A TRUTH AND RECONCILIATION APPROACH TO THE GENOCIDE AND CRIMES AGAINST HUMANITY IN RWANDA

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1. INTRODUCTION

Since 1994, justice in Rwanda has become a topical theme as well as one of research and international politics and cooperation. Governments, development agencies, the press and academic institutions, have invested considerable human and financial resources in this domain. This investment sought to respond to the important challenge posed by the genocide and crimes against humanity which took place in Rwanda in 1994: how can justice be rendered to the victims of these crimes and to the Rwandan society itself, and, at the same time, contribute to the creation of a context which is conducive to a sustainable human development[1] ? The expectations imposed on the Rwandan judicial system and the International Criminal Tribunal for Rwanda (ICTR) were, and still are, enormous. This article seeks to examine whether and how an alternative non-judicial approach, could complement the individual judicial procedures that are currently taking place before the courts and tribunals[2].

2. AN OVERVIEW OF THE JUDICIAL APPROACH

As of early March 1998, some 330 persons have been convicted or acquitted by the Specialised Chambers of the Tribunals of First Instance in Rwanda. The ICTR did not pass a single verdict[3]. Other national jurisdictions, of which the competence regarding acts of genocide ensues from the principle of universal jurisdiction, have neither convicted nor acquitted anyone[4]. Some 130,000 persons are held in prisons or other detention centres in Rwanda[5]; the large majority of them is accused of acts of genocide or other crimes against humanity committed during the months of April, May and June 1994. Tens of thousands of Rwandans are still outside the country[6]. Although the impact of the possible return of this new diaspora[7] on the prison population is hard to assess, according to some estimates[8], their return (in addition to the arrests of previous returnees and others) could raise the number of those detained to some 200,000

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[1] See, for example: GOVERNMENT OF RWANDA, *Rwanda Round Table Conference - Medium-Term Policy Framework Document (1996 - 1998)*, Geneva, June 1996, p.43.

[2] We will limit ourselves to the initiatives at the level of the state, leaving aside the traditional reconciliation mechanisms, which, at the local level, could play an extremely important role outside of the context of public administration and national politics.

[3] In his report to the Security Council on June 4, 1995, the Secretary-General of the UN had announced that the investigations by the Prosecutor's office of the ICTR would cover 400 suspects who had been properly identified. In reality, to date, 35 persons have been indicted. (UN SECURITY COUNCIL, *Report of the Secretary-General on the United Nations Assistance Mission for Rwanda*, S/1995/457, 4 June 1995, para 30).

[4] Fully aware of the primacy of the ICTR, the Special Rapporteur of the UN Commission for Human Rights, Mr. Degni-Ségui, had nevertheless hoped that the ICTR would not be the only institution to prosecute the «*big criminals*» who were outside Rwanda's territory. (COMMISSION DES DROITS DE L'HOMME, *Rapport sur la situation des droits de l'homme au Rwanda soumis par le Rapporteur spécial, M. René Degni-Ségui, en application du paragraphe 20 de la résolution S-3/1 du 25 mai 1994*, E/CN.4/1996/7, 28 juin 1995, p.50).

[5] The latest report of the UNHCHR on the HRFOR includes figures, as of 31 December 1997, of 77,349 for central prisons and around 48,863 for other detention centres (excluding military and sector-level civilian lock-ups). This adds up to 126,212 detainees (UN COMMISSION ON HUMAN RIGHTS, *Human Rights Field Operation in Rwanda. Report of the United Nations High Commissioner for Human Rights*, E/CN.4/1998/61, 19 February 1998, p.7).

[6] Some reports suggest that approximately 75,000 Rwandan refugees are scattered throughout the region (XINHUA, *UNHCR ends three-day visit to Rwanda*, 17 February 1998).

[7] In January 1998, the president of the Commission for the Repatriation and Reintegration of Refugees declared that «*the Government of Rwanda is seeking, by all possible means, to ensure that these persons, whether innocent or not, return home*» (AFP, 27 January 1998) (translated by the author).

[8] STIFTUNG WISSENSCHAFT UND POLITIK, *Improving African and International Capabilities for Preventing and Resolving Violent Conflict. The Great Lakes Region Crisis*, Berlin, July 1997, p.17. The document even refers to an estimate by the Government of Rwanda: «*The Rwandan government has a projected figure of 200,000 persons subject to imprisonment.*» (p.98).

persons. No judicial system, whether in Rwanda or in a so-called "developed" country, has the capacity to judge such a high number of persons within an acceptable time frame[9].

Nevertheless, the Rwandan government sought to organise the prosecution of acts of genocide and crimes against humanity which had destroyed the country, along the lines of individual trials against each suspected genocide perpetrator. The international community supported it in this way to meet its stated objective, which consists of putting an end to a culture of impunity which had reigned for too long in the country. Several donors even took the first steps in this area of co-operation for the rehabilitation of a judicial system and the promotion of the rule of law: court buildings have been rehabilitated, legal personnel has been trained, and institutional support has been provided to the Ministry of Justice and the judiciary. The aim of all these interventions was, above all[10], to contribute to the trial of genocide suspects by the Rwandan justice system[11]. During all of 1996, diplomats and other representatives of the international community continuously insisted that the Organic law of 30 August 1996 on the organisation of prosecutions for offences constituting the crime of genocide or crimes against humanity committed since 1 October 1990, be published as quickly as possible in the Official Gazette «*so that trials may start* »[12]. This was considered as an essential and indispensable instrument for establishing the truth and for promoting reconciliation. Several human rights organisations, have, for a long time, insisted on what the Rwandan government is trying to achieve, namely, identifying and prosecuting those responsible for human rights violations is indispensable for rendering justice to victims, their families and to the society as a whole. The Rwandan government's strategy is therefore totally legitimate and highly justified.

Several elements may help explain why, to date, this judicial approach based on individual trials has not succeeded in coming to terms with the past.

- Firstly, there is the magnitude of the problem. The number and intensity of the crimes committed is enormous. As a result, the number of potential suspects to be brought before the Rwandan justice system is extremely high. Arrests have continued until today, and consequently, the number of detainees (and, hence, trials) largely exceeds the one of February 1996, when the above-mentioned draft organic law was adopted by the Council of Ministers[13] and presented to the international community[14].
- Secondly, the capacity of the judicial system was reduced to almost zero. Even if a remarkable effort of reconstruction has been accomplished and the number of human resources (judges, public prosecutor's offices and judicial police inspectors) exceeds the one of the situation prior to April 1994, the capacity of the judicial system is inadequate and will continue to be so, even after new training sessions for legal personnel.
- Thirdly, the mechanism provided for under the Organic law to pass tens of thousands of judgments in a reasonable time frame (without having to resort to expeditious justice) has not worked. The confession and guilty plea procedure (articles 4 and 5 of the Organic law of 30 August 1996) which includes a penalty reduction in case of a confession, has not led to numerous confessions, nor to sufficient evidence to prepare the tens of thousands of case-

[9] Numerous calculations have been made to estimate the number of years needed to bring all detainees to trial at the present rate of progress. See, for example, CURRIN, B., "Southern African Catholic Bishops' Conference Delegation to Rwanda" in *Justice and Peace Annual Report*, 1997, p.32: «*It could take up to 500 years to process all the cases*».

[10] Another equally important objective was obviously the long-term rehabilitation of the "normal" judicial system, outside of the context of the trials of suspected perpetrators of genocide. This strategy which aims to combine both objectives was not supported by all the experts in this field; see for example: SCHABAS, W., *Battling Impunity for Genocide in Underdeveloped States: The Crisis in Rwandan Justice*, ICHRDD Occasional Paper, April 1996, p.3-7.

[11] See: VANDEGINSTE, S., *Justice for Rwanda and International Cooperation*, Working Paper, University of Antwerp, September 1997.

[12] The law came into effect the day of its publication, 1 September 1996. The first trial hearings actually took place on 27 December 1996.

[13] The draft was adopted on 16 February 1996 (UNITED NATIONS DEPARTMENT OF HUMANITARIAN AFFAIRS, *Monthly Information Report Rwanda. February 1996*, Geneva, March 1996, p. 17).

[14] By the end of January 1996, the number of detainees registered by the ICRC stood at about 65,000 persons. (UNITED NATIONS DEPARTMENT OF HUMANITARIAN AFFAIRS, *Monthly Information Report Rwanda. January 1996*, Geneva, February 1996, p.14).

files[15] needed. Among the possible reasons why detainees have not confessed in large numbers, one could cite, for example: those detainees who would like to confess, do not dare to do so, and are taken hostage by their co-detainees[16]; a large number of detainees is not guilty or, in any event, consider themselves "innocent" having "simply followed orders"; the complexity of the procedure entails a difficult access to it for detainees; etcetera.

