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Justice Mechanisms and the Question of Legitimacy

The Example of Rwanda's Multi-layered Justice Mechanisms

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Abstract

Legitimacy, this contribution argues, plays a key role in connecting transitional justice mechanisms to sustainable peace, and strengthening people's perceptions of legitimacy should be of concern to all those involved in these institutions. Here, it is important to take an empirical, people-based approach to legitimacy, with regard for its dynamic quality. This approach should focus on all three dimensions of legitimacy: the input into transitional justice mechanisms, the popular adherence to the demos that sets them up, and their output. In addition, legitimacy requires an explicit deliberation by means of justificatory discourse, and the involvement of all stakeholders. Drawing on the example of Rwanda's multi-layered justice mechanisms this model then draws attention through the processes through which various internal and external actors can seek to (de)legitimate transitional justice institutions, and what this entails for the legitimacy of these mechanisms in general.

1. Introduction

"Peace", as the Secretary-General of the United Nations wrote in 2004, "cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice" (3). In a way, his words echoed the sentiment expressed by a prominent Rwandan observer who, eying the remnants of the onslaught in his country a decade earlier, stated that "what we need now is justice and cash, in that order".

In the case of Rwanda, that justice came in many forms. Genocide justice is not only dispensed by the International Criminal Tribunal for Rwanda in Arusha, and universal jurisdiction procedures in a host of countries over the world, but also by a National Unity and Reconciliation Commission, the domestic courts, and the neo-traditional gacaca. As such, the Rwandan "legal laboratory" forms one of the most poignant examples of the central features of transitional justice in our days: the strong involvement of the international community, the search for alternatives to the classic retributive mechanisms, the tenuous linkage with wider political and socio-economic processes, the ongoing debate on the relationship between justice and reconciliation.

It also, thirteen years after the genocide, offers an opportunity to look into that feature deemed crucial by not only the Secretary-General, but frequently under-researched: legitimacy. What is meant by the legitimacy of transitional justice institutions, what have been the dimensions of legitimacy and strategies of legitimation in Rwanda's search for justice and what general lessons can be drawn from this? In answering these questions, this contribution first offers a definition of legitimacy, and argues why the issue should be approached empirically rather than normatively, and focuses on perceptions instead of assumptions. Such an empirical assessment, as section 3 argues on the basis of the literature, should focus on all three dimensions of legitimacy in these cases: the input in the transitional justice process, both in terms of procedures and principles; the adherence to the demos concerned, whether this is the international community, the nation-state or the locality; and the output. It should also take into account two crucial preconditions for establishing legitimacy: a communicative strategy geared towards deliberation on, and justification of, choices made on all three dimensions, as well as involvement of all stakeholders, not merely a majority, in all three dimensions. A next section applies this model to the Rwandan context and thus points out some of the strengths and weaknesses of all Rwanda's justice mechanisms, and the strategies of (de)legitimation employed by key actors. These lessons, then, form the basis for a number of wider observations and recommendations concerning legitimacy in a final section.

2. Legitimacy in an era of Global Governance

From Assumptions to Perceptions

There are many definitions and understandings of legitimacy, but the one used here will be that "legitimacy is a generalised perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions" (Suchman: 574). A crucial feature here is that legitimacy is about compliance, and the voluntary acceptance of costly rules: it is about accepting the jurisdiction of the court that sentences your brother to life-long imprisonment, and not doubting the procedures followed, even if the outcome is adverse (Risse). For legal institutions, Gibson and Caldeira argue, no attribute is more important than legitimacy as this gives them the "latitude necessary to make decisions contrary to the perceived immediate interests of their constituents" (1995: 460; Risse). In a famous trilogy Kratochwil distinguished three motivations for rule acceptance: fear of punishment, a cost-benefit calculation and acceptance of the norm as binding, and indicated how the rule concerned could only be considered legitimate in the third instance (cf Steffek: 254).

This bridging of the moral component of rules and institutions and their popular acceptance sets legitimacy apart from related concepts like legality, credibility and accountability. Legality points at the lawfulness of rules and institutions, and how these comply with preset norms, but does not imply their moral qualities, or popular acceptance. Credibility concerns the capability of eliciting belief, but does not indicate whether this belief is indeed present with the people concerned. Accountability, on the other hand, points at a particular relationship between actors, while legitimacy concerns a quality of institutions, like courts and rules (Risse: 7).

Legitimacy, in Suchman's definition, concerns a generalised *perception* or *assumption*, and can thus be approached either empirically, through social-scientific research into popular perceptions, or normatively, through the avenue of political philosophy (Follesdal). Over times, a marked shift has taken place from more normative to more empirical approaches to the issue. Of old, legitimacy was bestowed upon the sovereign on the basis of a moral-theological conception rooted in divine cosmology. After the Vienna Congress legitimacy came to be associated with constitutionalism, and was firmly clamped to the notion of the nation-state, again from a more philosophical and normative standpoint (Clark).

In the early 19th century, Weber explicitly shifted focus from the normative to the empirical and from assumptions to perceptions, holding that rule is legitimate when those governed believe it to be so. Here, the litmus test for legitimacy became "not the truth of the philosopher, but the belief of the people" (Schabert: 102). Legitimacy, in Weber's rendering, was intimately coupled to authority and domination, that could either be charismatic (the family, religion), traditional or legal-rational (as is the case with the modern state and its bureaucracy) (1993). Habermas, building on Weber's work, emphasised the dynamic character of legitimacy, and the role of law-making in giving an order binding force (1998).

Rules, and courts, thus play a key role in strengthening legal-rational authority and establishing a legitimate order. For, although discussions on legitimacy often concern a political community as a whole, generalised procedural and substantive rules are a key mechanism in guaranteeing the acceptance of outcomes. At the same time, the legitimacy of rules and courts themselves can be looked into, as is the case in this paper. While examples of such research are relatively scarce, examples include studies on the popular acceptance of the South African and the Sierra Leone Truth and Reconciliation Commission, the European Court of Justice or the US Supreme Court (Gibson 1997; 1998; 2003, Kelsall, cf Carothers).

Legitimacy and Global Governance

If legitimacy has always been a key concept in political and socio-legal studies, recent changes in the world order have made it even more relevant. The notion of a nation-state as the sole political order with the right to rule, and a monopoly of force, is increasingly confronted with a more multi-faceted reality: global governance has brought hybrids like side-by-side governance (where local and international non-governmental organisations rule together with governments) and web governance (by governments, elites, mass publics, transitional corporations, NGOs, INGOs) (Rosenau: 81). In addition, there is a stark rise of decentralised power-holders, whether local governments or chiefs. On the international plane, Fukuyama argues how "in Somalia, Cambodia, Bosnia, Kosovo, East Timor, and now Afghanistan, the "international community" ceased to be an abstraction and took on a palpable presence as the effective government of the country in question" (97). The ICC, with which state parties voluntarily share their monopoly of force, could well be the best example of how Weber's one-actor model of political society hardly fits today's world anymore.

