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses[80].

[77] Guidance Note of the Secretary-General, Transitional Justice: "A Strategic Tool for People, Prevention and Peace", 2023, p. 17

[78] Jens Iverson, Transitional Justice, *Jus Post Bellum* and International Criminal Law: Differentiating the Usages, History and Dynamics, *International Journal of Transitional Justice*, Volume 7, Issue 3, November 2013, Pages 413–433

[79] OHCHR, About transitional justice and human rights, https://www.ohchr.org/en/transitional-justice/about-transitional-justice-and-human-rights#:~:text=Transitional%20justice%20is%20rooted%20in,truth%2C%20justice%2C%20and%20reparation.

[80] United Nations: Human Rights Office of the High Commisioner, https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law

The international human rights movement was built upon the Universal Declaration of Human Rights, adopted on the 10 December 1948 pillar. The Declaration was created as a common standard of achievement for all people and nations; for the first time in history, the Declaration spelled out basic civil, political, economic, social, and cultural rights attributed to and belonging to all human beings[81].

Human Rights Law serves as a pillar in the field of transitional justice: transitional justice uses Human Rights Law both to identify the situation upon which it is important to act and as a benchmark to reconstruct after the intervention; transitional justice enters in action when there are serious violations of human rights and no institution able to guarantee the rule of law exercising in compliance with the same Human Rights.

Adhering to the normative roots of transitional justice means that the United Nations must promote a human rights-based and victim-centered approach to transitional justice[82].

Compliance with norms and providing redress for human rights violations ans and abuses are central to reaffirming victims as rights holders and addressing their problems, which include various forms of marginalization[83].

The United Nations shall also moreover oppose political instruments or the discriminatory or otherwise selective use of transitional justice processes[84] .

The very fact that serious human rights violations and abuses have occurred determines the need for redress, which should not be influenced by the racial, social, political, ethnic, religious gender, or other characteristics or affiliations of the victim or apparent perpetrator[85].

Finally, in consideration of the grounding of transitional justice in human rights, the United Nations must follow a holistic approach to transitional justice[86].

[81] United Nations: Human Rights Office of the High Commisioner, https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law
[82] Guidance Note of the Secretary-General, Transitional Justice: "A Strategic Tool for People, Prevention and Peace", 2023, p. 5-6
[83] Ibidem
[84] Ibidem
[85] Ibidem
[86] Ibidem

The success of transitional justice and the application of all of its processes depends strongly also on the centrality of victims and their essential role in the design and implementation of those measures. This translates into taking their rights, needs, and aspirations into account throughout each step of the building-up pattern. A transitional Justice process maintains so both as a pillar and as one of its principal aims empowering victims to effectively assert themselves as rights holders and reaffirm their dignity[87].

Ensuring a victim-centered approach requires strong involvement on the part of civil society, including particular attention to women's and youth-led organizations. Victims and civil society organizations play indeed a critical role in advocacy, in accessing and mobilizing victims, in education and capacity building, and in providing technical, logistical, and other support[88].

Meaningful participation in the conduct of public affairs is not only a human right per sè, expressed in the Universal Declaration of Human Rights in art.21[89], but it also fosters civic engagements, provides recognition, facilitates public awareness and understanding, helps humanize complex issues, and gives legitimacy to the process[90].

Including Human Rights in the process and mechanisms to restore Justice, in countries that just suffered such violations, is not the only contribution of human rights: a key contribution of transitional justice is, in fact, to promote the inclusion of communities and segments of the population who are often marginalized or discriminated against, such as women and girls, ethnic and religious minorities, Indigenous peoples, those in rural regions, refugees, migrants, persons with disabilities, and people with diverse sexual orientation, gender identity, gender expression or sex characteristics[91].

It is moreover important to stress that in an era in which inequalities are deepening and people feel alienated and disaffected from a common political project, mechanisms of social integration are essential. Processes that are elite-driven or only acknowledged by

[87] Guidance Note of the Secretary-General, Transitional Justice: "A Strategic Tool for People, Prevention and Peace", 2023, p. 8
[88] Ibidem
[89] Art 21 attach
[90] Guidance Note of the Secretary-General, Transitional Justice: "A Strategic Tool for People, Prevention and Peace", 2023, p. 8
[91] Ibidem

select stakeholders are not effective, and the broadest and deepest possible public understanding and involvement are critical.[92]

1.5 The Relationship Between National Transitional Legal Systems and International Transitional Legal Systems

As seen in the precedent section the cooperation and coordination between the national and international layers of Transitional Justice are fundamental to structuring the proper and well-functioning of system to restore Justice in a country that just suffered serious breaches of Human Rights.

Transitional Justice is an effort to deal with the legacy of violence, in a global project. The questions around that are however multiple: can notions of justice that work on a national scale be transferred? Are there shared moral values beyond a locally confined community? Are there global normative orders that define counts as just? Where do they come from and where do their boundaries stand?[93]

Changes in the forms of violence led to changes in the forms of transitional justice. Questions of justice were not easily solved in contexts where all parties committed human rights abuses, and, while democracy remained an end of transition, reconciliation, and nation-building became important objectives too.[94]

This led to the expansion from retributive justice, exercised through tribunals, which maintain a fundamental role, to the designing of truth commissions with a strong focus on national reconciliation, as well as a growth of measures such as apologies and reparations.[95]

[92] Ibidem
[93] The Oxford Handbok of International Political Theroy, Chapter 12 "Transitional Justice", Susanne Buckley-Zistel
[94] The Oxford Handbok of International Political Theroy, Chapter 12 "Transitional Justice", Susanne Buckley-Zistel, p.155
[95] ibidem

This concept can be otherwise expressed as an enlargement of the purpose of justice: a holistic approach to the matter. The involvement of restorative justice in the already existing concept of retributive justice.

This shift to restorative justice has turned the field more local, away from grand institutionalized structures to the concerns of victims, a focus that wasn't present previously.[96]

Furthermore, due to some disillusionment with the reach of externality-induced or imported transitional justice mechanisms such as retributive tribunals or restorative truth commissions, as well as a trend to promote local ownership, there has been a turn to assess and encourage justice mechanisms that already exist within the particular society concerned.[97]

The cooperation between the national and international levels in the process of transitional justice: while the international dimension sets the standards to structure the process of rebuilding and identifying and processing the people guilty of the highest charges, the national dimension is responsible for fostering a broad community of ownership alongside the support of the UN. While the UN can help place the issue of inclusivity on the public agenda and build more institutions for the future[98]; the State has the fundamental role, when in the capacity to maintain and reiterate this process, to involve the population, regain their trust, and start a transgenerational process, harnessing the potential of children and youth in the process of peacebuilding and peacekeeping without forgetting to respond to the difficulties that the elder population may encounter.

There are several tools developed to reach a better outcome for this dichotomous system within which Truth Seeking and Guarantees of Non-recurrence.

Truth Seeking refers to the process followed to reach a non-judicial truth (the truth reached through judicial procedures; criminal courts have a role to play in establishing facts, however, judicial records will generally be insufficient). Truth-seeking requires

[96] ibidem
[97] ibidem
[98] Guidance Note of the Secretary-General, Transitional Justice: "A Strategic Tool for People, Prevention and Peace", 2023, p.8

States to establish institutions, mechanisms, and procedures authorized to seek information about disputed events[99].

In extent to catalog the nature, context, and extent of violations, truth-seeking is aimed at recognizing victims' experiences, rebuilding trust, strengthening the rule of law, and promoting social integration and reconciliation. The processes involved in the truth-seeking aim may allow victims to speak in a public forum, affirming their status as equal rights holders[100].

However, it is important to state that establishing truth about violations and abuses, prosecuting perpetrators, and repairing harms are unlikely to be perceived as justice if such measures are not accompanied by a State's commitment and tangible action to stop the continuation of the violations and prevent their recurrence[101].

The goal and guarantees of non-recurrence are the only pillars of transitional justice forward-looking and oriented to the core function of prevention: for this reason, it does not comprehend a specific measure but rather a set of tools and possible provisions to be applied in every specific context, according to the necessities of the context.

The focus of guarantees of non-recurrence is often set on institutional reform, seeking to disable abusive capabilities and strengthen integrity within the State Institutions, and more than others the security sector: this may include steps in the areas of constitutional legal reform, including those taken to ensure the compliance of emergency and security legislation with human rights, justice reform to enhance the independence of the judiciary, and the establishment of independent human rights institutions and ombudspersons[102].

All of these legal and institutional reforms must be accompanied by measures that touch upon societal, cultural, and personal spheres of the community: these measures can be interfaith dialogue, art-based and cultural initiatives to promote tolerance and social solidarity, memorialization initiatives to honor victims and create conditions for societal debate and dialogue on the causes and consequences of past abuse and the attribution of

[99] Guidance Note of the Secretary-General, Transitional Justice: "A Strategic Tool for People, Prevention and Peace", 2023, p.14
[100] Ibidem
[101] Guidance Note of the Secretary-General, Transitional Justice: "A Strategic Tool for People, Prevention and Peace", 2023, p.20
[102] Ibidem

responsibility[103]. All of these initiatives are moreover usually supported by mental health and psychosocial support, to try to come to terms with grievances and abjuring long-wrenched stereotypes and prejudices.