· Finally, trials will face important difficulties contributing to the realisation of the main objective in the medium and long-term, namely, the reconciliation of the Rwandan society. Three main problems can be identified within this context: (1) some suspected perpetrators of genocide continue their activities of in the form of a rebellion : survivors are threatened and attacked; (2) a large part of the population perceive a lack of representation of the ethnic majority in the new state institutions[17], including at the level of the judicial system; (3) those responsible for human rights violations committed by the RPA enjoy selective impunity; identifying and prosecuting these persons would constitute the real test of the fight against impunity of the present regime[18].

This overview leads us to an inevitable conclusion : the purely judicial approach (be it at the national or international level) cannot solve the problem. Even if the capacity of the judicial system were doubled or tripled, even if tens of thousands of detainees decided to confess[19], even if case-files were prepared in large numbers, thereby enabling the trials to continue at a faster pace, a complementary non-judicial alternative will be needed. This need is even more pressing, given the detention conditions to which detainees, including undoubtedly, thousands of innocent people, are subjected. This observation is by no means new. In this article, we will try to go beyond the observation and to contribute to a debate which should be placed on the national and international agenda. Other countries have also experienced periods where massive violations of human rights were a seen as a way of exercising political power. Numerous studies have been undertaken concerning the way in which countries such South Africa, El Salvador, Ethiopia, Mozambique, Cambodia, Chile and others, have succeeded or failed to come to terms with their past, to establish the *truth* and promote *reconciliation* in their societies. Two of these studies will serve as reference theses for this article. Their observations, conclusions and recommendations will be summarised to introduce the notion of a truth and reconciliation approach. Next, an attempt will be made to apply the theory to the Rwandan situation, in order to identify certain opportunities and constraints.

3. THE TRUTH AND RECONCILIATION APPROACH: INTRODUCTION

Within the framework of this paper, it is impossible to study the transition process which the above-mentioned countries have passed or are passing through. Other authors have examined

[15] The Human Rights Field Operation estimates that case files formally bringing genocide charges have been opened for around 65 percent of detainees (UN COMMISSION ON HUMAN RIGHTS, *Report of the United Nations High Commissioner for Human Rights*, E/CN.4/1998/61, 19 February 1998, para. 6).

[16] In fact, some detainees have no interest in confessing. Under the Organic law, persons accused of planning, organising, instigating, supervising and leading the genocide, those who acted in positions of authority, notorious murderers, persons who committed acts of sexual torture, cannot benefit from penalty reductions (article 5). In this context, the suggestion has been made to separate the detainees who have confessed or who would like to do so from others.

[17] An expert undertook an exercise considered not very *politically correct*, namely, an ethnic count of senior civil servants. According to his estimates, at the end of 1996, 15 of the 22 cabinet directors, 16 of 19 director generals, 6 of the 11 prefects, 80% of burgomasters and 95% of all soldiers, gendarmes and police officers were Tutsi (PRUNIER, G., *The Rwanda Crisis. History of a Genocide*, Colombia University Press, New York, 1997, p.369).

[18] Some soldiers of the RPA have in fact been taken before military tribunals. In September 1997, for example, 2 majors and 2 second lieutenants were accused of murder and complicity to murder of some 110 civilians killed during an RPA operation in Kanama (in Gisenyi prefecture) in September 1995. The Military Tribunal sentenced them for failure to assist persons in danger. It ruled that the massacre was neither ordered nor intentioned by the military system, but was rather the consequence of individual actions of a few soldiers. The court, therefore, did not place responsibility within the command of the RPA (UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *The trial of Majors Rwigamba and Ruzibisa and of Second Lieutenants Sano and Rutayisire, RPA Officers, in connection with the 12 September 1995 incident in Kanama commune, UNHRFOR Status Report*, 30 October 1997).

[19] The confession and guilty plea procedure, initially provided for by the Organic Law of 30 August 1996 for 18 months, has been prorogued by the Presidential Order n° 05/01 of 10/03/1998 for another 18 months from 1 March 1998 onwards (*Official Gazette of the Republic of Rwanda*, 15 March 1998).

this in detail and we have selected two to describe the elements of a truth and reconciliation process, in order to be able to recount what separates the Rwandan situation from other cases and also, to contribute to a more in-depth analysis of how common elements from other experiences could apply in the Rwandan context. Reference will be made to the works of Daan Bronkhorst, *Truth and Reconciliation. Obstacles and Opportunities for Human Rights*[20], and Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and Practice*.[21]

3.1. Introduction

Both authors are aware of the unique character of the experiences of each country, the repression of its people, its history, economic development, old and new political powers, traditional values and legislation. «*I have been forced to relinquish the hope that from my findings I might be able to distil some model in the process of achieving truth and reconciliation. No one state has closely followed the example of another. (...) I believe, however, that it is within the scope of a relatively modest book (...) to show how in all this diversity there are certain elements which constantly reappear - and that a few basic patterns can be distinguished*».[22] Roht-Arriaza notes that countries which face a heritage of human rights violations often take inspiration from the successes and failures of other experiences, while bearing in mind the unique character of their particular situation.

Bronkhorst tries to place the role of *justice* in the *truth* and *reconciliation* process. The truth helps to shed light on the past. Who are the victims? Who should be held accountable? Reconciliation seeks to heal the society and to help it to come to terms with its past. The place of justice (the identification, prosecution and punishment of perpetrators) in this context seems more controversial. In some countries, justice is, to a large extent, an instrument used to discover the truth. In others, the abdication of justice (i.e. the absence of legal proceedings against suspected perpetrators) is an essential pre-condition for reconciliation. In still other cases, perpetrators are tried and convicted, but then pardoned (and released).

3.2. Political transition

Generally speaking, truth and reconciliation initiatives are part of a wider framework of political transition. Bronkhorst distinguishes three phases of political transition: genesis, transformation and readjustment. The genesis is usually characterised by internal armed conflicts, a repression, an international war, and, in any event, by the extremely limited participation of the population in state affairs. The transformation is marked by efforts towards rehabilitation and reconciliation, armed groups forming political parties and rebels becoming government officials. Readjustment could, after some time, lead to either more violence and oppression, or to a more democratic and open society in which human rights, security and democratic participation are respected. In the country in question, this third phase, which forms an integral part of the transition, will eventually have to confront numerous challenges: the heritage of past human rights violations, new forms of violence and insecurity, the massive return of refugees, the lack of a democratic tradition, the frustration of the population faced with limited economic and social benefits after the transition.

Where might one place Rwanda is such a chronology of transition? Firstly, it is certain that enough of the *genesis* criteria have been found in the case of Rwanda, according to some people since the revolution of 1959, according to others since the war of 1990. Concerning the second phase, the negotiations and the Arusha Accords seem to comprise a first attempt at *transformation*, which has unfortunately failed. According to a first thesis, the Arusha process had no chance of success from the beginning, and could only lead to a still-birth. According to another thesis, internal divisions in the unarmed opposition parties, stirred up by events in Burundi at the end of 1993, completely destabilised the tripolar mechanism of Arusha. According to yet another

[20] BRONKHORST, D., *Truth and Reconciliation. Obstacles and opportunities for human rights*, Amsterdam, Amnesty International Dutch Section, 1995, 173 pages.
[21] ROHT-ARRIAZA, N. (ed.), *Impunity and Human Rights in International Law and Practice*, New York, Oxford University Press, 1995, 398 pages.
[22] BRONKHORST, D., *op. cit.*, p.13.

thesis, the Arusha Accords could even have succeeded in the hours following the attack on the presidential plane on 6 April 1994, which was, in reality, the trigger for a genocide which had been planned well before this date. A second attempt at *transformation* and *readjustment* is presently underway: rebels have become political authorities with reconciliation and rehabilitation as stated objectives. Some elements such as the massive return of refugees, the lack of security and economic take-off are also present in the current Rwandan scenario. Concerning the outcome of this process in the Rwandan case, it is undoubtedly too early to pass a final judgement. However, some authors especially point out the continuation in the leadership, hidden behind the facade of an apparently radical change of regime[23]. In fact, there seem to be no guarantees that this second attempt at transition will lead to the above-mentioned democratic and open society.

Truth and reconciliation initiatives are usually found in the second and third phases. In fact, the first attempt at transformation, namely the Arusha Accords included the establishment of an International Commission of Inquiry to investigate human rights violations committed during the war, without however elaborating mechanisms for judicial proceedings, the compensation of victims, amnesties, etc. This is important because the Arusha Accords are part of the current Fundamental Law, as will be examined in chapter 4. The current, second attempt at transition only foresees trials organised on the basis of the Organic law of 30 August 1996. In the preceding section, we have indicated why a complementary alternative is needed.