If the legitimacy of the nation-state is debated and contested by a variety of actors all over the world, this is even more so in Africa. Here, discussions concerning the legitimacy of the state have often circled around "l'état importé", and posed the question whether the state institutions – structures of governance and courts alike – are endogenous and can claim some historical continuity, or have been superimposed by the colonial state (Englebert 2000; 2001). In Pham's words: "by and large, the contemporary African state is not endogenous. It supplanted pre-existing political institutions, underlying norms of social and economic behaviour, and customary sources of law and authority" (cf Oomen 2005).

Just as a colonial history puts particular challenges to normative theories concerning the legitimacy of the nation-state, so do many post-conflict situations. Whether it is about East-Timor, Afghanistan, Iraq or Columbia, the state itself was often a key actor in the conflict, leaving its institutions not only ruined physically but also severely delegitimised. Courts and rules in general then become mechanisms for re-establishing legitimacy.

Transitional Justice and its Empirical Legitimacy

The global era and the post-colonial and post-conflict condition thus all necessitate increased attention for issues of legitimacy, approached in an empirical, people-centered manner. This also applies to the burgeoning field of transitional justice. Transitional justice, as is well-established, concerns both a set of institutions and a debate. The institutions can range from international(ised) tribunals, national courts, truth commission, vetting

procedures to local courts, and the debate is about the aims best suited to make the transition from violent upheaval to sustainable peace: reconciliation, truth-telling, retribution, reparations or otherwise (Humphrey; Roht-Arriaza; Teitel). The debate was long held in terms of dichotomies: Truth vs. Justice; Reconciliation vs. Retribution; National courts vs. International Tribunals. Recent insights, however, have strongly underlined the need for more holistic strategies. As the Secretary-General put it in his 2004 report on the rule of law and transitional justice: "Our approach to the justice sector must be comprehensive in its attention to all of its interdependent institutions, sensitive to the needs of key groups and mindful of the need for complementarity between transitional justice mechanisms" (United Nations 2004).

In establishing the merits of these comprehensive, holistic "justice packages" it is crucial to take an empirical, people-centered perspective. To again quote the Secretary-General: "Our experience in the past decade has demonstrated clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice" (Ibid: 3). Here, both the normative *assumptions* and the empirical *perceptions* of legitimacy are deemed important in working towards peace: the institutions have to be legitimate in moral terms, but the general public – in all its diversity – also has to perceive them as such.

For a long time, empirical research into the legitimacy of transitional justice institutions was hardly carried out. Baxter pondered in 2002 why the decision to put in place a Truth and Reconciliation Commission in South Africa was not based on empirical research, while Pouligny notes a similar disregard for "what people believe about themselves, the other, the nature of justice, the requirements of community, and the proper structure of rights and responsibilities that determine, at least in part, post-conflict politics, social action, and communal life" (2). Other authors, like Mokhiber and Carothers, extend these findings to the whole justice sector.

Recently, however, a number of NGOs and scientists have carried out empirical research on people's perceptions and expectations of transitional justice mechanisms. In a carefully drafted and carried out study, Stover and Weinstein show how "the views and opinions of those most affected must be solicited and given careful consideration", and, on the basis of field research in Rwanda and former Yugoslavia, work towards an "ecological paradigm of social reconstruction" (11, 18). The International Center for Transitional Justice, correspondingly, carried out survey research on people's opinions on transitional justice institutions in countries like Iraq, Uganda and Columbia (2004).

However strong the need for such empirical research, a number of cautionary remarks related to the dynamic quality of legitimacy and the value of such research for policy formulation have to be made. The first concerns the lack of knowledge and understanding of transitional justice institutions that many interviewees are likely to have at the time of research. One of the central lessons in socio-legal studies is that the more people know about courts, the more they tend to appreciate them: "to know courts is to love them, because to know them is to be exposed to a series of legitimizing messages focused on the symbols of justice, judicial objectivity, and impartiality" (Gibson 1998:345). Also, people's institutional preferences are generally not formed by a preset legal culture - like Asian Confucianism - but determined by the range of institutional options available (Friedman). People's perceptions of legal institutions can, therefore,

increase with the knowledge that people have of them and the degree to which they are deemed to be available.

What is needed, then, is a conceptual model that puts people's perceptions and appreciation of transitional justice structures at its core, and at the same time recognises the dynamic quality that is essential to gaining and maintaining legitimacy. In the following sections such a model will be elaborated, and applied to that "legal laboratory" of a thousand hills.

3. Conceptualising Legitimacy: Input, Demos and Output

Legitimacy, with all its understandings, becomes a bit like the blind men's elephant: the trunk to the one, the tusk to the second and the tail to the third. In order to capture tail and trunk alike, but also the movement of the animal concerned, the model will distinguish three dimensions determining the legitimacy of transitional justice institutions that come close to the threefold distinction of democracy made by Lincoln in his Gettysburg address: government *of* the people, government *by* the people and government *for* the people (Scharpf). Translated, the legitimacy of courts, truth commissions and the other institutions concerned is made up by the procedural and substantive *input* (of the people); the adherence to the wider community that puts the institutions in place, the *demos* (by the people) and the acceptance of the *output* of the institutions, whether in the short term (specific case law) or the long term (reconciliation).

On the basis of the philosophical and the socio-scientific literature, the following can be postulated: First, the legitimacy of transitional justice institutions hinges on all three dimensions: an Truth Commission in which the input is considered legitimate, but that lacks output or was put in place by a community that people do not adhere to will still suffer a lack of legitimacy. Second, the legitimacy of an institution is not static, but can fluctuate over time. It has to be both assumed (normatively) and perceived (empirically) and *deliberative* democracy, with an explicit justificatory discourse, helps bridge the gaps between the two. Whereas the model follows Ignatieff in stating that "the truth, if it is to be believed, must be authored by those who suffered its consequences" (175) and thus puts the people's perspective first, it is equally important to involve all *stakeholders* in these discursive processes. Attempts to enhance the legitimacy of transitional justice procedures should therefore be concerned with the input, the demos and the output, take a discursive approach and involve as many stakeholders as possible. The following sections will discuss the foundations and the importance of each of these prerequisites.

The Input Dimension

The *input* dimension of legitimacy, as introduced by Scharpf, concerns the procedural and substantive elements that go into designing transitional justice institutions. Input is the classic locus of legitimacy, and the only one to some theorists and practitioners. It points at a faith in the design of institutions, the procedures followed and the underlying values that will ensure acceptance of decisions made by – for instance – courts, even if they have adverse effects for the people concerned.

Procedural fairness is at play when the setting up of institutions follows preset rules, and is done by authorities who have the right to do so. It points at procedural correctness and a lack of arbitrariness in the way in which institutions are set up: not as a political, behind-closed-doors arrangement in the transition process, guaranteeing (for instance) amnesty to members of the former regime, but through an open procedure. An element can be public participation in the design and the staffing of the institutions. In South Africa, for instance, the job interviews with Truth Commissioners were held on public television, for all the country to follow. In addition, mandates have to be fair, covering all actors involved (including the international community) and all human rights abuses committed (including those of the victors).