The pillar of guarantees of non-recurrence is strictly connected to identifying the root causes of the conflict, in the 2010 Guidance Note it was advocated that transitional justice: "processes and mechanisms take account of the root causes of conflict and repressive rule, and address violations of all rights, including economic, social and cultural rights[104]",

The goal of nonrecurrence has often been highlighted as the one step in the chain of Transitional Justice often overlooked and forgone. This may be the key element to understanding why sometimes the intervention of the United Nations and the efforts of the rebuilding State aren't enough to reconstruct a peaceful and stable society. The analysis of the case of Rwanda will be fundamental to understanding in practicality what was discussed in this section of the thesis, being one of the most complete and explicative examples of the theory discussed up to this point.

1.6 CONCLUSIONS

The structure and concept of Transitional Justice are built upon the two correlated dimensions of international and national systems. Both of these two aspects are fundamental for the positive outcome of the project. For this reason, the thesis will continue to analyze the case of the Rwanda Genocide: a case in which both international and national provisions were well structured to re-constitute Rwandan Society. The second Chapter will aim to analyze the International Criminal Tribunal for Rwanda, the Tribunal that aimed to reach retributive justice after the atrocity, while the third chapter will aim to analyse the experiment of the Gacacas court, a domestic institution developed and structured to reach restorative justice.

[103] Guidance Note of the Secretary-General, Transitional Justice: "A Strategic Tool for People, Prevention and Peace", 2023, p.20-21
[104] *2010 Guidance Note*, pp. 7

CHAPTER 2: INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA: ITS IMPACT AND CONTRIBUTION TO TRANSITIONAL JUSTICE

The following section of the thesis will focus on the serious breaches of Human Rights perpetuated in Rwanda in 1994. The analysis will take into account different measures of transitional justice promoted by the UN and by the national legal system: specifically, chapter two will analyze the birth and the functioning of the ICJ for Rwanda, and chapter 3 will focus on the experiment of the gacaca courts.

The first part of this chapter will be devoted to give an historical reconstruction on the events, and on the consequent instauration of the Tribunal.

The chapter will continue with a more in-depth analysis of the Tribunal's functioning and Statute, finishing with an analysis of the impact that the Tribunal's work had on Transitional Justice.

2.1 HISTORICAL RECONSTRUCTION OF EVENTS

2.1.1 Social Background

The Rwandan population is mainly composed of two different groups the Hutu and the Tutsi. The Hutu alone constitute almost eighty percent of the total population, while the Tutsi account for one-seventh.

The structural organization of Rwandan society always imposed an important social gap between these two ethnic groups. Tutsi, having a strong pastoralist tradition, gained over time social, economic, and political ascendancy over the Hutu, who were mainly designated to agriculture and activities belonging to the second sector[105].

Throughout history, however, the identification and the distinction between the two groups was very fluid: intermarriage was very diffused and it was in vigor the use of a common language.

[105] Rwandan Genocide of 1994 https://www.britannica.com/event/Rwanda-genocide-of-1994/Aftermath#ref1111312

The severe categorization of the two ethnicities was in reality perpetuated by the colonizers who put into action a very rigid distinction between the two groups based on their physical distinctions[106].

The German colonial government, 1898-1916, established a policy of indirect ruling which strengthened the Tutsi's hegemony of the political and social ruling class.

This social structure was maintained immediately following Belgium's colonization, which lasted until the end of the First World War.

The Hutu increasingly started to demand equality; on 1st November 1959, the Hutu revolution started. A rumor of the death leader attributed to Tutsi perpetrators spread and the Hutu as a response started to launch attacks on the Tutsi.

Months of violence followed the starting events and many Tutsi were killed or fled the country, finally on January 28 1961 the Hutu coup deposed the Tutsi king (who was already situated outside the country since the first attacks of violence) and abolished the the Tutsi monarchy. Rwanda became in this way a republic and an all-Hutu provisional national government came into being. Since all of the processes were sustained firsthand by the Belgium colonizers' government, independence was managed to be proclaimed in the next year[107].

In the period between 1959-1961, an estimated 20.000 Tutsi were killed, and by the start of 1964, more than 150000 Tutsi already asked for asylum in neighboring countries[108].

In 1963, 1967, and 1973 additional rounds of periodical mass killings were perpetuated[109].

In 1990 tension between Hutu and Tutsi was reborn when Tutsi-led Rwandan Patriotic Front rebels invaded from Uganda. A cease-fire was negotiated in early 1991, and the negotiations between the rebel troops and the Hutu president Juvènal Habyarimana began

[106]University of Minnesota, Rwanda, https://cla.umn.edu/chgs/holocaust-genocide-education/resource-guides/rwanda
[107] Rwandan Genocide of 1994 https://www.britannica.com/event/Rwanda-genocide-of-1994/Aftermath#ref1111312
[108] Outreach Programme on the 1994 Genocide against the Tutsi in Rwanda and the United Nations https://www.un.org/en/preventgenocide/rwanda/historical-background.shtml
[109] Ibidem

the next year and finally were signed in August 1993. The treaty called for the creation of a broad-based transition government that would include the RPF; the Hutu extremists were of course extremely against the finalization of the provision[110].

The dissemination of the extremists' anti-Tutsi agenda, already allowed spreading in the previous year in all the legal media of the county, was boosted in the entire nation.

2.1.2 The 1994 Genocide

On 6th April 1994, a terrorist attack was actuated, a plane carrying Habyarimana was shot down over Kigali, and each person on board died. Although not having any trial or investigation the attack was attributed to RPF leaders, completely overseeing the first suspects on the Hutu extremists[111].

The organized killings of the Tutsi ethnicity and of the moderate Hutu started that same night. The genocide perpetrators had a clear first target in mind: Agathe Uwilingiyama the moderate Hutu Prime Minister. The intent behind this choice was to create a void in power and so enable the immediate possibility to set the formation of an interim government of Hutu extremists, led by Col. Thèoneste Bagosora[112].

On 9th April the interim government officially started its mandate, after nominating the head power of the legislative branch the new Rwandan President.

The Rwandan genocide was a planned campaign of mass murder that occurred between April and June 1994: in a period of 100 days more than 800.000 civilians, Tutsi and moderate Hutu, were killed and more than 2.000.000 civilians left the country.

The mass killings were primarily perpetuated by the Hutu militia groups Interahamwe and Impuzamugambi. It is however important to highlight how throughout the entire genocide the media were used to spread hate messages and to incite and encourage Hutu civilians to kill their Tutsi acquaintances. It is estimated that more than 200.000 Hutu participated in the mass massacre, either by choice or forced by the extremist Hutu militia.

[110] Ibidem
[111] Outreach Programme on the 1994 Genocide against the Tutsi in Rwanda and the United Nations https://www.un.org/en/preventgenocide/rwanda/historical-background.shtml
[112] UNHCR, refworld Global Law and Policy Database, https://www.refworld.org/reference/countryrep/hrw/1994/en/21916

The massacre was conducted through brute and crude killing modalities mainly through the use of machetes.

It is important to stress how throughout the entire genocide rape was also used as a weapon, including also the deliberate use of perpetrators infected with HIV to carry out the sexual assaults[113].

2.1.3 International Intervention and the instauration of the International Criminal Tribunal for Rwanda

In November 1994 the UN responded to the charges of genocide in Rwanda by creating the International Criminal Tribunal for Rwanda (formally known as the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1st January and 31st December 1994).

The ICTR had an international character in its composition and was set in Arusha, Tanzania.

The tribunal was not invested with capital punishment, but only punishments translated into imprisonment terms.

The subjects of prosecutions were Murder, torture, deportation, and enslavement; however, the ICTR stated that genocide included ‘subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below the minimum requirements. It also added that ‘rape and sexual violence do constitute genocide to the extent that they were committed with the specific intent to destroy, in whole or in part, a particular group targeted as such: the tribunal

[113] Rwandan Genocide of 1994 https://www.britannica.com/event/Rwanda-genocide-of-1994/Aftermath#ref1111312

was indeed one of the first international bodies to formally recognize sexual abuse as a war crime[114].

2.2 ICTR Statute and Working

A fundamental step to frame the Statute of the International Criminal Tribunal for Rwanda in the right context is to take into analysis Resolution 955 (1994) adopted by the Security Council laying before the redaction of the statute.

The Resolution expresses the recognition of the happening of Genocide and condones the gravity of the genocide itself and all of the other systematic widespread and flagrant violations of international humanitarian law committed in Rwanda[115].

The Security Council determines the situation in Rwanda as a threat to international peace and security and declares itself determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them[116].

The Security Council continues by adding a statement fundamental to the purpose of this thesis strictly linking the purposes of the UN, Transitional Justice's aims and tools, and International Criminal Law. The Resolution does in fact affirm that the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and the restoration and maintenance of peace, believing that the creation of the International Criminal Tribunal will contribute to ensuring that such violations are halted and effectively readdressed[117].