Bronkhorst ends his analysis of the different types of transition with the observation that a genesis in the form of a military dictatorship leads more easily to prosecution of perpetrators of human rights violations, than a one party system, where a large part of the population may be considered as being co-responsible for the repression. The latter scenario applies to Rwanda. However, a radical political change (e.g. after a military victory, as was the case in Rwanda) is generally more favourable towards initiatives of justice, truth and reconciliation, than a progressive transition (which was, for example, the scenario under the Arusha Accords). Assuming that this analysis also applies to Rwanda, the Rwandan context of political transition seems to present pros and cons for a truth and reconciliation initiative.

3.3. The conciliation methodology

Although a universal model of a truth and reconciliation process is not available, Bronkhorst introduces in his work, as a heuristic instrument, the industrial conciliation model (as described in the *Encyclopedia of the Social Sciences* - 1968), which comprises 4 elements: investigation, mediation, arbitration or settlement and adjudication. This model is not at all prescriptive, but is, rather, an instrument of analysis, which seems useful to better understand the different components of a truth and reconciliation process.

Investigation includes the inquiry and publication of the facts. Often, a special institution, a truth commission or another institution, is set up by the government or by a parliament to this end. Bronkhorst cites numerous examples: Uganda (report published in 1994), Argentina (1984), Chile (1991), Chad (1992), El Salvador (1993)[24], Sri Lanka (report finished but not published in 1993)[25], etcetera. Current circumstances obviously have an enormous impact on the work of such a commission, which, in principle, only examines the past with the aim of building foundations for the future. Thus, in Chad, the author of the report of the Commission of Inquiry into crimes and

[23] REYNTJENS, F., "Rwanda. Evolution politique 1996-1997" in CENTRE D'ETUDE DE LA REGION DES GRANDS LACS D'AFRIQUE, *L'Afrique des grands lacs. Annuaire 1996-1997*, Paris, L'Harmattan, p.51; According to *Le Tribun du Peuple*, a private newspaper supporting the regime, the «*revolution failed because, once we arrived in power, we plagiarised the methods of the government which we were fighting.(...) If we look closely, the liabilities of the management of the country by Habyarimana & Co at the end of the first 15 years of his reign, were largely attained by the new rulers of the country during the past three years.* (MUGABE, J.P., "Le FPR s'est abjuré", *Le Tribun du Peuple*, n° 97, August 1997 - text reprinted in *Dialogue*, September-October 1997, p. 87-90) (translated by the author).

[24] In El Salvador, one week after the publication of the report, the government adopted a presidential proposal granting a general amnesty.

[25] However, in September 1994, the government of Sri Lanka announced that the reports of the three commissions of inquiry would be published and that trials against those *prima facie* responsible would follow (AMNESTY INTERNATIONAL, *International News*, November 1997, p.8).

irregular activities committed by ex-president Habré or his accomplices, highlighted that at the time when the inquiries were undertaken, the population was gripped by fear, because the actions of the ex-president's entourage, had not yet come to an end. This case presents an interesting precedent for the Rwandan scenario. In other cases such as El Salvador and Guatemala, the establishment of a commission was immediately preceded by a peace accord. Very often other, unofficial institutions also conduct parallel inquiries which feed into the work of the official institution: victims' families, local (human rights and other) NGOs, professional lawyers associations, etcetera. Nevertheless, Roht-Arriaza rightly points out that an official *imprimatur* is needed to give authority and credibility to the investigations and their results. The systematic and complete documentation of previous violations is extremely important : it constitutes proof against oblivion; it is at the basis of a collective reminder of events and could help resolve individual complaints submitted. Bronkhorst makes reference to the examples of Argentina, Chile, South Africa and the Philippines. To this, one could add the condition that the inquiries should be, above all, reliable with results that are widely accepted, thereby lending a moral authority, a unique character and a reference value to the investigation conducted.

Mediation comprises all attempts at dialogue between adversaries, possibly under international patronage. Although Bronkhorst makes no reference to this, it seems clear that, in order for there to be a dialogue between adversaries, it is necessary, first of all, to identify the adversaries, and, moreover, to clarify their representativeness, which may turn out to be extremely difficult in the Rwandan context. In this context, some key persons can have a symbolic value of such weight that they can easily undermine all mediation initiatives. Bronkhorst cites the example of the former head of the South African army, Constant Viljoen: «*He once declared that he "was the man who made the elections possible", which is not entirely an exaggeration: just a week before the elections he openly refused to support an attempted coup d'Etat which might have been successful*.»[26].

Arbitration or *settlement* comprises efforts to redress violations (by compensating victims, taking disciplinary actions against police officers, soldiers, etc.). The report of the National Commission on Truth and Reconciliation in Chile, makes reference to the public rehabilitation of victims (in the form of a monument, a death certificate for persons who disappeared, a lump sum pension and houses for the families), as well as to prevention (in the form of the ratification of international treaties, a publicly accessible database concerning all detentions, human rights education programmes in schools, ...). At the level of the United Nations, the former Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Mr. Theo van Boven, elaborated "*The Basic Principles and Guidelines on the Right to Reparation for Victims of (Gross) Violations of Human Rights and International Humanitarian Law*", which were submitted to the 53rd session of the Human Rights Commission in 1997. These stipulate, among other things, that reparation may be claimed by the victims or their relatives, that it should be proportionate to the gravity of the violations to which they were subjected and should include elements of restitution, compensation and rehabilitation, as well as guarantees of non-repetition[27]. Restitution will help to re-establish the situation prevailing before the violations, including at the level of employment, citizenship and property. Indemnity will cover all assessable damages, including material damage, lost opportunities of education and loss of earning potential. Rehabilitation will include medical and psychological care, as well as access to legal and social services. The guarantees of non-repetition will include, among other things, the cessation of continuing violations, the verification of the facts and the full and public disclosure of the truth, apologies and acceptance of responsibility, the commemoration of victims, human rights education, the strengthening of the independence of the judiciary, etcera[28].

[26] BRONKHORST, D., *op. cit.*, p.65.
[27] UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, *Question of the human rights of all persons subjected to any form of detention or imprisonment. Note by the Secretary-General*, E/CN.4/1997/104, 16 January 1997, p.3.
[28] The debate concerning these principles and directives is far from over. The Secretary-General presented the comments and observations of several states on the text elaborated by Mr. van Boven, to the 54th session of the Human Rights Commission, (E/CN.4/1998/34, 22 December 1997).

Adjudication comprises the prosecution and judgment of perpetrators. In the next section, reference will be made to international law, which, for that matter, is not all that developed at the level of legal proceedings and punishment. Besides the legal perspective, the question is raised of the political expediency to prosecute, judge and punish all those who have committed crimes, even if these are sanctioned by national legislation. How does one prevent the judicial proceedings from plunging the country into long-term political instability? How does one prevent the trials from serving other objectives such as political interests, personal vendettas, ethnic or regional discrimination?[29] How does one elaborate a strategy for legal proceedings in cases where repression has been more or less widespread and evidence against the numerous perpetrators will be hard to find? In a military but also administrative context, what is the responsibility of a superior for the acts committed by a subordinate, and that of a subordinate for acts ordered by his superior? Under this same chapter, matters relating to amnesty and pardon also need to be dealt with. The difference between the two is essential, to the extent that amnesty erases the offence in question and can, among other things, put an end to ongoing investigations. Pardon, on the other hand, only comes into play after the prosecution and judgment and only has consequences at the level of execution of the sentence.

3.4. In International Law

In international human rights instruments, there are, generally speaking, few explicit references in covenants or conventions regarding the prosecution of those responsible for human rights violations or regarding the corresponding penalties. Nevertheless, Roth-Arriaza finds that since the second world war, the principle of universal competence, which offers any state the possibility to bring any suspected perpetrator to trial, is being applied to an increasing number of crimes. Moreover, this competence is no longer simply authorised, but is becoming increasingly obligatory (in the form of domestic prosecutions or extraditions). This principle is applied to, among others, war crimes and crimes against humanity, including genocide[30]. The Convention on the Prevention and Punishment of the Crime of Genocide explicitly requires that the Contracting Parties «*enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide (...)*» (article 5).