Input legitimacy is also enhanced through building on values that enjoy broad acceptance among the community. Classically, universal human rights are best suited to act as these values through their emphasis on equality and procedural fairness. At the same time, it is important to build on the underlying values in national law, and in traditional and religious cosmology. As a woman in East Timor said about the community reconciliation process "it is because we also involve the traditional leaders, and swear oaths as in our tradition, that forgiveness becomes true".

The Demos

The way in which input in transitional justice procedures is valued is closely related to stakeholders' acceptance of the polity that puts in place the institutions concerned. This polity – the "people" in the *by* the people referred to by Lincoln – can be the international community, the nation-state or the locality.[1] Even if, as discussed before, all these polities might consist of a host of actors once unpacked, their mythical identity as coherent communities of belonging continues to exist (Clark, Steffek). While the demos can be conceptualized in legal-rational terms, as the polity given the right to rule by its citizens, its added legitimacy lies in its mythical qualities: that of the imagined community and the fact that this causes the institution concerned to be perceived as "our court" or "our commission".

The mythical quality poses particular challenges in each of the three polities concerned, but arguably most poignantly where it concerns the international community (Falk). As Risse states: "there is no global 'demos' available in terms of a world community of citizens in whose name governance could take place. At best, governance beyond the nation-state relies on a rather 'thin' layer of collective cosmopolitan identity of 'world citizens'. …" solidarity with the global community is restricted to particular issue-specific publics organised in transnational networks of like-minded people" (1). Here, justification of actions and narratives of belonging become even more important in order to gain popular legitimacy. That this is not always the case is demonstrated by the relative lack of support for the Yugoslavia tribunal amongst Bosnians, Croats and Serbs, of whom many feel that "The Hague Tribunal is a big mockery" (cf Fletcher, Stover: 147).

While the nation-state arguably has the strongest credentials to act as a mythical community of belonging to all its citizens, this myth has often been thoroughly

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[1] These are, of course, not all forms of demos thinkable: in the context of transitional justice the church and other non-government organizations might also function as communities of belonging that set up specific transitional justice procedures.

shattered during the war and requires rebuilding around common narratives of ancestry, history, the war and the future that often take generations. Whatever national government is involved in setting up transitional justice procedures – democratically elected, interim or a government of national unity – its legitimacy is likely to be challenged by those who feel marginalised. A reinterpretation of the past, a rephrasing of a common identity, a record of what took place and why is crucial towards re-establishing this legitimacy.

In this context, it is vital that the state is perceived to strive for the common good: that it seeks to dispense socio-economic justice and treats all its citizens fairly in providing goods like employment, schooling and housing (Uvin 2003). A transitional justice process, however legitimate the input and the output, will not be perceived as legitimate if there are doubts concerning the degree to which the *demos* truly acts in the common interest.

It is precisely because of the tattered and tarnished image of the nation-state as a community of belonging that policy-makers have increasingly focused on the locality as more suitable, legitimate demos within which to initiate transitional justice initiatives. The community programs in East Timor and Sierra Leone can serve as an example. For all the merits in this approach, there are also dangers in romanticizing post-conflict communities: often, these are characterized by a high degree of social tension (Berkeley, Stover). In these uneasy day-to-day arrangements memories of intimate violence and discourses of insiders and outsiders, perpetrators and victims linger right below the surface, and preclude the notion of a communal identity.

In sum, for all these polities to be the legitimate author of transitional justice strategies they themselves have to be rebuilt as well, through narratives of belonging and day-to-day actions that include all stakeholders. These wider processes are of high importance to ascertaining the role of justice in rebuilding peace in general, and in making for successful transitional justice institutions.

Output

As people are often highly sceptical of the demos that sets up transitional justice institutions, the output of these institutions becomes more and more important. This shift from *input* to *output* legitimacy as a result of global governance has often been noted: how an institution was set up and who did so becomes less important, as long as it gets the work done (Scharpf). "We don't care too much who tries the members of the Pol-Pot regime, as long as they go to jail", as a Cambodian respondent said.

In discussing output legitimacy it is important to distinguish between the direct output and the outcome; the divergent aims that transitional justice mechanisms seek to achieve. In terms of output legitimacy is attained through, amongst others, the speediness of procedures, the amount of cases heard, the accessibility (both physical and in terms of language) and – importantly – the selection of cases. A court that has a well-designed mandate but is perceived to try only certain actors in the conflict risks a loss of legitimacy, as in the case of the International Criminal Tribunal for the former Yugoslavia (ICTY), on which a Serb man said: "The Hague is dictated by the Americans. Those that they want to send to The Hague are sent there. And the wrong people are being tried" (Stover: 147).

Even more important, be it difficult to research empirically, is public support for the underlying aims of transitional justice procedures: to what extent do people

want retribution, reconciliation, truth-telling, reparations to play the role that they do in the given institution? Ideas and expectations in this field might differ strongly. In South Africa, reconciliation was deemed to be the main aim of transitional justice, while empirical research pointed out how most South Africans found retribution to be equally important (Hayner: 144, Gibson, Wilson). Similarly, the scarce attention for reparations in justice procedures in Guatemala, East Timor and Sierra Leone proved to be a great disappointment for many participants (Roth-Arriaza).

The Importance of Deliberation, and Justificatory Discourse

Assumptions and perceptions of legitimacy can come closer to one another in processes of justification. The issue is subsequently to not only attain legitimate input and output, and to strengthen the legitimacy of the *demos*, but to engage in ongoing processes of legitimation and justificatory discourse. Habermas, for instance, asserts how legitimate law-making stems from the formation of public opinion and will-formation that produces communicative power that in turn influences social institutions (1998). Justification, arguments for the choices made, the input, the right of the *demos* to act on behalf of the stakeholders and the value of the output are key elements in strengthening legitimacy.

One example are the outreach programs of the International Criminal Court (ICC) and other international(ised) courts that seek to explain their mandate and procedures at the level of the locality. In designing such programs, it is important to keep the three dimensions in mind: an international court has the greatest chance of being perceived as legitimate if it involves the people concerned in its set-up, includes values held and procedures respected locally and explicitly communicates its underlying values, explicitly justifies the fact that it acts on behalf of a community of belonging, and – in its selection of cases and wider aims – takes peoples perceptions into account and communicates its results to them. The way in which the media are involved in broadcasting information on a wide range of transitional justice initiatives in countries like Sierra Leone, East Timor and Rwanda, often at village level, can serve as an example.

Stakeholders

Legitimacy, like beauty, is in the eyes of the beholder. In processes that bring closure to a period of horrific human rights violations there are often many actors with very divergent interests: the perpetrators and their families, who can put the emphasis on reconciliation and forgiveness; the ex-combatants, whose primary interest might be reintegration into society; the victims, who often have a legitimate desire for revenge and retaliation; the by-standers, who value socio-economic justice; NGOs, which seek to work on a wider culture of accountability and adherence to universal human rights; elites, who might or might not have played a role in the conflict; international donors, with their own agenda's and political interests; the international community at large, that – more often than not – could have played a greater role in preventing the conflict than it did.