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[114] Rwandan Genocide of 1994 https://www.britannica.com/event/Rwanda-genocide-of-1994/Aftermath#ref1111312

[115] S/RES/955 (1994)* 8 November 1994
RESOLUTION 955 (1994)
Adopted by the Security Council at its 3453rd meeting, p.1

[116] S/RES/955 (1994)* 8 November 1994
RESOLUTION 955 (1994)
Adopted by the Security Council at its 3453rd meeting, p.1

[117] S/RES/955 (1994)* 8 November 1994
RESOLUTION 955 (1994)
Adopted by the Security Council at its 3453rd meeting, p.1

2.2.1 Analysis of the Statute of the ICTR

Unable and unwilling to act upon the serious situation before the necessity of building an institution to face the serious breaches of human rights and humanitarian law committed in Rwanda, the statute of the ICTR defines the legal entity and the characteristics of the entity entitled to have such a role: an entity constituted with the awareness of the necessity of reaching long-term objectives defined within the context of the Arusha Peace Agreement of Arusha, in 1993: justice and the reconstruction of Rwandan Society. The Rwandan process is based on a direct concern for international humanitarian considerations and bringing the perpetrators of acts of genocide to justice[118].

As determined in the first article the jurisdiction of the Tribunal concerns only crimes of Genocide and other serious violations of International Humanitarian Law committed by Rwandans in Rwanda and in the neighbouring countries in the period between 1 January 1994 and 31 December 1994[119]. The jurisdiction of the ICTR is so limited both in time and in place as clearly stated and remarked in Article 7 of the Statute.

The Jurisdiction of the ICTR is moreover defined in Articles 5 and 6 as Personal Jurisdiction: the tribunal is concerned with natural persons and individual criminal responsibility cannot be disclaimed by reliance on superior orders[120].

Article 8 of the Statute establishes that the International Tribunal for Rwanda shall have the primacy over the national courts of all States; and that at any stage of the proceadure, the ICTR may formally national courts to defer to its competence in accordance with the Statute and the Rules of Procedure and Evidence of the ICTR[121]. Other states and Rwanda were so demanded to cooperate with and to assist the Tribunal. In Article 9 the Statute, in addition, reaffirms the principle of *non bis in indem*: the principle stating that it is not possible to sentence an individual more than once for the same crime.

[118] The International Criminal Tribunal for Rwanda, Gerhard Erasmus and Nadine Fourie, International Review of the Red Cross, p. 707
[119] Article 1, ICTR Statue
[120] The International Criminal Tribunal for Rwanda, Gerhard Erasmus and Nadine Fourie, International Review of the Red Cross, p. 708
[121] Art.8, ICTR Statute

Articles 2,3,4 define the crimes that the Tribunal will analyse and take into consideration during its trials: offering a definition of Genocide and Crimes against Humanity.

Genocide is defined in the second paragraph or article two as killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group; entailing behind those actions the intent of destroying, in whole or in part, a national, ethnical, racial or religious group[122]. In Article 3 Rape is included as part of the Crimes against Humanity listed under the definition given: widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds[123].

The second section of the Statute of the ICTR describes the structure and the composition of the Tribunal: two Trial Chambers, an Appeals Chamber, a Prosecutor, and a Registry. The Chambers are composed of eleven independent judges, with three serving in each of the Trial Chambers and five judges serving in the Appeals Chamber[124].

The judges are selected on the basis of impartiality, integrity, and the necessary qualifications and experience.

The institution created in the ICTR is such that it functions as a true international tribunal, even though it is already programmed as a temporal institution. This dynamic can be interpreted as an international commitment to solving the Rwandan problem, but it may also constitute a weakness as the success of the work of the Tribunal will depend strongly on the cooperation of a number of independent governments.

2.2.2 Procedures and Functioning of the ICTR

As already stated in the previous chapter, the ICTR is considered to be an efficient judicial institution that has conducted fair trials, created important jurisprudence, and made a

[122] Article 2, ICTR Statute, 1994
[123] A rticle 3, ICTR Statute, 1994
[124] The International Criminal Tribunal for Rwanda, Gerhard Erasmus and Nadine Fourie, International Review of the Red Cross, p. 708

significant contribution to the development of international criminal law: considerations demonstrated by the several innovations brought by the court, as well as the totality of the people the Tribunal managed to hear in its trials.

The work of the Tribunal was generally structured within the Statute itself (in the Articles from 10 to 32); it is, however, important that the International Criminal Tribunal for Rwanda did, however, adjust much of its operation throughout the happening of its mandates; a very reasonable behavior considering that the ICTR was alongside the ICTY a first time experience for the international legal community.

When analyzing the functioning of the Tribunal is so important to divide the analysis following the timeline of the mandates.

The first mandate, 1995-1999, determined the beginning of the works of the ICTR, after the election of the Judges, the same held the first plenary section in the Hague, during which they adopted the Rules of Procedure and Evidence; a document that sets forth and explains the entire mechanism of the International tribunal.

The construction period protracted itself for quite a while and lasted up to 1997 when the initial two courtrooms were ready to hold the first trials.

At the beginning of the life of the ICTR, the Prosecutor invested was common to the ICTY, and carried out a dual function.

Throughout the first mandate, experience showed that it was very difficult to establish an operational administration in Arusha and in Kigali. However, in spite of these difficulties, the tribunal rendered six judgments involving seven accused[125].

The work of the ICTR proceeded and the second mandate started, 1999-2003; a period in which the topic of discussion was centered around the continuos arising of technical issues that delayed and postponed the end of different trials. The second mandate assisted so to a continuous work developed by Tribunal to sail around those issues and increase the productivity of the ICTR.

The ICTR delivered its last trial judgment on 20 December 2012 in the Ngirabatware case. Following this milestone, the Tribunal's remaining judicial work now rests solely

[125] Journal of International Criminal Justice 3, Main Achievements of the ICTR, Erik Mose, 2005, p.923

with the Appeals Chamber. As of October 2014, only one case comprising six separate appeals is pending before the ICTR Appeals Chamber.

One key function assumed by the Mechanism is the tracking and arrest of the three accused who remain fugitives from justice. The continued cooperation of national governments and the international community as a whole is of paramount importance to the successful apprehension of these fugitives. When apprehended, the Mechanism will conduct their trials and supervise any sentence imposed along with all of the sentences previously imposed by the ICTR[126].

It is important to fully grasp the essence of the ICTR it is important to stress and highlight how differently criminal justice works at national and international levels. International criminal proceedings when compared to criminal cases at a national level are legally and factually very complex: there is a considerable volume of documents required to try alleged architects and perpetrators of such atrocities, individuals; individuals that might include high-ranking members of government (figures that at a national level wouldn't even be able to be brought to court)[127].

Another difference is that the trials are moreover conducted in an international court in which many languages are present, in addition, all the documents present in one's trial are subject to disclosure, and translation is so needed and may require thousands of pages into least one official language of the tribunal[128].

Another difference lies in the capacity that international tribunals need to have to face the often considerable number of witnesses. The witnesses' testimonies required to be translated and interpreted in three languages; after the testimonies, witnesses have moreover to be extracted from difficult environments, and so assigned considerable protection in the period before and after their testimonies, which sometimes might even include the measure of relocation[129].

[126] United Nations International Residual Mechanism fo Criminal Tribunals; https://unictr.irmct.org/en/tribunal

[127] Journal of International Criminal Justice 3, Main Achievements of the ICTR, Erik Mose, 2005, p.9227-928

[128] Journal of International Criminal Justice 3, Main Achievements of the ICTR, Erik Mose, 2005, p.928

[129] Ibidem

Another important factor to consider is that the staff and counsel of an International Criminal Tribunal are involved in cases concerning different cultures and traditions, and effective communication and comprehension require new skills and extra effort. Step considered to be fundamental not only for the positive outcome of the trials, but also to gain legitimacy and trust from the population: this point will in fact also resurface when discussing the relationship of the ICTR with Transitional Justice.

The technical issues indeed arose throughout the entire being of the ICTR, it is however important to stress how the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for former Yugoslavia were the first two ever ad hoc Tribunals, the first international tribunals after the Nuremberg Trials, and the first tribunals to be set up under Chapter VII of the Charter[130]. This can be translated as an interpretation of the two Tribunals as open laboratories, during the being of which it was necessary to learn and improve from mistakes and solutions to the issues. In addition to all the procedural functional issues, the ICTR had to face the disponibility of very limited infrastructure and the placement in an area that had never experienced the location of an international criminal tribunal (differently to what was the experience of the ICTY, located in the Hague)[131].

Some of the improvements that the tribunal managed to apply in its processes managed to have a radical positive impact on the well-functioning of the Court.

Right from the beginning of its being the Tribunal managed to understand that, due to the large field of witnesses, it had to speed up the procedure concerning the gathering of information: the Chamber began so organizing pre-trial and pre-defence conferences and had the possibility to require testimonies, statements of agreed facts and law, and lists of exhibits[132] [133].

Another important innovation to speed up the processes was to allow the possibility for some motions to be decided by a single judge rather than by the full Bench. A year later, the Tribunal decided to amend another improvement: questions pertaining to the form of

[130] Journal of International Criminal Justice 3, Main Achievements of the ICTR, Erik Mose, 2005, p.927
[131] Ibidem
[132] Journal of International Criminal Justice 3, Main Achievements of the ICTR, Erik Mose, 2005, p.930
[133] Rules of Procedure and Evidence of the ICTR, 1995

the indictment may be raised in one motion only and an explicit provision was adopted to allow a chamber to impose sanctions against counsel who brings motions that are frivolous or an abuse of process[134].