Moreover, the application of some international human rights standards which do not explicitly require the prosecution of suspected perpetrators, has given rise to more progressive interpretations regarding the prosecution of suspects and the compensation of victims. In this context, we will limit ourselves to the International Covenant on Civil and Political Rights, which was ratified by Rwanda in 1975. In article 2, the Covenant stipulates that «*Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant (...)*». In a number of cases of torture, summary execution and/or disappearance, the Human Rights Committee, established under article 28 of the Covenant, interpreted this article in the sense that investigations against those responsible and compensation of victims are included in the obligation to guarantee the recognised rights. In addition, protection from torture or from cruel, inhuman or degrading treatment (article 7), requires that individual complaints are examined, that those responsible be held accountable and that victims have a right to redress, including a right to compensation. The

[29] The legal proceedings of a "new regime" could create the occasion to detain not only those who are really responsible for past crimes, but also the current opposition who are not guilty of anything. In Ethiopia, after the departure into exile of the former president Mengistu in 1991, the bodies of thousands of persons who were killed or "disappeared", were found, exhumed and buried. Trials of those responsible only really started in March 1995. The majority of those accused, were members of the security forces, the former party in power or from the government of Mengistu. In July 1996, some 1,700 other persons were detained without being charged; some persons for over 5 years. According to Amnesty International, some of these persons were arrested without being indicted because of their criticisms and opposition towards the new government (AMNESTY INTERNATIONAL, *Ethiopia. Human rights trials and delayed justice. The case of Olympic gold medallist Mammo Wolde and hundreds of other uncharged detainees*, London, July 1996).

[30] For more details see, JOYNER, C., "Arresting Impunity: the Case for Universal Jurisdiction in Bringing War Criminals to Accountability" in BASSIOUNI, C. and MORRIS, M. (eds.), *Accountability for international crimes*, Special Issue of *Law and Contemporary Problems*, Vol. 59, No. 4, Autumn 1997, p.148-167.

Committee is also opposed to the granting of amnesty for acts of torture[31]. In some articles, the Covenant is even more explicit concerning a victim's right to compensation. Article 9 specifies that «*Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation* ».

Roht-Arriaza also devotes a chapter to measures of amnesty, not only from a perspective of political expediency, but also from a legal perspective. On the one hand, there are very few explicit bans on amnesty in international law instruments. Moreover, the second protocol of the Geneva Convention dealing with the issue of internal armed conflicts, which came into effect in 1978 and was ratified by Rwanda, invites states to consider amnesty for participants in an armed conflict: «*At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained*» (article 6(5))[32]. On the other hand, however, the above-mentioned, more recent interpretations of the obligations of a state to guarantee fundamental rights, seem to limit the possibilities to grant generalised amnesties to those responsible for more serious violations of human rights.

3.5. *"Set of principles for the protection and promotion of human rights through action to combat impunity"*

In the context of international law, reference must also be made to a recent development which, given the date of publication of her study, was obviously not examined by Roht-Arriaza, namely the report regarding the question of impunity of perpetrators of human rights violations which Special Rapporteur Joinet submitted to the 49th session of the UN Sub-commission on prevention of discrimination and protection of minorities[33]. In his report, the author proposes 50 principles which should guide states in their action to combat against impunity. He groups them in three categories: the right to know, the right to justice and the right to reparations.

(1) The right to know goes beyond an individual victim's right to the truth. The right to know is also a collective right of a society, drawing upon history to prevent violations from recurring in the future. The duty to remember on the part of the states corresponds to the right to know. In order to achieve this collective right, Joinet considers that, in the context of mass violations, a judicial system is often not capable of rendering justice by identifying, prosecuting and sentencing perpetrators within an acceptable timeframe. He proposes, henceforth, the prompt establishment of an extrajudicial commission of investigation, with certain principles to guarantee its independence and impartiality and to protect victims, witnesses and suspected perpetrators. As a result, the names of the latter may only be published if they had the opportunity to be heard before the commission or to exercise a right of reply in writing. In order to contribute to the collective memory of the society, the commission's report should be distributed as widely as possible.

(2) The right to justice implies that a victim can assert his or her rights and receive a fair and effective remedy. If forgiveness is to be granted, it must first have been sought. The right to justice entails corresponding duties of the state to conduct investigations, prosecute perpetrators and punish them if their guilt is established. The trials before the judicial authorities, should, in any event, be in conformity with human rights, and meet the fair trial standards. Matters such as prescription, amnesty, the right to asylum, extradition, due obedience as a mitigating circumstance, procedures of repentance and confession, military jurisdictions cannot be conceived and/or applied in such a way that they harm the fight against impunity. The instrument of amnesty, has, in fact, rarely been envisaged by the UN, which corresponds to the above-mentioned tendencies in the interpretation of the state's obligation to protect human rights. The UN's policy on this point, does not, however, seem to follow an all too consistent line. In August

[31] ROHT-ARRIAZA, N., *op. cit.*, p.29

[32] Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), UN Doc A/32/144, Annex II (1977). For some problems concerning the application of this article, see ROHT-ARRIAZA, N., "Combating Impunity: Some Thoughts on the Way Forward" in BASSIOUNI, C. and MORRIS, M., *op. cit.*, p.91.

[33] UN COMMISSION ON HUMAN RIGHTS, *The Administration of Justice and the Human Rights of Detainees. Question of the impunity of perpetrators of human rights violations (civil and political). Final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119*, E/CN.4/Sub.2/1997/20, 26 June 1997.

1992, for example, after the publication of the report of the Goldstone Commission[34] in South Africa, the Secretary-General of the United Nations recommended that amnesty be granted to all those perpetrators of political crimes committed in the period covered by the Commission[35].
(3) The right to reparation is situated at both the individual and collective levels. At the level of the individual victim, including relatives or dependants, this right includes his restoration, to the extent possible, to his situation preceding the violations, compensation (for physical and mental injury, including lost opportunities, physical damage, defamation and legal aid costs) and rehabilitation (including medical care and psychological treatment). At the collective level, one finds commemoration and public homage to the memory of victims, as well as some steps to avoid the reoccurrence of these events: the disbandment of armed parastatal groups, the repeal of emergency legislation and abolition of emergency courts, the removal from office of senior officials implicated in serious violations.

In his report, Special Rapporteur Joinet tried to elaborate rather general principles, without bearing in mind the specific situation of any particular country. Nevertheless, it is noteworthy that in the conclusion of his report, the author explicitly refers to the Rwandan situation, and leaves little hope for an immediate solution: «*In concluding, the Special Rapporteur would like to draw attention to a number of particularly alarming situations for which he must admit he has no solutions to propose, though such situations - albeit largely for technical reasons - help to perpetuate impunity. How is it possible to combat impunity and ensure a victim's right to justice when the number of people imprisoned on suspicion of serious human rights violations is so large that it is technically impossible to try them in fair hearings within a reasonable period of time. Mention can be made of the case of Rwanda (...)*»[36].

3.6. Conclusions

«*No society can come to terms with the past unless what really happened has been generally acknowledged. (...) Reconciliation between opposing classes or other groups can only be realised once the facts, the background, motives and emotions have been recognised and admitted by both sides*»[37]. The element of truth is essential and has great value. Therefore, although a general amnesty has been declared in the days following the publication of the report of the Truth Commission in El Salvador, its chairman nevertheless considers the report to be of great value, more particularly given the popular support which was expressed in an opinion poll: 45% approved, 27% disapproved while 27% had no opinion[38]. At the same time, the element of truth constitutes a prerequisite *sine qua non* for all other steps or initiatives of mediation, reconciliation, compensation and justice. In order to define the concept of truth in this context, Bronkhorst refers to the theories of Jürgen Habermas, who, in his *Theory of Communicative Action*, distinguishes three main elements: (1) a communication intended to convey the truth must correspond to the facts; (2) the message should comply with a normative system which allows those for whom it is intended to understand it and to make a judgment; (3) the message should be sincere or truthful. The body charged with establishing the truth should therefore, first of all, reconstruct and describe the events in an accurate manner. Next, it should communicate and present its message in a language which is accessible to a large section of the population, which is not necessarily, in fact, on the contrary, the legal language of a magistrate for example. Not only the language but also the context in which it is presented, could determine the degree of truth which the population attaches to the message: depending on local culture, the normative system could possibly require some type of ceremony, for example. Finally, the investigators, and also preferably those responsible for the follow-up, should, at all times, emulate truthfulness and a personal commitment.

[34] The commission's official name was "the Commission of Inquiry into Public Violence and Intimidation". It had been set up following violent incidents which between July 1990 and June 1992, cost the lives of about 6,200 persons.
[35] ROHT-ARRIAZA, N., *Impunity and Human Rights in International Law and Practice*, New York, Oxford University Press, 1995, p.271.
[36] UN COMMISSION ON HUMAN RIGHTS, *op.cit.*, p.9.
[37] BRONKHORST, D., *op. cit.*, p.150.
[38] The approval rate was particularly high among the working class (BRONKHORST, D, *op. cit.*, p.149).