In this context, legitimacy theory points at the overriding importance of *consensual* (as opposed to majoritarian) decision-making and involving all stakeholders in strengthening each of the dimensions of legitimacy: in designing the institutions, in the wider community that is the *demos* and also in delivering justice: the output side (Clark; Mokhiber). One example is the involvement of

victims in court procedures, an issue underscored by the International Criminal Tribunal for Rwanda (ICTR) and the ICTY, but well catered for within the ICC.

The conceptual model as set out above is summarized in table A. It shows how legitimacy can only be enhanced through attention for its three different dimensions, and the importance of justificatory discourse, and involvement of stakeholders, in all of these dimensions. In what follows, the model will be applied to the multi-layered justice mechanisms of Rwanda, explaining the sources of legitimacy of each of these mechanisms, what strategies to (de)legitimise the transitional justice process were successful and why.

A. General Model of the Legitimacy of Transitional Justice Institutions

Dimensions	Input	Demos	Output
Preconditions for legitimacy			
Legitimacy in general: procedures	Institution set up in open process, according to preset norms	Whether the international community, the nation-state or the locality: constituted through democratic elections or other procedures that elicit confidence	Procedural fairness: trying all parties in a conflict, speedy, expedient justice, accessible in terms of language and distance
Legitimacy in general: principles	Universal human rights, national law and traditional, religious values	A mythical community of belonging	Outcome: reconciliation, retribution, truth, reparations?
Justificatory discourse	Explicit two-way communication	Narratives of common identity, history and future, combined with socio-economic justice	Explicit discussion on the aims of transitional justice procedures and short-term output
Involvement stakeholders	Open procedures, all stakeholders	Consensual decision-making, attention for minorities	Involvement of victims, bystanders, perpetrators and support of NGOs and international community

4. Rwanda and its Multi-layered Justice Mechanisms

Moving, now, from the theoretical plane to the issue of legitimacy in the "legal laboratory" in the country of a thousand hills, it is necessary to first give a very brief sketch of the 1994 genocide and its causes. As is well established, the

starting point of the killings was the shooting of the plane that carried Rwanda's president Habiyarimana on April 6. In the hundred days that followed, an estimated 800.000 Tutsi and moderate Hutu were murdered, often by acquaintances or intimates, with machetes and other farming utensils (Prunier, Des Forges). One of the poignant features of the Rwandan genocide is the scale of the killings and the widespread involvement: recent reports have estimated the number of killers at 750.000, one out of four Rwandan adults at the time (PRI 2006:1).

In looking into the causes of the genocide, and with it the potential for justice and sustainable development, a number of issues are important. There is, for one, the legacy of authoritarianism and obedience, dating back to the times of the *mwami,* king*.* But there is also the colonial legacy of ethnic differentiation, the overpopulation and general economic pressures at play in the early 90s, the Rwandan Patriotic Front (RPF) invasion of the country in 1990, the role of the extremist government and its use of the media, the role of the international community and, of course, the culture of impunity.

Rwanda is one of the few African countries where "l'état importé" is not an issue, and that still more or less has the borders of the pre-colonial kingdom of the *mwami*, that was highly hierarchically organised and centralised (Mamdani). While the exact nature of the historical relationship between Hutu and Tutsi at the time remains subject to vehement debate amongst historians, a number of issues are established (Lemarchand, Newbury). One is that the Hutu and Tutsi people might have different historical origins, but that they have long shared the same religion, language and territorial space. The differentiation between the groups was mostly socio-economic in nature, distinguishing agriculturalists from pastoralists and allowing for social movement between the two.

It was only during Belgian colonisation after the First World War that these social categories became ethnicised, and that favouring Tutsi in access to employment and education became common practice. This systematic discrimination sowed, or at least nurtured, the seed for the ethnic violence that erupted after independence in 1959 (causing many Tutsi to flee to, amongst others, Uganda), but also in 1962 and 1972 when Rwandan Hutu killed and expelled thousands of Tutsi.

The actual build-up to the genocide took place over a number of years. Even if Rwanda was a success-story in developmental terms, land scarcity had long been a problem and became even more so in the 1990s (Bigagaza). In addition, the plummeting of the worldwide coffee and tea market in this period hit the country hard. The general sense of uncertainty was further heightened by the RPF Tutsi-led invasion from Uganda in October 1990.

The increasingly extremist Hutu government, under internal pressure to carry out the democratisation agreements of the Arusha accords, channelled this general uncertainty into a discourse of exclusion. Via the newspapers and radio stations like Mille Collines Tutsi were presented as *inyenzi*, cockroaches, to be exterminated before they would wipe away the Hutu population. Moderate voices were increasingly silenced, and when the presidential plane crashed on April 6 a long-planned scenario, on the basis of death lists and well-trained militia and involving the majority of the adult population, was carried out (Des Forges; Reyntjens).

Later analyses have all pointed at the failure of the international community, both in foretelling the genocide and in stopping it once it unfolded (Barnett; Dalaire; Power). Uvin, in analysing the role of the development community in Rwanda in the 1990s argued that it "interacted with the processes that underlay the

genocide. Aid financed much of the practices of social exclusion, shared many of the humiliating practices, and closed its eyes to the racist currencies in society" (1995: 8). Once the genocide started, under the eyes of the world media, the unwillingness of the international community to label it as such and thus to stop it was one of the reasons why the killers could go on for so long, and why the death toll could rise to one tenth of the population (Power).

A final, often-cited partial explanation for the genocide lies in the culture of impunity that had accompanied the cycles of violence since independence. Once the genocide had been stopped by the RPF, which in turn killed tens of thousands of Rwandan Hutu and caused 2 million people to flee, one of the first priorities felt by the new government was that of justice. The international community, which returned to the country en masse after June 1994, enthusiastically supported this ambition through helping to conceptualise, finance and often administer a wide variety of transitional justice mechanisms.

Hence, post-genocide Rwanda came to be characterised by a true proliferation of justice mechanisms, often with very divergent aims and conceptions of the type of justice to be done. Of these mechanisms the most important are the ICTR, trials within foreign jurisdictions, the national courts, the National Unity and Reconciliation Commission and the neo-traditional local courts, the *gacaca.* All these institutions are characterised by a high degree of foreign involvement, which can be explained in part by the guilty conscience of the international community, and in part by the increased interest in transitional justice in general (Oomen 2005; Sarkin).