The Tribunal worked really hard on managing the bureaucracy in the optimal way possible: all of these provisions helped a lot in improving the efficiency which included the addition of two Courts, and the layout of draft pre-trial briefs together with draft exhibits and witness lists.

The work of the ICTR by developing its work through its actions and by overcoming all the difficulties and solving its work not only impacted the situations of the State of Rwanda but international criminal law and transitional justice as well. The next section will be focused on analyzing the changes that the ICTR brought to both fields.

2.3 The Impact of ICTR on International Law and Transitional Justice

As already exposed in the first chapter the two International Tribunals had a huge impact on International Criminal Law and on Transitional Justice; this Section of the thesis will be dedicated to delving deeper into the specificities of the changes brought to light by the International Criminal Tribunal for Rwanda.

Most of the people involved in the trials belonged to the high rankings of government: military generals, ministers, and heads of government. The majority of people indicted wouldn't have been brought to justice had it not been for the Tribunal's investigations, insistence upon their arrest, and subsequent request for transfer to Arusha[135]. People involved in the trials are in fact people towards which states are usually reluctant, if not impossibilitated, to initiate investigations and institute criminal proceedings at their own expense[136]; an expense that needs to consider also the impossibility of facing such trials when the rotten part of the social mechanism and part of the root of the conflict relays in the same institution.

The ability to bring to court such characters determined a turning point for International Criminal Law: the international community demonstrated that no one is above the

[134] Journal of International Criminal Justice 3, Main Achievements of the ICTR, Erik Mose, 2005, p.930
[135] Journal of International Criminal Justice 3, Main Achievements of the ICTR, Erik Mose, 2005, p.932
[136] Ibidem

international legal standards and that no such atrocity can and will remain unpunished. In terms of Transitional Justice, the ability to punish and prosecute figures of such high rank determined the ability to intervene within the rule of law of a country and to work towards the rebuilding of a properly working society. The conviction of those persons gave a clear signal to both the international community and to the people of Rwanda, working toward the common goal of restoring justice in both a criminal and restorative manner. In 1999 the Prime minister of Rwanda did in fact plaid guilty of the crime of Genocide: a clear signal to both the two dimensions aforementioned.

What just stated has been demonstrated throughout the entirety of the trials during which continuous reminding that trials in the Tribunal have several objectives, some of them not comparable to those found in domestic criminal courts were sent[137]: referring mainly to the set of historical records and to a more holistic approach to justice.

Another fundamental apport to International Criminal Law was in the power that the Tribunal had in creating Jurisprudence: the ICTR provides in fact abundant interpretative material on the legal nature and factual realities of the crime of Genocide[138].

The Akayesu judgment[139] was the first in which an International Tribunal was requested to interpret the definition of Genocide as contained in the Genocide Convention[140]: the ICTR was the first international body to adjudicate elements of that offence.

The convention of 1948 was complemented by several ICTR judgments: as seen in section 2.2.1, the genocide belongs to the Jurisdiction of the Tribunal: the sister tribunal, the ICTY, had relatively fewer indictments for genocide; this translates in the Arusha jurisprudence being a very important source for both the definition of this most serious offence and the elucidation of the legal ingredients of this so-called "crime of crimes"[141].

Another very important contribution that the ICTR brought to light during its work was the affirmation of rape as an international crime: rape was in fact considered for the first

[137] Journal of International Criminal Justice 3, Main Achievements of the ICTR, Erik Mose, 2005, p.934
[138] Ibidem
[139] ICTR-96-4-A, 1st June 2001
[140] Journal of International Criminal Justice 3, Main Achievements of the ICTR, Erik Mose, 2005, p.934
[141] Journal of International Criminal Justice 3, Main Achievements of the ICTR, Erik Mose, 2005, p.935

time as a possible actus reus[142] of genocide[143]. The Tribunal recognized this charge to the majority of the persons trialed and declared the sexual crimes as a prioritized area of concern.

The ICTR opened the doors for another very important development in international criminal law: the Media case is the first contemporary judgment to examine the role of the media in the context of mass criminality and international humanitarian law[144].

The importance of the media case is determined in the discussion of the boundary between the right of freedom of expression and incitement to serious international crimes[145].

In addition to all these revolutionary and groundbreaking starting points the corpus of procedural and substantive law developed by the ICTR, alongside the work developed by the ICTY, constitutes a basis for subsequent trials in international and hybrid tribunals, including the International Criminal Court[146].

Up to this point, the impact that the ICTR had on the field of Transitional Justice has not been fully discussed in its modalities and in its importance as a new tool and tool developer in the field.

The intent of reaching national reconciliation was clearly stated from the moment of the instauration of the ICTR, however, the Tribunal was aware that this goal was not reachable without implementations coming from the nation itself as well.

The ICTR implemented several provisions to help with the goal of national reconciliation: the first being that whenever a judgment was delivered an oral summary was given by the presiding Judge, the speech was interpreted in the two official languages of the Tribunal and Kinyarwanda and transmitted directly to the population[147]. This measure was thought to spread awareness in the population and to be able to reach a higher level of trust and safety perceived.

[142] Constituent elemnt of a crime
[143] Journal of International Criminal Justice 3, Main Achievements of the ICTR, Erik Mose, 2005, p.935
[144] Ibidem
[145] Ibidem
[146] Journal of International Criminal Justice 3, Main Achievements of the ICTR, Erik Mose, 2005, p.936
[147] Journal of International Criminal Justice 3, Main Achievements of the ICTR, Erik Mose, 2005, p.938

To strengthen the pursuit paths of reconciliation the Tribunal developed the Outreach Programme: an outreach programme can be enforced following two different strategies the transparency model and the engagement model.

On the one hand, the transparency model bases its strategy on rendering the opaque legal process more visible by giving accessible information about the court and the court's work to the communities recovering from the abuses. On the other hand, the engagement programme aims to overcome the pure transmission of information to involve and allow the tribunal to interact with the violated communities[148].

During its existence, the Tribunal suffered a crisis of legitimacy, depending only partly on its location, and mainly on the lost trust in the institutions suffered by the population. The crisis kept being fuelled by conflicting conceptions of justice, by Rwandan anger that was often channeled in resistance and skepticism towards the Tribunal also fed by the politicization of the Tribunal's prosecutorial agenda actuated by the newly instaurated Tutsi-led government[149]. In addition to these issues, unlike a long-established court that enjoys broad legitimacy, international criminal tribunals, despite their location, will often be perceived as alien as perceived as challengers of State sovereignty, the domestic conception of justice, and the belief of a government or society in its own innocence[150].

The commitment of the Tribunal to rendering the trials as public and transparent as possible was so very infertile in the complex political context it was facing: Tribunal officials hoped that making the court's work better known in Rwanda through the development of public relations initiatives under the banner of a so-called "outreach programme" would counter government and survivor group allegations of Tribunal indifference to the needs of victims and survivors. Thus, from the start, some officials at the Tribunal envisioned an outreach programme not only to keep Rwandan citizens abreast of the court's goals and accomplishments but as a strategy to repair the institution's deteriorating image[151].

[148] Journal of International Criminal Justice 3, Courting Rwanda, Victor Peskin, 2005, p.950
[149] Journal of International Criminal Justice 3, Courting Rwanda, Victor Peskin, 2005, p.951
[150] Journal of International Criminal Justice 3, Courting Rwanda, Victor Peskin, 2005, p.953
[151] Journal of International Criminal Justice 3, Courting Rwanda, Victor Peskin, 2005, p.951

It can be so deducted that more than depending on the efforts pursued by the Tribunal itself, legitimacy is attributed to the international institution by the approval of a nation's leaders.

The approach adopted by the ICTR mutated so in time in order to be able to face the more rooted resistance of the locals: the approach shifted from a more transparency-based model to an engagement model: the engagement model does not foresee the importance of open and transparent communication, but works on several different levels one of which is aiding the development of the Rwandan legal system[152].

Working on the Rwandan legal system entails the designing of initiatives to train Rwandan judges and lawyers as well as Rwandan human rights activists monitoring domestic genocide trials and following the instauration and renovation of the gacaca proceedings.

Engagement is key to bringing the reality of the Tribunal closer to the country because interaction between Tribunal personnel and Rwandans gives a human face to an otherwise abstract institution[153].

Despite all the difficulties that arose throughout the outlaying of the entire outreach program, and all the difficulties that the Tribunal had to face trying to gain trust and legitimacy in the eyes of the population; the instauration of such programme in the aims of the Tribunal and the recognition of the necessity of reaching such a vaster meaning of Justice in the first response of the international community to such atrocities after the Nuremberg Trials, was a fundamental step in the history of Transitional Justice and put a building stone to make it the fundamental and central topic of discussion that it is today.

The inclusion of such initiatives and purposes in the aims of such a milestone institution allowed the UN to later open the definition of justice as a goal and to position Transitional Justice as the important multifield that it is today.