The investigations are usually conducted by a commission set up by the executive or legislative power. Operational independence, widespread support and the respect of the population both at the level of national political actors and international partners, are prerequisites for the success of the commission in its efforts to reconstruct the collective history of the nation. This could require the involvement of persons representing all political tendencies, and, possibly, the auspices of an international organisation, as was the case in El Salvador, for example. Various factors can complicate the tasks of such a commission. Its effectiveness seems dependent on the time-frame established for the presentation of its report. On the other hand, this should in no way limit painstaking inquiries. The legal powers of the commission to interrogate witnesses, have access to locations and consult documents is often limited by not only the mandate of the commission, but also the conditions in the field. To this, one could also add the problem of defining and co-ordinating interaction with the official judicial investigations. What is extremely delicate is determining the mandate *ratione materiae*: should one only concentrate on the most serious and systematic violations? Should an inquiry be conducted into the abuses committed by the (former) armed opposition?

All truth and reconciliation processes should also contribute to strengthening the rule of law. All measures taken should ensure better protection against arbitrary violence by those in power. The process of truth and reconciliation should be democratic and transparent. It should be based on the major involvement and participation of the population. It should take place in all openness and under the watchful eyes of the national and international communities. The victims have the right to at least moral and, if possible, material compensation. This does not mean that the group which was victimised under the old regime, can, by definition, exercise moral superiority vis-à-vis the others. The trial of all perpetrators of violations will often be impossible because of the large number of crimes committed, or because of the political motives surrounding the trials of highly placed officials. However, in order to be successful, the reconciliation process requires the sentencing of those persons who ordered the most serious violations. Reconciliation has trans-border implications. The international community should assume its responsibility, because, quite often, crimes have been committed against humanity. All of the truth and reconciliation process should take place within the confines laid down by international law. Unfortunately, Roht-Arriaza notes that not only the national authorities but also peace and mediation initiatives under the auspices of an international agency, do not systematically refer to this international legal framework[39].

Bronkhorst notes that unfair trials or the reversal of judicial decisions by the executive power have a disastrous effect on the credibility of the institutions. On this subject, Roht-Arriaza rightly observes that past human rights violations were often tolerated by the old judicial system which did not have sufficient independence to be able to constitute a real counter-power. It may easily give way to a popular perception of a partial and dependent judicial system, steered by political considerations. This past can also weigh on the "new" judicial system. Finally, Roht-Arriaza notes that the number of crimes committed often (not only in the case of Rwanda) exceeds the capacity of the judicial system. This in itself generally requires that a selection be made of the crimes to be prosecuted. The problem therefore arises of determining a prosecution strategy: should priority be given to the highly placed instigators and organizers of violations, or should one adopt an approach which is more focused on the victim, thereby prosecuting those who have visibly committed the violations? Non-criminal but civil, administrative and/or disciplinary sanctions may provide for a somewhat easier solution. This may entail, among other things, a demotion in the military or administrative hierarchy, the suspension of the right to vote, the loss of employment or of the entitlement to pension, etc.

[39] It follows that the directives as proposed by Rapporteur Joinet, and based, among other things, on international law, are important and should be integrated into the international diplomatic and mediation efforts (ROHT-ARRIAZA, N., "Combating Impunity: Some Thoughts on the Way Forward" in BASSIOUNI, C. and MORRIS, M., *op. cit.*, p.93).

4. APPLICATION TO THE RWANDAN SITUATION

In the preceding sections, we tried to summarise what other authors concluded on the basis of their studies of other countries in political transition and where some sort of truth and reconciliation process has taken place. The case of Rwanda was not among them. In the subsequent sections, we will try to apply the above-mentioned conclusions to the Rwandan scenario, starting with some characteristics of the Rwandan situation which will indicate similarities and differences vis-à-vis other case studies.

4.1. A unique context of political transition

The analysis presented by Bronkhorst and others concerning certain models of political transition is not necessarily applicable to the Rwandan situation. In a simplified manner, one could summarise it as follows:

1. As in many of the other cases, the numerous human rights violations took place during a period of intensified political transition, which was spurred on by internal and international factors.
2. Contrary to the other cases, like Benin and Malawi for example, a situation of war, which coincided with the start of a wave of political liberalisation in Africa, interfered with the domestic process of political transition.
3. This combination led to a unique, tripolar situation (comprising the former single party, the armed opposition and the unarmed internal opposition), which was reflected in the negotiations and the Arusha Accords, which, at the same time, sought to meet not only the national and international calls for political liberalisation but also to put an end to the war. In fact, although the signatories to the accords only represented two parties, the tripolar system is explicitly reflected in some protocols[40].
4. This new political "equilibrium" was destroyed first of all by internal divisions within the unarmed opposition, and subsequently by, on the one hand, the planning and implementation of the genocide and political massacres by the former regime (and its supporters), and on the other hand, the resumption of war by the former armed opposition.
5. The tripolar system is no longer in existence. The unarmed opposition has been almost totally eliminated. The former single party and its supporters are almost totally identified with the genocide, and, consequently, have lost all credibility in the eyes of the international community. This only leaves the "victor" who has lost nearly all of his internal popular base.
6. Nevertheless, the final pole remaining has continuously stated its intention to build on the Accords which are tripolar in nature are and origin. The implementation of these Accords, especially the political aspects, is increasingly difficult, if not impossible.

4.2. The Arusha Accords and the truth and reconciliation approach

As an instrument and the translation of political transition, the Arusha Accords cover a wide range of subject matters. First of all, they constitute a peace agreement. Within the context of this article, however, we will focus on matters relating to the promotion of human rights, reconciliation and the fight against impunity. This section therefore constitutes a first confrontation of the Rwandan context with the conclusions of preceding chapters. It should be repeated that, in this context, the Arusha Accords have more than a purely historical value: to date, they form an integral part of the fundamental law of the country[41].

4.2.1. The judicial power

The Protocol of Agreement on power-sharing within the framework of a broad-based transitional government, reaffirms the independence of the judicial power. It plans the creation of

[40] Therefore, article 55 and 56 of the Protocol of Agreement on power-sharing within the framework of a broad-based transitional government refer to the distribution of government portfolios among the 6 political parties (the MRND, RPF, MDR, PSD, PL and the PDC).

[41] On the occasion of the third anniversary of the installation of the Transitional National Assembly, its president is said to have stated that Arusha remains the basis of the constitution in terms of power-sharing. However, according to some observers, one section of the political class would prefer to do away with the Arusha equilibrium.. (LAURAS, D., *Le partage du pouvoir issu des Accords d'Arusha remis en question*, AFP, 25 November 1997).

a Supreme Court, comprising a Department of Courts and Tribunals, a Court of Cassation, a Constitutional Court, a Council of State and a Public Accounts Court (article 28). The protocol also foresees the creation of a Supreme Council of Magistrates which decides on the appointment, termination of services and, in general, the administration of the career of judges (article 39). The protocol authorises the legislator to create specialised courts of law, but prohibits the creation of special courts (article 26). In accordance with the Arusha Accords, the new regime has effectively established the Supreme Court and the Supreme Council of Magistrates[42], while respecting, as scrupulously as possible[43] the text of the protocol on power-sharing. The creation of specialised chambers within the tribunals of first instance and the military courts by the Organic law of 30 August 1996, is not in contradiction to the Arusha Accords.

The "new" judicial system has inherited the popular perception of the former judicial system as being a dependent institution guided by political and personal interests and motives. Generally speaking, at the level of the state, justice has never been perceived as a source of truth, but rather as an instrument in the hands of those in power. This goes against the traditional justice system (non-state) of which the objective was mainly to re-establish of social harmony[44]. Given this reputation and the experience to which the population had been subjected for numerous years, why would people expect it to be different this time? To this, one can add the new regime's gradual monopolisation of power along ethnic lines, the judicial system being seen as one of the emanations of this power[45]. Whether or not this corresponds to reality, this perception, above all nurtured under the former regime, is extremely important in the context of truth and reconciliation. This undoubtedly reduces the role which the judicial system can play as an instrument to discover the collective truth and to promote reconciliation.

4.2.2.The specialised commissions

The Protocol of Agreement on power-sharing includes the creation of 3 broad-based specialised commissions (article 24). The Commission of National Unity and National Reconciliation would be charged with the preparation of a national debate on unity and reconciliation and the preparation and dissemination of information aimed at educating the population and achieving national unity and reconciliation. This commission was indeed established by presidential order in October 1997. It consists of 12 members appointed by the president on advice of the cabinet. This commission should sensitise Rwandans on national unity, promote the culture of reconciliation, fight all forms of sectarianism and divisionism, prepare a national programme for unity and reconciliation and sensitise Rwandans on their rights[46]. The Legal and Constitutional Commission would be responsible for drawing up a list of required amendments to render national legislation conform to the provisions of the Arusha Accords, in particular those relating to the rule of law. This commission would also prepare a preliminary draft of the constitution which shall govern the country after the transitional period. The Electoral Commission would be charged with preparing and organising local, legislative and presidential elections.