The ICTR is, of course, most strongly placed in the international sphere, and aims to prosecute persons responsible for committing genocide and for serious violations of humanitarian law in Rwanda in 1994. Another example of primarily retributive justice are the prosecutions of Rwandan nationals in countries like Canada, Switzerland and Belgium under the doctrine of 'universal jurisdiction' (AI 2001). In the same vein Rwanda's domestic courts also made retribution in the wake of the genocide into their central objective. Rwanda's Organic Law on Genocide of 1996 established special chambers to try acts of genocide as defined in the Genocide Convention of 1948, those crimes in the Rwandan Code Pénal committed in relation to the genocide, and crimes against humanity. In addition, but with a very different approach to justice in mind, the Rwandan government also installed a National Unity and Reconciliation Commission (NURC) in 1999. While the international community had pressurised for a full-fledged Truth and Reconciliation Commission along the lines of the South African TRC, and the government had toyed with this idea, it ended up with a body with much less far-fetching powers. Finally, there are the *gacaca*, the local courts erected on virtually every one of Rwanda's ten thousand hills, in which community members are supposed to collectively come to terms with the past and try the guilty amongst them. In the following sections we will briefly consider the legitimacy and legitimation of each of these justice institutions.

5. Multi-layered Justice Mechanisms and Their Legitimacy

Rwanda's manifold justice mechanisms each have their own sources of legitimacy, and strategies of legitimation invoked by the various stakeholders involved. A brief overview of these dimensions and debates in the ICTR, universal jurisdiction procedures, the NURC, national courts and the *gacaca* can not only

shed light on people's perceptions of the justice process, and what informs them, but also on the potential of each mechanism to truly contribute to sustainable peace.

The International Criminal Tribunal for Rwanda (ICTR)

The establishment of the Rwanda tribunal by the Security Council in 1994 was, together with its sister ICTY, a shining example of how Ignatieff's "Age of Implementation" of human rights had finally come about. The Tribunal's mandate followed the Genocide Convention of 1948 and the Geneva Conventions of 1949 in including genocide, war crimes and crimes against humanity and its temporal jurisdiction was wide enough to cover both the genocide and the crimes committed by the RPF as it invaded Rwanda from the North (Morris, Van den Herik). Procedurally, the emphasis would come to lie on common law, with its more adversarial approach. In terms of stakeholder involvement and communicating its results the tribunal, vested in Tanzania, did not get as much attention as its sister in The Hague, but was still fed and followed by countless NGOs, amongst which organisations like Hirondelle which published good media reports of the proceedings.

This input legitimacy was further heightened by the fact that it was Rwanda itself, which at the time was a member of the Security Council that had asked for the Tribunal to be put in place. In spite of this early Rwandan support, however, the *demos* from which the Tribunal derived its legitimacy was strongly that of the international community. Even at the inception, the Rwandan government presented the ICTR as a mechanism by means of which the international community could make up for its historical debt of not having prevented the genocide from taking place, and withdrew its support once prosecutor Del Ponte indicated that she might also issue arrest warrants for members of the current RPF government. As of that moment, communication about the ICTR within Rwanda became frosty, with Kigali emphasising mishaps above accomplishments (Reydams).

This detachment from the locality can be felt in Rwanda, where 56 % of the people interviewed in 2002 claims to be "not well informed" about the Tribunal and where people were generally more negative about the Tribunal than about the national courts and the *gacaca* (Longman in Stover: 213-215, cf Uvin 2003). It can also be felt in Arusha itself, where the Tribunal is dominated by a polyglot international legal community with a good Italian coffee bar, but surprisingly little Rwandans, both in the staff and in the audience (Cobban; Vokes). This, however, might change as the Tribunal moves to Rwanda in 2008, to complete its large cases in the *demos* for which it was primarily set up.[2]

While the input legitimacy of the Tribunal was generally laudable, the legitimacy of the demos was problematic, and the real problem that the Tribunal had in establishing legitimacy came with its output. As of June 2006, after 10 years of operation, the Tribunal had only handed out 22 judgments. The Tribunal has been criticised for its bureaucracy and costliness, even though administration became a little more expedient over the years. Whilst the Tribunal managed to set a number of important legal precedents – establishing that rape can constitute the crime of genocide, convicting the former prime minister Kambanda, looking into the role of the media – recent criticism has focused on

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[2] The first request of transfer of a case to Rwanda took place on the 11th of June 2007, cf www.ictr.org

one glaring omission: the fact that the RPF crimes were not tried, and the possibly political reasons for this. This background caused the Sierra Leone Chief of Prosecutions to argue that "the lack of eagerness on the part of the Prosecutor to initiate investigations about crimes committed by members of the Rwandan Patriotic Front … challenges the image of independence of the Prosecutor" (Côté, quoted in Reydams: 987, cf Nyemera). Here, the accusation of victor's justice lurks close around the corner.

Also, in terms of the output and outcome of the Tribunal, its day-to-day workings have been strongly criticised by victim's organizations, for instance in the adversarial approach in rape testimonies, the disclosure of the identity of certain witnesses, and the fact that perpetrators – in the beginning – would receive HIV/Aids medication whilst their victims would not. The emphasis on retribution is also valued differently: some victims might prefer an even stronger emphasis on retribution, including the death penalty. Academics, on the other hand, have pointed at the failure of the ICTR to make true its ambition of contributing to reconciliation; mostly through its simplistic narrative of the 1994 events (Hurst, Uvin 2003).

B. The ICTR

Dimensions *Preconditions for legitimacy*	Input	Demos	Output
Legitimacy in general: procedures	In line with international human rights and humanitarian law	International community; Rwanda involved in setting up, critical afterwards, will take over after 1998	Slow, bureaucratic, accusation of victor's justice as no RPF crimes have been included
Legitimacy in general: principles	In line with international human rights	International community not democratically elected, "democratic deficit"	Emphasis on retribution, criticised for lack of contribution to reconciliation
Justificatory discourse	Little communication on aims in Rwanda	Rwandan national debate centres on guilt of the international community	Little known on tribunal in Rwanda, limited outreach
Involvement stakeholders	International community, NGOs, Rwandan government	Rwanda antagonistic towards international community, because of its failure to prevent the genocide	Little attention for victims in procedures

Universal Jurisdiction Procedures

The Rwandan genocide, perhaps more than any other tragedy in the 20th century led to a relatively widespread resolve to make true the essence of the 1948 Genocide Convention: that certain crimes are of such gravity that no person or entity that committed them enjoys immunity and their punishment is the responsibility of the whole international community (cf Reydams 2003). Following this doctrine of universal jurisdiction, a number of states – including Belgium, Switzerland, Spain, Finland, Canada and the Netherlands – instigated procedures against persons involved in the Rwandan genocide, often after these had applied for asylum in the countries concerned. Belgium, for instance, convicted four Rwandans, amongst whom two Benedictine nuns, to imprisonment for war crimes in the 'Butare Four' case.