2.4 Conclusions

The important remarks that the ICTR brought to the International Legal System are several: in addition to leaving a print on International Criminal Law; the ICTR forever changed the field of Transitional Justice. The ICTR clearly stated the necessity for the

[152] Journal of International Criminal Justice 3, Courting Rwanda, Victor Peskin, 2005, p.954
[153] Ibidem

two fields to cooperate and to incorporate within the aims of the UN a definition of Justice comprehending the restoration of the civilian society and of proper functioning of the political and social mechanism. Including the idea of a holistic justice allowed the UN to start implementing programs to reach the newly set vaster goal: to develop and start structuring the Transitional Justice field, while weaving its relationship with International Criminal Law. It was however clear from the start that to be able to accomplish the goal of restoring justice within the society it was fundamental to build the basis for a mechanism working within the nation for the nation itself to be able to have a more direct and straight forward approach to the societal layers. It was so written from the beginning the necessity to work on instaurating the reform and reconstruction of the gacacas courts.

The entire architecture was thought to be able to reach the goal of nonrecurrence and so be able to eradicate the root of the conflict: an aspect that however was forgone it the practicality of an approach that kept more in mind a classical criminal system and so conception of justice.

The next Chapter will focus on the analysis of the domestic approach to Transitional Justice and the experiment (in being) of the Gacacas Courts.

CHAPTER 3: GACACA COURTS: THE EXPANSION OF THE MEANING OF JUSTICE AND ITS IMPACT ON THE RWANDAN POPULATION AND ON TRANSITIONAL JUSTICE

Introduction

As already explained before the study case of the Rwandan Genocide was picked as the subject of this thesis as it embodies perfectly all the dimensions that Transitional Justice has while developing and structuring a project.

In the previous Chapter, the analysis was centered around the struggle of the international community built within the international legal system. As reported several times, the international community had clear in mind from the beginning that in order to be able to fully reach the goal of rebuilding a just society, able to guarantee the prevention and nonrecurrence of such atrocities, it was needed to have support from the Nation, and a project to rebuilt from and within the national dimension. For this reason, the project of Gacaca Courts was created.

Gacaca Courts are considered to be one of the most ambitious Transitional Justice experiments blending local conflict-resolution traditions with a modern punitive legal system to deliver justice for the Genocide perpetrated in 1994[154].

The aim of this chapter will be to describe and analyze the system, with all its merits and its flaws; aiming to understand the impact the system had on Transitional Justice as well.

The chapter will start with an analysis of the process behind the instauration of the courts to continue analyzing the functioning of the courts.

The second section will concern the analysis of the work conducted by the courts and the impact that it had on the population, and the third and last section will be centered on analyzing the impact that gacaca courts had on the field of Transitional Justice.

3.1 Instauration of the Gacaca Courts

3.1.1 Reasoning behind the instauration of the courts

[154]Human Rights Watch, Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts, Leslie Haskell, 2011, p.1

There are different reasons behind the instauration of the Gacaca Courts system; the reasons can be grouped into two main categories that can be labeled as systematic and transitional motives.

The transitional motives can be summarized by the sentence of the Rwandan President Paul Kagame "African Solution to African problems[155]". The Rwandan community did in fact feel the necessity of a closer approach to their society, a method that possesses a more cultural legitimacy. To fully understand what is intended with cultural legitimacy in addition to what is already explained in Chapter One, the concept of ubuntu, a peculiarity belonging to African communities, that so applies and is very impactful to the case of Rwanda. Ubuntu is the African philosophy that holds the sense of life: a meaning that isn't limited to theoretical existential research but that is declined into the practical sociality and structure of the society. Ubuntu is in fact very distanced from the Western aphorism impacting the culture I think, therefore I am[156], being embodied in the aphorism I participate in, therefore I am[157]. This difference is very emblematic to fully comprehend why the Gacaca Courts were considered a necessity to overcome the serious violations of Human Rights that the society suffered.

Systematic motives are to be researched into the number of crimes that Rwanda had to face at the end of 1994. With the totality of crimes committed in such a short period of time, the mission to punish all of the individuals responsible for those actions would have been challenging for every country around the world, it is moreover impossible to be able to prepare a national legal system for such major crimes, a legal system that in the specific case, in addition, lost several judges in the Genocide.

By 1998 around 130,000 people were incarcerated: this situation was not sustainable for the State of Rwanda which couldn't face such a high number of prisoners and had its maximum penitentiary capacity set at one-tenth of the number of the defendants[158].

[155] Ibidem
[156] Renè Descartes (1596-1650), fisrt principle of his philosopfy
[157] African Journal of Social Work, Exploring African philosophy: The value of ubuntu in social work, Mugumbate, J. & Nyanguru, 2013, p. 82-100
[158] Human Rights Watch, Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts, Leslie Haskell, 2011, p.2

The continuous accumulation of prisoners was due to the reach of the breaches of human rights but also due to the fact that the law neglected an essential part of the definition of genocide contained in the International Convention on the Prevention and Punishment of the Crime of Genocide: the intent of the actor to eliminate all or part of a listed group. Thus persons convicted of crimes like theft committed between April and June 1994 were mostly convicted of Genocide without consideration of whether they were merely seeking to profit opportunistically from the situation or whether they actually sought to eliminate persons of Tutsi ethnic group[159].

If on the one hand prisons were overcrowded, on the other conventional courts were not able to overly speed up processes and at the rate at which they were conducting trials, sentences concerning the genocide would have continued for for more than a century[160].

The government decided so to try genocide-related using the customary gacaca model. The term Gacaca means grass: Gacaca courts are indeed held in the open and run by local judges and to properly work they need and encourage the participation of the entire community[161].

The choice of the Gacaca Courts was so brought by the union of systematic and transitional motives, managing to combine a higher speed in processing and having a strong impact in rebuilding societal layers and trust: advancing and sustaining three main arguments first accelerating the time, second breaking the cycle of impunity by holding individuals responsible for crimes rather than families or larger communities and finally third sustaining the participatory nature and reuniting the community[162], restoring and leveraging the ubuntu.

3.1.2 Analysis of the Structure and Functioning of the Courts

[159] Human Rights Watch, Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts, Leslie Haskell, 2011, p.18 quoting Caroline Stainier, Albert Muhayeyezu, Jean Jaques Badibanga and Hugo Moudiki Jombwe, Vade-mecum, Le crime de genocide et les crimes contre l'humanitè devant les jurisdictions ordinaires du Rwanda (avocats sans Frontières, 2004)
[160] Human Rights Watch, Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts, Leslie Haskell, 2011, p.2
[161] Ibidem
[162] Human Rights Watch, Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts, Leslie Haskell, 2011, p.15

The Gacaca courts instaurated after the Genocide differed from the customary Gacaca in different aspects: the first trait that needs to be mentioned is that the new Gacaca courts handled serious crimes, indeed the gravest of crimes. Secondly, it is important to stress the power that the new gacaca courts had the ability to impose prison sentences ranging from short terms to life imprisonment. However, as what happened in the customary Gacaca system reconciliation and restoration of social order remained one of the main goals of the newly installed Gacaca system: this is also why the customary classical physical structure was incorporated into the new Gacaca system. Moreover, contrary to what happened before, the new Gacaca system was an official State institution under the Ministry of Justice, which entailed that judges within the courts were not elders of the community but instead elected members[163].

The jurisdiction of the Gacaca Courts was longly debated; however, it always concerned the crimes that happened between 1990 and the end of 1994.

The crimes considered in the post Genocide legal scenario were divided into four categories. The first category included planners, leaders, organizers, and instigators of the genocide, well-known killers, and rapists: this category was left to the conventional legal system to try[164] in accordance with Article 8 of the Statute of the International Criminal Tribunal for Rwanda. The second category included all persons who committed homicide in the determined period of time. The third category included those who killed or inflicted bodily harm without the intention to kill; while the fourth and last category included those who stole or damaged property[165].

Differently from what usually happens in conventional courts, the Gacaca system did not present the figure of the prosecutor, but it laid the role of identifying the defendants in the civic society. This point is fundamental to understand the social rebuilding character attributed to the courts. By needing such strong civic participation, the courts made the victims the most important voice to hear, a voice that was given direct listening and

[163] Human Rights Watch, Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts, Leslie Haskell, 2011, p.17-18
[164] Human Rights Watch, Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts, Leslie Haskell, 2011, p.18
[165] Human Rights Watch, Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts, Leslie Haskell, 2011, p.19

validation for the first time. The courts gained an immediate higher legitimacy: partly gained from the participation and partly gained from the historical and cultural tradition.

Before the start of the trials, the Gacaca Courts established a determined period of time to gather information and consequently classify the suspects in the four categories aforelisted. The so-called pilot phase lasted two years, after which the trials could start. Trials typically took place on the grass outside of the community's local administrative office, the duration of the trials varied based on the difficulty and necessities of the different cases[166].

After the trials started, the necessity of continuing to gather information did not vanish, the government to regularize and facilitate this process actuated a nationalization of the mechanism: instead of gathering information through weekly community meetings, a figure of local authority was nominated: the authority nominated was in charge of gathering information by assembling small groups or by going door-to-door and later presented the written accusation to the entire community for verification[167].

At the end of the national gathering phase, there were fewer than 800,000 cases that needed to be brought to trial. A number that kept increasing through the development and resolution of trials. Despite the high functionality of the courts the closing date was to be prorogated several times, up to the point when it was decided that the courts were to remain active until the end of the last trial, stating however that the trials to be carried were to concern only the individuals already imputated, and no additional suspects[168].