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[42] *Loi organique n° 03/96 du 29 mars 1996 portant organisation, fonctionnement et compétences du Counseil Supérieur de la Magistrature* (*Journal Officiel de la République Rwandaise*, 1 avril 1996); Organic law n° 07/96 of 6th June 1996 relating to the organisation, working and competence of the Supreme Court (*Journal Officiel de la République Rwandaise*, 10 June 1996).

[43] Given the constraints resulting from the almost total depletion of human resources at the different levels of the judicial system, the composition of the Supreme Council of Magistrates had to be modified, which was done through a revision of the fundamental law adopted by the National Assembly on January 18, 1996 (*Journal Officiel de la République Rwandaise*, 1 February 1996).

[44] On the occasion of a conference "La justice nationale et internationale devant le génocide rwandais", organised by ASSEPAC, the International centre for the study and the promotion of human rights and information, in November 1997, Professor Charles Ntampaka illustrated how the challenges which the judicial system faced in the past, continue to date: thus, he distinguished between the need to reconcile justice with the law, with the population and with the separation of powers.

[45] A sociological field research would be necessary to give a more scientific character to this assertion.

[46] Article 5 of Presidential Order n°25/01 of 25/10/97 establishing the Rwanda National Unity and Reconciliation Commission, *Official Gazette of the Republic of Rwanda*, 1 November 1997, modified by Presidential Decree n°01/01 of 10/01/1998, *Official Gazette of the Republic of Rwanda*, 15 March 1998.

The Protocol of Agreement on the rule of law foresees the establishment of an independent National Commission on Human Rights, responsible for investigating human rights violations committed on Rwandan territory, instituting legal proceedings where necessary as well as for sensitising and educating the population about human rights. In October 1995, the government introduced a draft law for the establishment of this commission. This was withdrawn for revision two months later, because of comments received from the UN High Commissionner for Human Rights, among others.[47] In November 1997, however, a Commission on Human Rights was nevertheless created, not by a law, but by a presidential order. According to article 2, «*The Commission is independent*». Nevertheless, according to article 8, «*The members of the Commission are chosen by the National Assembly out of 10 candidates nominated by the Government. They will serve a three year term which can be renewable*»[48].

The establishment and the mandates of the above-mentioned commissions correspond fairly well to some of the elements of truth and reconciliation initiatives that Bronkhorst and Roht-Arriaza analysed. These mainly concern elements such as the prevention of future violations, by, for example, strengthening the rule of law, sensitising the population and ongoing monitoring of human rights protection. On the other hand, aspects concerning investigations, trials, punishment and compensation of victims do not seem to have been addressed.

4.2.3. The International Commission of Inquiry

Article 16 of the Protocol of Agreement on the rule of law stipulates «*the two parties also agree to establish an International Commission of Inquiry to investigate human rights violations committed during the war*». This commission seems to correspond to the first element of a truth and reconciliation process as described by Bronkhorst et Roht-Arriaza: reconstruction of the collective truth of past events. Article 16 gives but a few explicit indications regarding the mandate and functioning of the commission:

- Firstly, it is anticipated for everything to take place under international auspices, which undoubtedly corresponds to the need for independence and absolute moral authority essential for all investigative and truth commissions. Such was also the case in El Salvador, for example, where an Argentine national was president of the Truth Commission, established following the peace agreement in 1991.
- Next, the mandate *ratione temporis* of the Commission seems limited to the period of the war, presumably, therefore, between 1 October 1990 and 4 August 1993, the date when the peace agreement was signed between the president of the Rwandan Republic and the president of the Rwandese Patriotic Front.
- Can one assume that the human rights violations committed by both sides were implicitly covered by the mandate *ratione materiae* of the Commission? A positive answer seems most logical and obvious.

Many other implementation modalities of this article require clarification: nothing is mentioned concerning prosecution of perpetrators, possible amnesty measures, possible compensation for victims, possible disciplinary or administrative sanctions, etcetera. Regarding the latter aspect, reference should, however, be made to article 46 of the Protocol of Agreement

[47] The draft law was checked against the "The Paris Principles", which contain international guidelines concerning the structure, functioning and the independence of national human rights commissions (R*eport of the Special Representative of the Commission on Human Rights on the situation of human rights in Rwanda*, A/52/522, 22 October 1997, p.8).

[48] Presidential order n°26/01 of 11/11/97 establishing the National Human Rights Commission, *Official Gazette of the Republic of Rwanda*, 1 December 1997. With respect to the composition of a national commission on human rights, the Paris Principles prescribe «*the appointment of its members, whether by means of an election or other system, shall be established in accordance with a procedure which affords all guarantees to ensure the pluralist representation of the social forces (of) civilian society involved in the protection and promotion of human rights*» *(Principles relating to the status of national institutions for the promotion and protection of human rights*, Annex to General Assembly Resolution A/RES/48/134, December 20, 1993). The Special Representative for Rwanda of the UN Commission on Human Rights had strongly recommended that there be a full and open debate on the creation of a Commission before it was actually brought into being. He was therefore «*surprised to learn*» that the above-mentioned presidential order had been published (UN COMMISSION ON HUMAN RIGHTS, *Report on the situation of human rights in Rwanda submitted by the Special Representative, Mr. Michel Moussali, pursuant to resolution 1997/66*, E/CN.4/1998/60, 19 February 1998, para.38).

on power-sharing, which states that «*As a matter of urgency and priority, the Broad-Based Transitional Government shall rid the administrative apparatus of all incompetent elements as well as authorities who were involved in the social strife or whose activities are an obstacle to the democratic process and to national reconciliation*». Although human rights violations are not explicitly mentioned, the wording of this article also seems to cover them.

Imagine a situation in which no genocide has been committed and an international commission would need to be set up in accordance to the Arusha Accords. This would be the context which corresponds to most of the situations analysed by Bronkhorst and Roht-Arriaza and, consequently, in which their conclusions and recommendations would be more applicable to the case of Rwanda. In fact, there is no doubt that, in such case, the international community, beginning with Amnesty International and others, would have insisted on fighting impunity, the need to prosecute and punish those responsible for violations, the unacceptability of an amnesty and other modalities. This is also the situation in which the international community would probably have had difficulties in convincing the new transitional government, and avoiding that the past is forgotten and that the truth is not sacrificed in the interest of short-term stability and the new balance of power. In reality, a genocide did take place and a process of truth and reconciliation must confront a totally different context than that which was initially foreseen. The next section examines these differences as well as the constraints and specificities which make it even more difficult to apply the conclusions and recommendations of both reference works.

Before concluding this section on the value of the Arusha Accords in a context of truth and reconciliation and on the creation of the various commissions, reference be made to part of the prime minister's declaration, entitled "*The Democratisation Process"*, on the occasion of the Round Table conference held in Geneva in June 1996: «*The Rwandan Government intends to set up shortly, the different commissions foreseen under the Arusha Peace Agreement, beginning with the National Commission on Human Rights and the International Commission of Inquiry to investigate human rights violations committed during the war, the massacres and genocide. Both commissions will mainly examine the various human rights violations committed by anyone on Rwandan territory and in countries hosting refugees, particularly by state organs or organisations under state control or other organisations.»*[49] In his speech, the prime minister thus seems to indicate that his government has decided to extend the mandate *ratione temporis* and *ratione loci* of the International Commission of Inquiry. Moreover, he explicitly states that, *ratione materiae*, the International Commission of Inquiry will investigate the violations committed by all parties involved in the conflict.

Finally, it goes without say that this Commission, or, in more general terms, a truth and reconciliation initiative could also rely on the work and numerous reports published by national and international human rights NGOs[50] and by the United Nations special rapporteur. An excellent job was accomplished by the International Commission of Inquiry, composed of representatives from four international NGOs[51], whose report was published in February 1993, after a two-week field visit in January 1993. Contrary to some analyses[52], this commission of inquiry was independent, established at the request of Rwandan NGO associations, and had

[49] (underligned and translated by the author) "Déclaration de S.E.M. Pierre Célestin Rwigema, Premier Ministre de la République rwandaise" in PNUD, *Conférence de Table Ronde pour la République rwandaise. Rapport de la Conférence*, Geneva, June 1996, p.66.