The main challenge to the legitimacy of these procedures lies in the demos and its perceived interests. The procedures concerned are often followed critically by Rwandan perpetrators, victims and the Diaspora, especially where they concern ex-colonisers or nations with some form of involvement in the 1994 events (cf Eftekari). The Belgian resolve to try Bernard Ntuyahaga for his suspected role in the killing of ten Belgian paramilitaries on April 7 1994 is understood, because of the direct interest in the matter. The work of the French anti-terrorism judge Bruguière has, however, met a great deal of Rwandan criticism. In 2006 Bruguière published a research report accusing Rwandan president Kagame of responsibility for the 1994 plane crash, and recommending that Kagame (who enjoys immunity as a head of state in Belgium) be tried by the ICTR, whilst issuing arrest warrants for nine senior Rwandan officials (Rémy). In response, the authorities in Kigali not only accused France of seeking to destabilise Rwanda, and instigated a civil suit concerning defamation against the French judge, but also stated that "The French are trying to appease their conscience for their role in the genocide and are now trying to find someone else to hold responsible for their acts here"3.

The National Unity and Reconciliation Commission (NURC)

As opposed to these primarily retributive processes in the ICTR and national courts all over the world Rwanda's National Unity and Reconciliation Commission strongly puts the emphasis on reconciliation. While many donors had initially pushed for a South African-style independent Truth and Reconciliation Commission with the power to establish a historical record and offer amnesties, the government opted for a government body with relatively little powers instead (Vandeginste 1998). The NURC was established in 1999, and aims to "serve as a forum for Rwandan people of different categories to exchange on their problems and find solutions in truth, freedom and mutual understanding", for instance through the organisation of neo-traditional *ingando* seminars and solidarity camps for prisoners about to reintegrate into society.

Thus, even though the NURC is hardly a full-fledge justice institution, it is important to discuss its legitimacy and strategies of legitimation as it plays a central role in rebuilding the Rwandan demos around a particular government-sponsored narrative of history and common identity (Mgbako; Mironko). In broad lines, this narrative emphasises the common Rwandan past and national identity, and blames the Belgian coloniser in junction with the Hutu extremist government

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3 Foreign Affairs Minister Charles Murigande, quoted by Reuters news agency: http://news.bbc.co.uk/2/hi/africa/6168280.stm

for the events in 1994. It leaves very little room for individual accountability and dangerously charges the whole Hutu ethnic group with responsibility for the genocide, while positing all Tutsi as victims and glossing over the defects of the current government (PRI 2004: 19; Tiemesse). This narrative is backed up by the constitution that prohibits "divisionnisme" and any mention of a Hutu-Tutsi divide. This narrative, which is the way in which the NURC seeks to foster "a spirit of patriotism" amongst Rwandan people is presented at conferences but also at the *ingando*, the neo-traditional solidarity camps that "students, politicians, church leaders, prostitutes, ex-soldiers, ex-combatants, genocidaires, *gacaca* judges, and others" have to attend (Ibid: 202). It risks the danger of leaving little room for individual accountability and throwing a blanket of reconciliation over the remaining trauma, anger and feelings of resentment (Cf Pottier).

Donor participation in the NURC is high, as in all Rwanda's justice mechanisms, with a large number of foreign donors financing the proceedings (Oomen 2005). As such, the main stakeholders here are the government, in conjunction with the international community, which both thus strongly put the emphasis on reconciliation.

Rwanda's National Courts

Even if the Rwandan national courts have received relatively little attention in the debate over genocide justice in Rwanda, they have played an important role, which has only been strengthened over time. Just after the genocide, the Rwandan judicial system was completely shattered: only 40 of the eight hundred judges and lawyers practicing in Rwanda were still in the country by July 1994, and the rest had either fled the country or been killed and many courthouses had been destroyed. Rwanda's Organic Law on Genocide of 1996 established special chambers to try acts of genocide as defined in the Genocide Convention of 1948, those crimes in the Rwandan Code Pénal committed in relation to the genocide, and crimes against humanity.[4]

It took a number of years to rebuild the completely destroyed (and previously also relatively weak) Rwandan justice system: the first years after the genocide were characterised by lawyers flown in from abroad explaining the principles of criminal law to judges who more often than not had no primary or secondary education (cf Reyntjens Annuaires). Over time, however, this changed, and the courts managed to strengthen their output legitimacy by churning out a steady stream of about a thousand genocide cases on a yearly basis. Also, the amount of qualified lawyers and judges had increased dramatically: while it was estimated that only 5 % of the Rwandan legal personnel actually had legal training in 1995, this had risen to 95 % in 2006.[5]

Generally, Rwanda's national courts have not only been strengthened over the past decade, with new legislation passed, staff trained and courthouses built, but also become more independent over the years. The Rwandan constitution, for instance, holds some safeguards for judicial independence. On the one hand, the independence of the judiciary cannot be separated from the authoritarian climate

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[4] Loi organique du 30 août 1996 sur l'organisation des poursuites des infractions constitutives du crime de génocide ou de crimes contre l'humanité, commises à partir du 1er octobre 1990, Art. 1

[5] According to B. Johnston, President of the Rwandan High Court, The Hague, 6 December 2006

in post-genocide Rwanda, with, for instance, Supreme Court nominations linked closely to ethnic background (Des Forges in Stover: 60; Reyntjes 2004: 188). Nevertheless, Longman, in conducting research on people's attitudes towards the national courts, not only found that people were generally more positive towards them than towards the ICTR but also that ethnicity did not significantly influence attitudes (In Stover: 215).

C. The National Courts

Dimensions	Input	Demos	Output
Preconditions for legitimacy			
Legitimacy in general: procedures	Generally in line with international human rights standards	Started of as highly donor-driven, became more of a Rwandan enterprise over the past decade	Increased strongly, in terms of quality and quantity, over time
Legitimacy in general: principles	Death penalty, not administered after 1998	Judiciary accused of being 'Tutsified', not the perception of Rwandans	Emphasis on retribution, criticised for lack of contribution to reconciliation
Justificatory discourse	Little communication		Little communication of results
Involvement stakeholders	International community, NGOs, Rwandan government		

The gacaca

What might be the most interesting quest for legitimacy is made in the context of Rwanda's *gacaca*, the neo-traditional courts that are held on each of Rwanda's ten thousand hills. In legitimising these institutions, stakeholders refer to traditional authority – in the Weberian sense – as well as to more legal-rational forms of authority. The *gacaca*, which are the courts of first instance in all genocide cases heard in Rwanda had been debated since 1998, and have both a pragmatic and an ideological background. From a practical point of view Rwanda was faced with a backlog of over 120.000 prisoners, living in abject conditions, by 1999, and with the sheer impossibility of trying them within the domestic court system. But there was also a more ideological reason for opting for the local courts, with the emphasis both on the cultural authenticity and the reconciliatory character of these institutions. After a series of pilots the *gacaca* system finally took off in 2005. Below, we will discuss some of the different dimensions, the justificatory discourse and the involvement of various stakeholders in the *gacaca*.