The new Gacaca system presented several differences in comparison with the conventional Rwandan legal system. Some of these differences represented the opening for different malfunctioning that later arose.

The first difference that can be highlighted is that Gacaca Courts had to face an extraordinary number of trials, which dealt with the consequences of the worst crime, thus having an unthinkable radius of reach until then. The Rwanda legal system was, as

[166] Human Rights Watch, Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts, Leslie Haskell, 2011, p.22
[167] Ibidem
[168] Human Rights Watch, Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts, Leslie Haskell, 2011, p.22-23-24-25-26

already mentioned before unprepared to face such a large quantity of trials, and at the same time if the Gacaca Courts had helped with the trial rate (the time needed to sustain a trial), the Rwandan legal system, which lost more than two-thirds of its judges during the genocide, was not even ready to sustain the creation of such a resource-demanding courts system. The project of the Gacaca Courts system presented more than 12,000 courts, impossible to staff with legally trained professionals[169], with the left disposable national legal system.

The courts were so entrusted to inyangamugayo, local judges designated specifically to Gacaca Courts specifically trained to handle complex cases and to uniformly apply legal standards and elected by the community[170].

The population elected approximately 259,000 laymen and women to serve as gacaca judges in genocide cases[171]. The judges in order to be possibly elected needed to own certain characteristics: judges needed to be at least 21 years old and considered persons of integrity. The condition of integrity entailed different criteria: the person in discussion needed to be considered of high moral character, not have participated in the genocide, should not have sectarian or divisionist beliefs, and should have never been imprisoned for more than six months[172].

All of these judges did however not possess any legal background or ability to face trials and decisions of such scale. The government determined six full-day compulsory training sessions presenting instructions on the basic principles of the gacaca law, management skills, ethics, and trauma[173]. It goes so without saying that for how much the government effort had an impact and can be appreciated, the new legal staff did not receive adequate preparation.

Another important problematic difference was that gacaca judges did not receive any remuneration for their work within the courts, even though that entailed losing several

[169] Human Rights Watch, Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts, Leslie Haskell, 2011, p.65
[170] Ibidem
[171] Ibidem
[172] Ibidem
[173] Human Rights Watch, Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts, Leslie Haskell, 2011, p.66

work days per week. This point was quite emblematic of the start of the problem of corruption.

Another important question was to be able to determine an appropriate punishment for genocide and related offenses has been hotly debated both inside and outside Rwanda. Genocide is among the most heinous of crimes, and as such the punishment should reflect the gravity of the crime[174].

Rwanda abolished the death penalty in 2007, so the maximum penalty established for genocide in all the courts of Rwanda, whether conventional or Gacaca, was "life imprisonment with special provisions"[175].

Special provision was originally designated as isolation and provided that supplemental legislation would establish more specific modalities for its application. For-life isolation was, however, considered inhumane and out of the legal standards set by Human Rights law, and so inapplicable by the International Community, and by several members of the Rwandan community as well, and so its abolition was called[176]. To marginalize the problem Rwandan law guaranteed basic rights to the prisoners as for example the possibility of receiving visits from close relatives.

Another important provision introduced was community service: in order to overcome the problem of the overcrowding of the prisons the nation introduced the community service punishment, according to which if belonging to category 2 offenders who confessed their crimes a person could spend the first portion of their sentence in prison and the second portion doing community service. At first, the provision was based on the consensus of the defendant to accept to participate in the program while later it became compulsory for each individual belonging to the category aforementioned[177].

Compensation was also thought of as a fundamental redress needed for the community, and for that end, it was planned for every family victim of the genocide. Compensation

[174] Human Rights Watch, Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts, Leslie Haskell, 2011, p.73
[175] Ibidem
[176] Human Rights Watch, Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts, Leslie Haskell, 2011, p.75
[177] Human Rights Watch, Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts, Leslie Haskell, 2011, p.78-79

was expected and planned in the sentences of the Gacaca courts; the reason why it was opened the "Found for the Support and Assistance of Genocide Survivors".

3.2 Analysis of the Scope and Impact of the Gacaca Courts on the Population: Merits and Flaws of the Gacaca Courts

The decisions and judgments of the ICTR did not reach most Rwandans. The ordinary courts in Rwanda would not have been able to deal with all genocide cases and would, for many, have been too far and costly to attend as well. The Gacaca proceedings were a response to dealing with the problems emanating from the 1994 genocide. By choosing gacaca, the Rwandan government did not only aim for justice by prosecuting the perpetrators, but also for reconciliation and unity among Rwandans; Gacaca therefore offered "an opportunity for all levels of the Rwandan population to participate in finding solutions to the problems that resulted from the genocide" which provided ownership to its citizens and empowered them[178]. Throughout the entire trial process in fact the community was encouraged to speak out and participate in order to flush out the truth of the events that had occurred during the Genocide; due to the decrease in voluntary participation, eventually participating in the hearings was even made compulsory and the absence could resolve in facing fines[179].

Gacaca contributed to the process of national reconciliation and was a good starting point in that process as it separated the truth from lies and clarified the circumstances of the death of the victims and where their remains could be found[180].

Even though the Gacaca court system has encouraged greater transparency of proceedings with the public as witnesses, and the fact that the dialogue opened and instaurated through the different proceedings promoted understanding and was perceived as a useful tool for educating the next generation in order to avoid another violent tragedy[181]; several complications and problems presented themselves in the mechanism, in the Gacaca dynamics and system.

[178] International Criminal Law Review 13, A.-M. de Brouwer and E. Ruvebana ,2013, p.965
[179] Global Tides, Volume 8, article 4, "An Analysis of the Effectiveness of the Gacaca Court System in Post-Genocide Rwanda", Lauren Haberstock, 2014, p.8
[180] International Criminal Law Review 13, A.-M. de Brouwer and E. Ruvebana ,2013, p.961
[181] Global Tides, Volume 8, article 4, "An Analysis of the Effectiveness of the Gacaca Court System in Post-Genocide Rwanda", Lauren Haberstock, 2014, p.9

What was mostly forgone and was the central breaking point for the perception of the population was the missed correspondence with the traditional Rwandan concept of justice, which develops around the word utabera, the idea of social reconstruction. The Gacaca system was not perceived by the majority of Rwandan as a tool coinciding with the traditional concept of restoring the social balance but rather as a tool that had a main retributive justice goal[182]: even in this case, however, people failed to be met in this need as well as compensation was guaranteed throughout the trial to only people who experienced privation of property[183].

Other important obstacles were brought by the structural entity and functioning of the courts: defendants were violated of several basic rights such as having proper legal counsel, and convictions not based on physical evidence, but rather only on witnesses' testimonies. The Rwandan constitution, domestic laws, and international treaties to which Rwanda is a party guarantee certain minimum fair trial rights: the right to a lawyer, the rigt to be presumed innocent, the right to be informed of the charges against oneself, and to have adequate time to prepare a defense, the right to be present at one's trial and to confront witnesses, the right against self-incrimination, the right not to be tried twice for the same crime, and the right to be free from arbitrary arrest and detention[184]. As just aforementioned some rights were to be sacrificed to gain rapidity in resolution, while others were guaranteed to mediate the human rights watch worries[185].

Another important point to add to what might be described as the defendant's perspective is that due to the shortening and lightening of the sentence, individuals often confessed crimes they did not commit or confessed crimes they truly committed but without taking true accountability for what they did[186]. This dynamic increased the mistrust already severely present between the two communities and made it hard for the two communities to coexist in the same habitat: people could not in fact afford to move and even if that would have been a preferable choice were obliged to live close to people who were not

[182] Global Tides, Volume 8, article 4, "An Analysis of the Effectiveness of the Gacaca Court System in Post-Genocide Rwanda", Lauren Haberstock, 2014, p. 10
[183] International Criminal Law Review 13, A.-M. de Brouwer and E. Ruvebana ,2013, p.961
[184] Human Rights Watch, Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts, by Leslie Haskell, 2011, p.27
[185] Ibidem
[186] Global Tides, Volume 8, article 4, "An Analysis of the Effectiveness of the Gacaca Court System in Post-Genocide Rwanda", Lauren Haberstock, 2014, p. 11

yet trialed to killed or violate relatives or close people. This translated in the beginning into what can be called a security issue that luckily the State was able to contain and marginalize in a short period of time[187].

Another important factor that fuelled the continuation of animosity between the two ethnic groups was the unwillingness of both the ICTR and the Gacaca Courts to process the exponents of the RPF, for the crimes perpetrated against the Hutu populations right after the end of the Tutsi Genocide, crimes perpetrated in search of avenge. This led many Hutu to view the form of justice handed down by the Gacaca as one-sided[188], this translated into a loss of trust and level of legitimacy attributed to the courts.

Samely, the victims of the genocide came to lose their trust in their courts due to several cases of corruption verified in the trials and didn't perceive judges as impartial anymore[189].

Another initial block to the gain of legitimacy was the very extensive debate on whether the Gacaca system had the means to face such important trials. Block overcame thanks to the fact that the Rwandan population needed to find a solution for themselves and be able to deal with with the situation at their own terms. However, the debate remerged when victims of the genocide were elected judges to take part in Gacaca, and when other judges were incriminated as active or involved parts in the genocide and needed so to be removed from their office.