[50] Some NGOs have already made an appeal in the sense of this study: «*It is vitally important that the truth be told about the crime of genocide committed in Rwanda. This report is a first exercise in doing this; African Rights hopes that it will be followed by other investigations by Rwandans into what has happened (...). Truth telling is the most basic form of justice (...). Exposure is also, in itself, a measure of punishment for those responsible*.» (AFRICAN RIGHTS, *Rwanda. Death, Despair and Defiance*, London, 1995, p.1162).

[51] The *Fédération Internationale des Droits de l'Homme* (FIDH), Africa Watch, the *Union Inter-Africaine des Droits de l'Homme et des Peuples* and the International Centre for Human Rights and Democratic Development.

[52] « *The roots of the Rwandan Truth Commission lie in an agreement between the government and the armed opposition to establish a commission of inquiry into past atrocities - agreed to in the Arusha Accords negotiated in Arusha, Tanzania, in the fall of 1992*.» (HAYNER, P., *Lessons from the Past: Thirteen Truth Commissions - 1974 to 1993*, Colombia University, 1993, p.56).

«*nothing to do with the official proposals of the government and the RPF*»[53], agreed in the above-mentioned protocol of agreement.

4.3. Specific constraints

Undoubtedly, it is difficult to compare the Rwandan case to other experiences. In the preceding section, reference has already been made to the unique character and context of political transition. Other particularities give rise to certain constraints requiring a more detailed study in view of the development of a truth and reconciliation initiative for Rwanda. In this context, we have tried to identify some key questions, which are by no means exhaustive.

4.3.1. The mandate *ratione materiae*

Any truth and reconciliation initiative would need to address not only massive human rights violations and war crimes, but also acts of genocide. This was not the case in the large majority of case studies in the reference works. Furthermore, the Convention on the Prevention and Punishment of the Crimes of Genocide explicitly requires that contracting parties (including Rwanda) enact effective criminal sanctions for persons guilty of genocide. Despite this fundamental "qualitative" difference, one can, however, hardly imagine that a non-judicial initiative would only be addressing those violations which are not classified as genocide (including those committed by the RPF/RPA), and that it is excluded for all acts of genocide (including for example, the violations committed by persons covered by category 3 of the Organic law of 30 August 1996[54])[55].

To this "qualitative" constraint, one may add the "quantitative" challenge: the number of victims and the number of crimes committed largely surpasses those in the other case studies[56]. This does not only constitute a major constraint for the current judicial approach, it also makes truth telling of what happened on every hill and the compensation of victims all the more difficult in a non-judicial truth and reconciliation approach. This would therefore require the deployment of numerous roving sub-commissions of a truth commission.

These qualitative and quantitative specificities also mean that there has been an enormous destruction within the society itself. The challenge of rehabilitating this society and reconciling its members is therefore gigantic.

4.3.2. The mandate *ratione loci* and *ratione temporis*

On several occasions, some authors have proposed a regional approach to the different crises in the Great Lakes region. This approach could take the form of a regional conference[57], or an extension of the ICTR's mandate[58], etcetera. This idea effectively corresponds to a real interdependence and interaction at the political, military and economic levels. Nevertheless, the ad hoc and short term nature of regional alliances, seems to indicate that the crises in the region, while having regional repercussions, are first of all composed of internal crises at the domestic level. Already in the past, the idea of a purely regional approach has been used as a pretext to

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[53] (translated by the author) FIDH, *Violations massives et systématiques des droits de l'homme depuis le 1er octobre 1990*, Paris, 1993, p.6.

[54] «*Persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person.*» Reference is made to any serious assault not causing death.

[55] According to Landsman, on the other hand, a truth and reconciliation process should not be used for certain violations of human rights, including genocide (LANDSMAN, S., "Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions" in BASSIOUNI, C. and MORRIS, M., *op. cit.*, p.84).

[56] Professor Reyntjens has estimated that approximately 1,100,000 person were killed: 600,000 Tutsi and 500,000 Hutu (REYNTJENS, F., "Estimation du nombre de personnes tuées au Rwanda en 1994" in CENTRE D'ETUDE DE LA REGION DES GRANDS LACS D'AFRIQUE, *L'Afrique des Grands Lacs. Annuaire 1996-1997*, Paris, L'Harmattan, 1997, p.182).

[57] See, for example, FRERE DES HOMMES, *Une seule terre*, Numéro Spécial Zaïre-Rwanda, December 1996, p.6.

[58] See, for example, UN COMMISSION ON HUMAN RIGHTS, *Initial report on the human rights situation in Burundi submitted by the Special Rapporteur, M. Paulo Sergio Pinheiro, in accordance with Commission resolution 1995/90*, E/CN.4/1996/16/Add.1, 27 February 1996, para. 69.

avoid all national initiatives[59]. In any case, the mandate *ratione loci* is an important question to be resolved. Some answer has been given by the Prime Minister in his above-mentioned declaration at the Round Table conference in Geneva in June 1996: *"Both commissions will mainly have to examine the various human rights violations committed by anyone present on Rwandan territory and in countries hosting refugees, particularly by state organs or organisations under state control or other organisations"*[60]. The violations committed on non-Rwandan territory and mentioned in the speech of the Prime Minister, were mainly carried out by former soldiers of the *Forces Armées Rwandaises* and members of the Interahamwe militia. It seems only logical to add the violations committed by the RPA in its operations in eastern Zaire at the end of 1996 and the beginning of 1997.

This brings us to the question of the mandate *ratione temporis*. The mandate of the Commission of Inquiry into Violations of Human Rights in Uganda, covered the period between October 1962 and January 1986. In many other cases, beginning with South Africa, the period covered by a truth and reconciliation initiative has been relatively long. A long history or even tradition of repression and human rights violations should not, in itself, limit the possibilities of such an approach. There is little doubt that determining the mandate *ratione temporis* would give rise to a major discussion in the Rwandan context. One could, for example, include the events of 1959, but also the RPA operations in eastern Zaire in 1996 - 1997, and in the north-western part of Rwanda in 1997 - 1998. From a comparative perspective, one should note that the ICTR's mandate covers the period between the beginning of January and the end of December 1994. The Organic law of 30 August 1996, on the other hand, deals with the period between 1 October 1990 and 31 December 1994. The International Commission of Inquiry, provided for by the Arusha Accords, logically covered the period between 1 October 1990 and 4 August 1993, but its envisaged mandate seems to have been explicitly extended by the Rwandan Government, as indicated in the declaration of the Prime Minister at the Round Table conference in Geneva in 1996.

4.3.3. The relation with the judicial approach

This study does not, in any way, constitute a plea to abandon the judicial approach. On the contrary, as we have written on other occasions, the Rwandan Government and its international partners should strengthen and accelerate their efforts in the judicial domain (both at the level of training human resources, institutional capacity building, detention conditions, the right to legal counsel, etc.), while certain conditions should be imposed and their non-respect should be sanctioned (like, for example, the unconditional access of international observers to detention centres in military camps, the condemnation of the activities of the so-called syndicates of denunciation, etcetera)[61].

A complementary non-judicial approach in the form of a truth and reconciliation initiative should, from the outset, elaborate a working relationship with the judicial system. Nevertheless, it seems important that this initiative avoids, at all costs, being presented or perceived as having its origins in the same judicial system. As an illustration of the delicate relations to be defined between both approaches, reference is made to Professor Sarkin concerning the role of a possible truth commission in the context of the confession and guilty plea procedure, established by the Organic law of 30 August 1996. Sarkin presents the general lines of two options regarding the confessions which detainees would present to the commission: the commission would either have to submit this confession to the judicial system, which would do the follow up, or, the commission is given the power to impose sanctions or civil compensations or grant pardon. According to

[59] See INTERNATIONAL CRISIS GROUP, *Great Lakes Exploratory Mission*, Working Document, 1997, p.2; see also, the comments of Filip Reyntjens concerning the idea of a regional conference in: STIFTUNG WISSENSCHAFT UND POLITIK, *op. cit.*, p.131-132.

[60] (underlined and translated by the author) "Déclaration de S.E.M. Pierre Célestin Rwigema, Premier Ministre de la République rwandaise" in PNUD, *Conférence de Table Ronde pour la République rwandaise. Rapport de la Conférence*, Genève, June 1996, p.66

[61] See, VANDEGINSTE, S., *Justice for Rwanda and International Cooperation*, Working Paper, Antwerp University, September 1997, also published on CD n°4 and 5 of the Geneva based International Documentation Network on the Great African Lakes Region.

Sarkin, even in the scenario of a more limited mandate of the commission, an individual perpetrator may more easily make a confession before this non-judicial authority, which would serve as a facilitator[62]. In this regard, we would suggest that both options be maintained and applied in accordance with the categorisation foreseen under the Organic law.