In terms of their input, the *gacaca* have been designed to deal with crimes ranging from genocide to crimes against property (Organic Law 40/2000). They consist of three levels, the *gacaca* courts of the cell, the *gacaca* courts of the sector and the *gacaca* appeal courts. The local level courts function as courts of

first instance, which can classify the crimes committed during the genocide into three categories: the first category comprises masterminding the genocide, rape and killing with exceptional zeal, the second category consists of killing and assault, and the third category is about crimes against property. Whilst the local-level *gacaca* only impose sanctions in the latter category, they make an inventory of all the crimes committed in the community and are responsible for the classification. Community presence has been mandatory as of 2004, and the *gacaca* are presided over by a minimum of nine village judges, the *inyangamugayo* or intègres, who are often illiterate.

In terms of their input legitimacy, the procedural safeguards within the *gacaca* have been criticised from their inception. Organisations like Amnesty International openly doubted whether the village courts could guarantee basic fair trial standards like an open, independent and competent tribunal, and whether the notion of equality of arms would not be compromised if suspects did not have a right to defence (AI 2002, Uvin in Bloomfield). Also, the fact that confessions can lead to a severely reduced sentence has been criticised. As with the national courts, the fact that the *gacaca* could not try RPF crimes severely comprised their input legitimacy in the eyes of some stakeholders. In terms of procedures the *gacaca* draw loosely on the traditional way of solving disputes "on the lawn", with the community. Also, government discourse emphasised the degree to which reconciliation, as a core value, is in line with African tradition. There are crucial differences, of course, in terms of the subject matter under discussion: genocide instead of land issues and cattle theft (Reyntjens 1990).

One of the strongest points in establishing input legitimacy is the involvement of a very high amount of stakeholders in the process. In spite of the human rights concerns, the international community massively supported the process and provides by far the largest part of the funding of the *gacaca*. Victims' organisations like Ibuka have also given their hesitant support to the process. In addition, over 200.000 *gacaca* judges were trained and all adult village members are obliged to partake in the process. An extensive communication intervention, drawn up with assistance of John Hopkins University, made that 96 % of the Rwandans had heard of the *gacaca* by 2003 (Babalola). The public attitude towards the *gacaca*, as looked into in 2002, was generally positive, with 82 % of the people interviewed claiming that they had confidence in the *gacaca* process (Longman in Stover: 217).

The demos at play here is thus that of the community. While often romanticised, the *gacaca* that have been held since 2005 have also brought some of the tensions that exist at this level to the surface. While participation in the weekly *gacaca* was voluntary in the pilot phase, it was the reticence to participate that caused the government to make it mandatory after 2004 (PRI 2003; 2004). Reasons for this hesitation were both pragmatic and ideological. People often preferred to work on the fields instead of attending the lengthy meetings. But many also feared, and continue to fear, the *gacaca* procedures: the reopening of old wounds, the sense of victor's justice, the accusations of friends and family members (Ibid.) Often, the *gacaca* are considered more of a government project than a local initiative, and support for the process could well be linked to support for the national Rwandan demos. The degree to which this wider demos has legitimacy, in the sense of voluntary compliance, is highly debated: while president Kagame received 95 % of the votes in the 2003 presidential elections, human rights organisations speak of a "dictatorship under the guise of democracy" (ICG 2002:54, cf HRW 2003). The influence of this authoritarian climate on reconciliation could well be tragic: as Thiemesse writes: "the state-imposed approach of command justice has politicised the identity of the

participants in Gacaca -- perpetrators remain Hutus and victims and survivors remain Tutsis".

If the input legitimacy and the adherence to the demos concerned provide a rather mixed picture that has shifted over time, the same goes for the *gacaca* output. On the one hand, the amount of cases treated by the *gacaca* by 2007 is impressive: nearly 820.000 cases have been classified, including that of a Belgian priest and important authorities.[6] At the same time this classification has led to the realisation that there are over 750.000 suspects of the *gacaca*, an amount that will take years to try and for which the overloaded Rwandan prisons do not have the space. In addition, NGOs have issued disconcerting reports on intimidation and disappearances of *gacaca* witnesses, and villagers fleeing in order to evade being tried by the *gacaca*.[7] The intended *gacaca* outcome has also undergone a shift, from a pragmatic instrument for the punishment of over a hundred thousand perpetrators to fora in which reconciliation is mandatory, and that might for that reasons not only cause frustration among the victims but also "intensify a retributive sense of justice and a desire for vengeance among the Hutu majority" (Corey: 15).

D. The gacaca

Dimensions	Input	Demos	Output
Preconditions for legitimacy			
Legitimacy in general: procedures	Lack of fair trial guarantees, limited mandate Link with traditional procedures	A community-owned or a government (and donor) sponsored project?	High degree of cases heard, concerns about fairness of trials, trying the amount of accused (750.000) problematic
Legitimacy in general: principles	Underlying values combine "traditional" preference for reconciliation with international criminal law		Shifted from retribution to reconciliation over time; mandatory reconciliation could well lead to further polarisation
Justificatory discourse	Good communication strategy before starting	Strongly conceived as community projects and responsibility	Great deal of national and international attention for the *gacaca*
Involvement stakeholders	High	Communities often still highly fragmented	Victims hesitant, perpetrators fear collective incrimination

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[6] The achievement in *gacaca* courts, published on www.inkiko-gacaca.gov.rw/
[7] Cf the reports on Rwanda on http://hrw.org/

6. Conclusions and Recommendations

Legitimacy is the core feature linking transitional justice institutions to sustainable peace. This study has pointed at the importance of an empirical assessment of legitimacy, most particularly in the current constellations of global governance that characterise many transitional justice settings. While studies into people's *perceptions*, as opposed to normative assumptions, on the legitimacy of truth commissions, international(ised) tribunals, trials and other justice mechanisms are important, they should merely function as a baseline. Legitimacy, as legal sociologists teach us, is a dynamic quality, and people's perceptions of transitional justice institutions fluctuate depending on their knowledge of them, and their availability. In the absence of a credible national procedure, for instance, people might prefer an international tribunal. Or adversely, people might express support for traditional justice institutions if they feel that this is the only option to have some form of justice done. This, then, says less about legal culture than about the range of available options. A first, more general, recommendation to come out of this research is then somewhat paradoxical: *it is important to conduct empirical research on what justice mechanisms people deem desirable, proper and appropriate, but to simultaneously realise that such preference can alter strongly over time*.

A first dimension of legitimacy to look into is the input. *Input* legitimacy concerns the degree to which people adhere to the procedures by which transitional justice mechanisms were set up and the principles on which they are based. It is especially at the international level that input legitimacy runs the risk of becoming conflated with legality: as long as the establishment of, for instance, international(ised) tribunals has followed the right rules, and is based on international human rights law, these are deemed to be legitimate.

True input legitimacy goes further. Procedurally, for one, *transitional justice institutions have to be set up in procedures involving all stakeholders, not merely the majority.* At the international level, it is crucial to have the initial support of the country concerned, as was the case in setting up the Rwanda tribunal but also in the state referrals to the ICC by Uganda and the Democratic Republic of Congo. The way in which the situation in Darfur was brought to the attention of the ICC, via the Security Council, risks a lack of local legitimacy through its non-involvement of key Sudanese actors.