The Gacaca system has also been viewed as reinforcing ethnic division because almost an entire generation of Hutu men has been associated with the crimes of the genocide, an idea that the collective guilt of all Hutus is perpetuated rather than individuating guilt based upon individual actions[190].

The term reconciliation varied in its meaning from coming or living together again, finding out the truth to being asked for forgiveness by, and forgiving those who had harmed you, or a combination of all three. There are instances in which survivors and families of the

[187] International Criminal Law Review 13, A.-M. de Brouwer and E. Ruvebana ,2013, p. 953
[188] Global Tides, Volume 8, article 4, "An Analysis of the Effectiveness of the Gacaca Court System in Post-Genocide Rwanda", Lauren Haberstock, 2014, p. 11
[189] Human Rights Watch, Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts, Leslie Haskell, 2012, p.122
[190] Global Tides, Volume 8, article 4, "An Analysis of the Effectiveness of the Gacaca Court System in Post-Genocide Rwanda", Lauren Haberstock, 2014, p. 11

perpetrators do not live in harmony with each other, while in other cases survivors choose to abandon their place because unable to bear the fear of living among the former genocidaires[191].

From the recollection of testimonies, it was however demonstrated that the Gacaca processes were a personal experience for each victim varying for the most traumatic experience and the most healing experience. It is however important to highlight the commitment that the State put forward to build a network of psychological help disposable for all the people who felt the necessity to be supported.

It could be said that reconciliation on the level of society at large – where survivors see reconciliation from a broader perspective; not just vis-à-vis the perpetrators who committed crimes against them and their family members – may be more easily attained, understood by, and expected from individuals than the former[192].

Despite all the possible criticism that can be moved towards the GGacaca court system, the only opinion that matters is the one of the Rwandan citizens. Polls taken early in the 200s presented a rather positive outlook on the Gacaca system from the Rwandan population; however, to be able to have a more complete idea it is necessary to look at more recent research. According to an undergraduate research with the University of New Hampshire, only a small percentage of the Rwandan population pursues higher education, it can so be deducted that the few current university students will be the future managerial class of the future. The study presented thirty-two interviews of students at the National University of Rwanda to test the beliefs of the future leadership, to see if the measurement taken managed to resolve the root of conflicts, and finally their perception in regard to the Gacaca system. Both the Hutu and Tutsi students had similar views on the Gacaca courts. When asked about the general characteristics of the Gacaca courts in relation to effectiveness, the responses were positive and hopeful. Many of the students wholeheartedly believed in the mission of the Gacaca courts. However, when asked more specific and pointed questions about the effectiveness of the courts, the students began to waver in the confidence they had previously shown in the courts. A few students talked about the room for corruption within the Gacaca court system. Others mentioned that the perpetrators' families often suffered the most. Ultimately, the students agreed with the

[191] International Criminal Law Review 13, A.-M. de Brouwer and E. Ruvebana ,2013, p.952
[192] International Criminal Law Review 13, A.-M. de Brouwer and E. Ruvebana ,2013, p.961

goals of the Gacaca court but saw a disparity between the goal and what actually came about as a result of Gacaca[193].

3.3 The Impact of Gacaca Courts on Transitional Justice

The Gagaca system as seen in the previous section presented several problems during its being; however it was a fundamental step in the history of Rwanda society, and in the history of Transitional Justice as well.

The Gacaca experiment is quite a pillar for Transitional Justice and more importantly, what is intended as the application of Transitional Justice programs and projects. One of the first experiments where the legal and social layers blended and where the retributive and restorative approaches to justice overlapped. The Gacaca jurisdiction does in fact represent one of the boldest and most original legal-social experiments, which seeks justice in an open, accessible, and participatory fashion[194].

The Gacaca system had the dual aim to both guarantee retributive justice and to guide and help the process of reaching restorative justice: it presented several tools toward the achievement of these two aspects; however, retributive aspect in time seemed to become more central, forgoing the most important layer for transitional Justice. Gacaca courts had the ability to directly open the dialogue for people and to directly act on the struggling and devasted society. This section of the thesis aims to analyze the important information that Rwandan gacaca courts left to the entire international legal community and the lessons left to learn in the field of Transitional Justice, while also highlighting the strength and the possibility of actions that those courts had on Rwanda population, whether they did apply those measurements at their full potential, or if in some cases aspects were left behind with time.

Rwandan Gacaca Courts for the first time expressed a deeper necessity that to receive and condone individuals responsible for such inhumane actions. While the punishment of perpetrators and redress for victims remains a central question in a transitioning society

[193] Global Tides, Volume 8, article 4, "An Analysis of the Effectiveness of the Gacaca Court System in Post-Genocide Rwanda", Lauren Haberstock, 2014, p. 13

[194] Journal of Dispute Resolution, Rwandan Gacaca: An Experiment in Transitional Justice, Maya Goldstein-Bolocan, 2004, p.356

other forms of justice that the society might experience a need for might be: rendering a truthful account of the past, pursuing reconciliation, deterring and preventing the occurrence of future violence and abuses, and advancing the rule of law while strengthening the foundations of the new hopefully more stable more right guaranteeing democratic order[195].

The model of individual accountability forms the basis of modern human rights law, since the happening of the Nuremberg Trials, the basis that found its consolidation also in the establishment of the ICTR, the International Criminal Tribunal for Rwanda aimed to affirm the duty of the international community to prosecute for crimes against humanity, war crimes, genocide, and torture.

By assigning individual responsibility, criminal trials significantly point out that specific individuals have committed the crimes in question, not an entire ethnic or religious group, or an entire ruling class, on the one hand helping reconciliation, but on the other possibly avoiding coming to the root of the conflict and risking to forgo important aspects afflicting societal doubts and fears. If the field of research of the trials remains too tight, justice might be perceived as too bartered away for political settlements, with impunity as the bitter price to be paid to secure an end to ongoing violence and repression[196].

Prosecutions can moreover reinforce the rule of law by discouraging personal vendettas, failure to adequately punish former human rights abusers breeds cynism and distrust towards the new political order: as expressed by Ruty Teitel when processes are conducted with full legality and following each legal standard:" they express public condemnation of aspects of the past, as well as public legitimization of the new rule of law"[197].

These reasons explain why prosecutions needed to be and have in fact been incorporated within the Gacaca System, the words of Ruti Teitel express perfectly the necessity perceived by the population, having reaffirmations and answers to their needs is very

[195] Journal of Dispute Resolution, Rwandan Gacaca: An Experiment in Transitional Justice, Maya Goldstein-Bolocan, 2004, p. 357
[196] Journal of Dispute Resolution, Rwandan Gacaca: An Experiment in Transitional Justice, Maya Goldstein-Bolocan, 2004, p.357-358
[197] Journal of Dispute Resolution, Rwandan Gacaca: An Experiment in Transitional Justice, Maya Goldstein-Bolocan, 2004, p. 359

important, and acquiring an even more special meaning if the measurements are adopted by the new rule of law, alongside gaining authority and legitimizations both in the perspective of the judiciary both as the perspective of the new ruling class.

While understanding the importance of retributive justice and incorporating it into the system, Rwanda didn't underestimate the importance of restorative justice, a broader form of justice that includes reparation, shaming for ambivalent bystanders, apologies from aggressors, and giving some voice to victims[198]. The participatory and restorative nature of the Gacaca system makes it an instrument potentially suitable to uncover the ruth and foster sustainable peace and reconciliation in the long term[199].

Unlike retributive justice, which considers crime primarily as an act against the state and a violation of its laws, restorative justice views crime as a conflict between individuals that results in injury to the victims, as well as the community and the offenders themselves. Crime is envisioned in restorative justice as a violation of people and relationships, this vision is so translated into obligations to make things right: justice is so perceived as an interactive process that engages victims, offenders, and the whole community in search for solutions[200]. In order to achieve healing, restorative justice calls for restitution to the victim by the offender. This is intended to restore the victim's status to the extent that is possible and to stop the cycle of violence, instead of escalating it through retributive, or forceful, responses[201].

The choice to pursue restorative justice and listening to the voices of the population claiming forms of national justice to aim for national restoration was fundamental in Rwanda and was demonstrated fundamental in the context of transitional society, able to address the reintegrative needs of both victims and perpetrators and as if that is the case of a preexisting form of restorative justice, it can help the restoration of the link with the cultural roots as well[202].

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[198] Journal of Dispute Resolution, Rwandan Gacaca: An Experiment in Transitional Justice, Maya Goldstein-Bolocan, 2004, p. 361

[199] Journal of Dispute Resolution, Rwandan Gacaca: An Experiment in Transitional Justice, Maya Goldstein-Bolocan, 2004, p. 381

[200] Journal of Dispute Resolution, Rwandan Gacaca: An Experiment in Transitional Justice, Maya Goldstein-Bolocan, 2004, p. 362

[201] Ibidem

[202] Journal of Dispute Resolution, Rwandan Gacaca: An Experiment in Transitional Justice, Maya Goldstein-Bolocan, 2004, p. 363

The Rwandan Gacaca system experience demonstrated several things that were incorporated into the pillars of Transitional Justice: on the one hand it was understood that truth and accountability are fundamental in a society that just experienced a genocide or other horrific violations of human rights. On the other it was also understood that the process to restore justice peace and stability within a society is very context-driven: to determine not only what form of justice is desirable but more importantly pragmatically feasible and realistic it has always to be kept into analysis a combination of social, political, economic and cultural factors[203].

Gacaca was in fact explicitly designed to reach the goal of reconciliation, this decision was both pushed and retained fundamental within a society where perpetrators of the Genocide and survivors of the same were in the inevitable situation of sharing their nation, both in a geographical, cultural, and political sense. Justice thanks to the level of participation required, to the cultural root of the modalities adopted, and to the national imparted character of the provision becomes visible, and helps the reconciliation with the past in exchange for finally having truth. Gacaca provided both moral and practical incentives for perpetrators to confess their crimes and seek forgiveness. The process was considered a necessity to gain the minimum level required for the possibility of coexistence, where the possibility of interconnected and interdependent structures is possible[204].

The problems that arose in the Gacaca system really risked warding off the centrality of restorative justice, and the building of the restorative paradigm: they risked transforming and translating the gacaca system in just another attempt and another layer to the classical retributive scheme put into action after crimes of a severe scale.

Despite all of its issues, the Gacaca courts were a fundamental step in the transitional Justice history that demonstrated how one justice do not have to die in favor of the other. Gacaca courts demonstrated that a holistic approach to justice is possible and has to be pursued while remarking on what are now considered the pillars of Transitional Justice:

[203] Journal of Dispute Resolution, Rwandan Gacaca: An Experiment in Transitional Justice, Maya Goldstein-Bolocan, 2004, p. 366

[204] Journal of Dispute Resolution, Rwandan Gacaca: An Experiment in Transitional Justice, Maya Goldstein-Bolocan, 2004, p. 384-385

truth-seeking, a victim-centered approach, giving back dignity to each individual who was exposed to the loss of it, aiming and doing all for the reach of the goal of non-recurrence

The Gacaca Courts demonstrated that amplifying the meaning of justice within or outside the same context of the courts may indeed better guarantee the restoration of a just society, a society in which accountability can be attributed to individuals without compromising the achievements of peace and stability in the long term[205].

3.4 Conclusions

The experience of the Rwandan Gacaca system was a fundamental experiment for Transitional Justice, despite and in spite of the problems that arose and how the Rwandan community was able to respond to them. The Gacaca system was proof that when speaking about transitioning societies it is fundamental to amplify the meaning attributed to the term Justice and to include in the aim of the reconstruction of the societal layers the well-being of the population: well-being that has to be reconstructed aiming to overcome the root of the atrocity the population suffered and to guarantee the impossibility of recurrence of the same crimes. The experiment demonstrated how a one-solution-fits-all approach is not possible in the field of transitional justice and how the mechanisms instaurated must indeed be victim-centered but without forgetting that what must be rebuilt is an entire society, in which all of its components present its needs.

[205] Journal of Dispute Resolution, Rwandan Gacaca: An Experiment in Transitional Justice, Maya Goldstein-Bolocan, 2004, p.395

CONCLUSIONS

The case of Rwanda demonstrates how fundamental the field of Transitional Justice is, as demonstrated for both the international and national dimensions respectively in chapter two and chapter three: to be able to act upon a devasted society, reenabling the functionality of the same, and to be able to guarantee the stability of a new rule of law, a new set of institutions accompanied with a new mindset of the ruling class, able to maintain the newly gained peaceful and just standards. Transitional Justice is fundamental to prioritize the well-being of each individual, to recognize the importance of guaranteeing a well-functioning society, and to acknowledge the centrality and the priority that human rights legal standards must have in each society.

Transitional Justice aims to restore a functional Rule of Law, and a functional society, as stated in the first chapter of the thesis: both applying international and domestic measurements, with the awareness of the necessity of not applying an external imposition of government, but restoring the well-being of the society within its cultural and historical context.

Transitional justice is indeed aware of the necessity of always finding new solutions relatable and applicable to the situation upon which it is needed to act, Transitional Justice has however been able to develop some pillars, or so guideline principles, to keep in each situation. Transitional Justice deals with truth, justice, reparation, and guarantees of non-recurrence: which are declined into pillars of accountability, rule of law, healing, reconciliation and rebuilding of social cohesion, sustaining peace, operations of peacebuilding, projects of sustainable development, and mechanisms of prevention[206].

All of the measures that can apply to a situation are unlikely to be perceived as justice by the population unless such measures are not accompanied by a State's commitment and tangible action to stop the continuation of violations and prevent their recurrence[207]. Guarantees of non-recurrence are inherently forward-looking and refer to the core function of prevention, rather than to a specific measure. It is a brought category of measures, the content of which ought to be determined in each specific context by an in-depth analysis of the type of violations and abuses that occurred, the ways in which they

[206] 2023 Secretary-General Guidance Note, "A Strategic Tool for People, Prevention and Peace", p.4
[207] 2023 Secretary-General Guidance Note, "A Strategic Tool for People, Prevention and Peace", p.20

were committed, their root causes, their impacts on victims and communities and how they can be best prevented in the future[208].

Effective prevention and sustainable transformation require more than changes in the security sector and institutional engineering, measures that touch upon societal, cultural, and personal spheres are as fundamental[209].

Despite the centrality of this aspect and its demonstrated importance in several cases, in Rwanda as well, the potential of the pillar of guarantees of non-recurrence is often overlooked. Seen as an umbrella concept that covers the institutional, societal, cultural, and personal spheres, transitional justice may offer a useful framework for the analysis and formulation of a prevention action plan. Prevention strategies in the context of transitional justice must be connected with broader upstream efforts to prevent human rights violations, atrocity crimes, terrorism, and armed conflict more generally[210].

Atrocities of such scale, as demonstrated in the history of Rwanda as well, exhibited in a more detailed manner in the first section of the second chapter , are not the fabrication of just an individual produced in one day: they are societal phenomena that find roots deep in history and that explode in tragedies after an important and distorted use of propaganda. These atrocities affect entire populations and need time to be resolved, new institutions need time to gain trust, and people need measures to sustain their healing process, as it was demonstrated by the instauration, implementation, and enlargement of the Gacaca system; but to guarantee the non-happening of revenge or the same discrimination, it is fundamental to arrive at the root, at the origin, of the conflict and resolve the issue. The Gacaca system showed in fact how most survivors felt that participating and testifying in first-hand domestic transitional justice experiments provided them – and the entire Rwandan population/community– justice and reconciliation[211].

It is so fundamental to implement all the actions above and within the State to condone individuals and their own actions, but it is as fundamental to implement provisions helping the society transition from the traumatic experience just lived, from the historic

[208] 2023 Secretary-General Guidance Note, “A Strategic Tool for People, Prevention and Peace”, p.20
[209] 2023 Secretary-General Guidance Note, “A Strategic Tool for People, Prevention and Peace”, p.20
[210] 2023 Secretary-General Guidance Note, “A Strategic Tool for People, Prevention and Peace”, p.21
[211] International Criminal Law Review, The legacy of the Gacaca courts in Rwanda: Survivors' views, de Brouwer, A. L. M., & Ruvebana,2013, p. 937-976

period escalated in the just lived inhumane actions. The ability to transition to a peaceful and working society has to be built within the population itself, respecting the culture and the characteristics of the population.

Another important aspect on which it is quite important to reflect is the preventive point of view that the international community should adopt in such fragile situations.

As happened in Rwanda in fact, a lot of situations in which it is necessary to intervene with transitional justice are the escalation of several decades of history: while the UN has developed several tools that protect individuals and act on prevention by guaranteeing rights, and the consequent eventual punishment following a breach, the UN had not yet thought to apply the transitional tools in action in already devastated State in which an escalation in atrocity can be predicted. Combining a preventive perspective with the goal of resolving the root of conflict could actually allow an already presented discrimination to translate into mass atrocity.

As admitted by the entire international community and by the UN itself, the chapter of Rwandan history, and the Genocide in particular, was one of the most impacting failures of the organization due to the incapability to define the situation as genocide before its ending and the incapability of acting on the situation before almost a million were killed. Once again the situation of Rwanda is emblematic and should be taken as a lesson to be learnt. In terms of transitional justice as well, preventive measures could be incorporated within the field, amplifying once again the meaning of the term justice, trying to define situations where killings did not occur as serious and worrying as those where proper breaches of humanitarian law are occurring or have already occurred.

Knowledge and consciousness concerning the field of transitional justice are fundamental to prevent and guarantee the possibility of intervention when needed. It would be needed to spread awareness of all the projects and the capacity of transitional justice as a field and as a tool to guarantee the aim of the maintenance of a world's peaceful state.

It is, in fact, too easy for everyone to find a parallel in the contemporary world of what happened in Rwanda, even if we yet can't count the same number of deaths or even more so situations at risk of experiencing an escalation and to be projected into war, or more generally situations in which the basic human rights are not respected and humanitarian

law is forgone, and to find people in the world forgoing the past and ignoring the present. In order to give more power to Transitional Justice the need to spread knowledge and consciousness is a fundamental step, that cannot be lessened and forgotten.

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