The same need for the involvement of all stakeholders, and consensual as opposed to majoritarian decision-making is at play at the national level. Procedures, which exclude major stakeholders, whether they are perpetrators, victims or the international community, risk being considered illegitimate by these stakeholders from the beginning. This is why the process of designing transitional justice institutions has to be as open as possible, and truly incorporate the suggestions offered from all different sides.

In addition, procedurally, the mandate of the institution concerned is of key importance: *the role of all actors, including that of the international community, in the conflict has to fall under the jurisdiction of, for instance, the court concerned.* East Timor is a case in point, where the fact that the Special Court could not look into Indonesia's central role in the atrocities delegitimised the tribunal in the eyes of many Timorese right from the start.

Concerning the principles on which transitional justice mechanisms are based, examples like Rwanda's *gacaca* teach us that *it is important to not only found institutions on universal human rights, but to also build on, for instance, religious and traditional values where possible.* These two sources do not have to

be mutually exclusive, and relying on both can substantially strengthen the input legitimacy of a tribunal or truth commission, giving it the quality of "our institution". The fact that South Africa's Truth Commission also departed from the African notion of *ubuntu* – "people are people through other people", and the reliance on *nahe biti* – a traditional dispute resolution mechanism – in East Timor all served to enhance the legitimacy of these institutions in the eyes of key stakeholders, without substantially derogating human rights guarantees. Meanwhile, such institutions should not lead towards forced reconciliation or lack of redress; as Allen wrote "there is no reason to believe that Africans are more inclined towards reconciliation than other people". In addition, it is important to explicitly communicate and justify the principles and procedures on which the mechanisms are based from the very beginning.

Classically, theorists of legitimacy often stopped at the input dimension. The recent rise of global governance and the resulting fragmentation of politics also call for an explicit focus on the legitimacy of the *demos* setting up the transitional justice mechanisms and the degree to which this is a mythical community of belonging.

This challenge is most poignant at the international level. The failure of the international community to intervene in the Rwandan genocide, for instance, has led to a severe lack of legitimacy within Rwanda that influences people's perceptions of the ICTR and donor support to other institutions alike. At a more general level, the international community is, these days, only a community of belonging to a particular group of people and – at worst – labelled as pro-Western and imperialist. *At the international level, then, justificatory strategies and the involvement of all stakeholders in processes of decision-making become more important than ever, as does a lack of military intervention (Iraq, Afghanistan) and a principled commitment to socio-economic justice in, for instance, the field of development cooperation.*

The most important Rwandan lessons concerning the role of the legitimacy of the *demos* in determining the legitimacy of transitional justice mechanisms might well lie at the level of the nation-state. The first is how the nation-state is still the most logical community of belonging, and the priority in setting up transitional justice mechanisms should lie at this level, hooking on to processes of nation-building and narratives of belonging and strengthening them. This is important to note at a time in which a great deal of donor attention and resources goes to international institutions, which have budgets that greatly exceed those of the national court systems. An empirical perspective of legitimacy adds extra weight to the doctrine of complementarity and makes a course for *putting more resources into strengthening the domestic court systems than it is currently the case.* In Rwanda, for instance, the completely ruined national judicial system was rebuilt to a generally acceptable level within a decade.

Of course, this national *demos* then has to be legitimate in the eyes of all its citizens. This is where the core problem in Rwanda lies. The most crucial flaw in each of Rwanda's justice mechanisms – the NURC, the domestic courts, the *gacaca* – is that the compliance with state rules is hardly *voluntary*, the key feature of legitimacy. Even if Rwanda has had multiparty elections in which president Kagame won 95 % of the votes, this is read by most analysts as an indication of the fear that rules the country rather than an adherence to government principles. Majoritarian decision-making, as established by theorists, is not enough to establish legitimacy: there needs to be consensus on the shared nature of the national dream.

This also translates into justice mechanisms, where the quality of voluntary compliance is as important as ever. Forced reconciliation, as it takes place in Rwanda, with little or no space for alternative narratives, individual accountability and feelings of anger and grievance can help perpetuate the very narratives that played such a large role in the genocide. True truth-telling requires openness on the whole messy political reality of the past, and holding all those responsible accountable, whether they are members of the government or of the international community. Thus, the hearing of a Belgian priest played an important role in legitimising the *gacaca* in the eyes of some local actors, while the impossibility of looking into RPF-crimes remains a crucial flaw.

The legitimacy of the *demos*, furthermore, is not only related to the consensual character of decision-making, but lies also in its capacity to achieve socio-economic justice. People interviewed on their preferences, whether in Uganda, Rwanda or East Timor, often list security and access to food, housing and education above justice. *Even if the input and output of justice mechanisms are perceived as fair, they will still lack legitimacy if they operate within a context of ongoing discrimination and deprivation.*

Finally, and as important as the input, is the output of all transitional justice mechanisms involved. The conceptual model makes a distinction between *output* and *outcome*, and argues that both are equally important. *Important elements in the output of transitional justice procedures include accessibility in terms of distance and language, the pace of the procedures and their cost-effectiveness.* The costliness of the ICTR, for instance, in combination with its slow pace, dampened enthusiasm for the Tribunal amongst internal and external actors alike. The Rwandan domestic courts, on the other hand, made up for their serious initial flaws by a reasonable output.

One of the main concerns and strongest grounds for delegitimisation in terms of output is a perceived bias in prosecutorial policies. The fact that the ICTR has, to date, failed to incriminate members of the RPF, in spite of overwhelming evidence of grave human rights abuses on its side, severely delegitimised the Tribunal in the eyes of the perpetrators but also, for instance, members of the international human rights community. *A very pragmatic recommendation here would be to truly put the interests and expectations of the population concerned, in all its diversity, first in drawing up prosecutorial policies.*

Looking at output legitimacy through the eyes of those most concerned also shows once again, that retribution and reconciliation are not mutually exclusive concerns but should function – in the words of a Timorese activist – "as the two wings of an aeroplane". An exclusive focus on reconciliation is as destructive as the purely retributive approaches of the Nuremberg paradigm. Here, *cooperation between institutions geared primarily towards retribution, and others focused on reconciliation becomes very important.*

Finally, looking at the case of Rwanda has shown how legitimacy is not a given, but a quality that has to be gained, and explained, on a case by case basis, while physically rebuilding the country and reweaving common narratives of belonging. Nowhere is this more difficult than in those societies that have been torn apart in countless cruelties over, at times, decades. But then again, nowhere is working on the "generalised perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions" more important.

Appendix

1. Abbreviations

HRW	Human Rights Watch
ICC	International Criminal Court
ICG	International Crisis Group
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
INGO	International Non-Governmental Organisations
NGO	Non-Governmental Organisations
NURC	National Unity and Reconciliation Commission
RPF	Rwandan Patriotic Front
TRC	Truth and Reconciliation Commission

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