Once again, we would like to emphasise the added value which this non-judicial initiative would bring to the treatment of individual cases, apart from increasing the institutional capacity to deal with larger numbers of dossiers. The identification, prosecution and the sentencing of perpetrators of human rights violations through the judicial approach are, in fact, of vital importance, but will they help to achieve the traditional objective of justice, notably, the re-establishment of the social order and harmony, which has more collective rather than individual dimensions? This is another level where a non-judicial alternative could complete the present judicial approach[63].

4.3.4.The situation of rebellion and war

Even after the so-called end of the war in July 1994, violence continued in Rwanda, initially, on a very reduced scale, gradually increasing during the years of 1996, 1997 and the beginning of 1998, especially after the massive return of refugees in November and December 1996. In June 1997, the Phases and Security Procedures of the United Nations considered a third of communes as being «*inaccessible*» to UN personnel, and another third of the communes as requiring «*a military escort*». The current situation, at the beginning of 1998, pits the Rwandan army against a hardly identified rebellion[64], without a programme[65] or political spokesperson; it is not at all clear whether it concerns a well-organised structure or what the role of certain former leaders of the former armed forces or militia might be. The number of human rights violations is increasing[66]. In such a context, it is difficult to protect and promote human rights. The problems which the High Commissioner for Human Rights faced in the field, illustrate these difficulties[67]. The same is also true for a possible truth and reconciliation initiative, which will require the deployment of teams to the field throughout all prefectures, as well as effective witness protection schemes.

The present situation, however, should not serve as a pretext to rule out the need for placing a truth and reconciliation initiative on the political agenda. The conditions which all truth

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[62] SARKIN, J., "Lessons from other Commissions around the World. The Mechanics of a Commission for Rwanda.", in NEWICK PARK INITIATIVE, *Le rôle de l'église dans la Restauration de la Justice au Rwanda (Rapport de la Conférence tenue à Kigali du 19 au 21 août 1997)*, Cambridge, September 1997.

[63] « *These issues* (= individual trials against genocide suspects, SV), *while important, have little to do with reconciliation or 'righting' the situation so the survivors can re-establish congenial relations with other Rwandans who may or may not have participated in the genocide*.» (WATERS, T., "Conventional Wisdom and Rwanda's Genocide: an Opinion", *African Studies Quarterly*, Vol. 1, n° 3, 1997). See also: AYINDO, B., "Retribution or Restoration for Rwanda", *Africanews*, Nairobi, 15 January 1998.

[64] In fact, the rebels rarely identify themselves. The leaflets which the ALIR (*Armée pour la libération du Rwanda*), the armed branch of PALIR (*Peuple armé pour la libération du Rwanda*), left behind during a rebel attack at Nyabikenke (in Gitarama prefecture) on 5 January 1998, is an exception. More recently, an organisation called "*Abatabazi. Forces combattant pour la démocratie et les droits de l'homme au Rwanda*", would have distributed pamphlets (CROS, M.F., "Le FPR se réorganise et place Kagame à sa tête", *La Libre Belgique*, 17 February 1998.

[65] A spokesperson of the government (!) gave a vague indication of the objective of the rebellion, following an attack on a lock-up in the Gisenyi prefecture on 2 December 1997: «*The aim of the insurgency is the control of the two prefectures - the traditional home of Hutu nationalism - as a precursor to negotiations over power sharing with the authorities in Kigali. Amnesty for genocidaires would be one of the preconditions for a peace deal.*» (UN DEPARTMENT OF HUMANITARIAN AFFAIRS, *IRIN Update for Central and Eastern Africa*, N° 305, Nairobi, 3 December 1997).

[66] See, for example, AMNESTY INTERNATIONAL, *Rwanda. Civilians trapped in armed conflict. "The dead can no longer be counted."*, London, 19 December 1997.

[67] See, for example the evaluation report prepared by Mr. Ian Martin concerning the human rights field operation in Rwanda, annex to the report of the High Commissioner for Human Rights presented at the fifty-second session of the General Assembly (A/52/486/Add.1/Rev.1, 12 November 1997). In the meantime, but more for political than for security related reasons, the day-to-day operations of HRFOR have been suspended since early May 1998 (*Statement by Mary Robinson United Nations High Commissioner for Human Rights*, 9 May 1998, http://www.unhchr.ch/news/dpipress9.htm).

and reconciliation initiatives should meet, whether in times of war or peace, could, at the same time, help to create a climate which would allow it to function. In fact, if the mandate and the composition at the level of the personnel of a truth and reconciliation initiative are fairly representative and supported by the population, civil society and, to the extent that there are any, by the big political leanings (which, in all circumstances, constitutes an essential condition), is it then excluded that the rebellion (and, a fortiori, the army) condones the deployment of a truth and reconcilition initiative? On the side of the armed forces, everything will depend on the genuine political commitment of the current regime. On the side of the armed opposition, this also presupposes the existence of an organised rebellion controlled by one or more structures in command of its activities. If, on the contrary, the rebellion is above all made up of an amalgamation of more or less "spontaneous" actions of some unstructured small groups, this hypothesis may be more difficult to materialise.

In this context, it should be reiterated that both the South African Truth and Reconciliation Commission, and, for example, the International Commission of Inquiry foreseen under the Arusha Accords, formed part of a political negotiation process and agreement, which was deemed to represent a large consensus within the diverse leanings of the political class. This in fact also seems to be a prerequisite in the present Rwandan context. It is therefore essential to be able to first identify and then select the national and international actors who should be involved in developing such a non-judicial approach. In an increasingly violent context, this could be very difficult.

4.3.5.The unipolar detention of persons accused of violations

In nearly all the cases studied in the two reference works, the situation at the time when a truth and reconciliation initiative was launched, was such that the suspected perpetrators of violations, targeted by the activities of this initiative, were at large, and were even carrying out functions within the public administration, including the armed forces.

This would also have been the context in which the International Commission of Inquiry foreseen under the Arusha Accords would have had to operate. In the present situation, this is still the case concerning violations committed by the former armed opposition, i.e. the present government. With regard to the genocide, the initial situation is very different: an unprecedented number of detainees (guilty or innocent) are languishing in prisons and lock-ups.

This situation has important consequences and repercussions on the establishment and operation of a possible truth and reconciliation initiative:
- First of all, it is extremely urgent given the presumption of innocence of detainees. In some other cases, the time elapsed between the establishment of a commission of inquiry and the publication of its report and follow-up, is extremely long[68]. This time of operation allows an entire society to cover the process at its own pace. At the political level, it possibly allows a more gradual transition. In the Rwandan context, the urgency of the situation, given the current detention conditions, would, without any doubt, reduce the time frame available for the launch of such an initiative.
- The initial imbalance (between violations committed by the former regime and those committed by the RPF/RPA) as a consequence of the above-mentioned "qualitative" specificity of genocide, is further increased by this state of affairs. A truth and reconciliation initiative could, in fact, give rise to sanctions (criminal, disciplinary, administrative or other) against some persons who are currently at large and who possibly are presently carrying out a public function, and at the same time, improve the situation of those who are punished *de facto* by being in detention. Consequently, at first sight, the government's interests would not appear to be served by a possible truth and reconciliation initiative which they should take, or, at least, tolerate. In the medium and long-term, the objectives of reconciliation, peace and rehabilitation of the society which the present government has set itself, will require such an approach.

[68] In Uganda, for example, the *Commission of Inquiry into Violations of Human Rights* was established on 16 May 1986. Its report was presented on 10 October 1994.

4.3.6.The state's responsibility

The suffering of victims of genocide and other human rights violations is irreparable. Nevertheless, a financial compensation (even partial) of the losses incurred, constitutes not only a right in itself, but at the same time, an instrument of reconciliation and of settlement of past scores. It is in this context that one places the responsibility of the State. We cannot, within the framework of this paper, go into all legal details of this question regarding the responsibility of the state[69] vis-à-vis the survivors of genocide and other victims of human rights violations. We will limit ourselves to some of the major themes of this debate regarding the responsibility of the state.

The genocide was perpetrated, by, among others, military and civil servants, who could be held accountable for paying damages and interests to victims. This is also true for violations committed by the RPA, after they seized power and installed the new government in July 1994. On the other hand, the state does not seem to have any responsibility for the human rights violations committed by the RPF as an armed opposition. Did the RPF have legal personality during the rebellion? Furthermore, the state also suffered losses and could possibly be a civil claimant against individual perpetrators, both in the context of the genocide, as well as other human rights violations. One could ask similar questions concerning the responsibility of third states[70] and the United Nations[71]. There is no unanimous doctrine concerning the duty of the international community to prevent and combat genocide and the possible responsibilities of the UN and Belgium with regard to the Rwandan genocide[72].

In any event, a minimal responsibility of the third states concerned and the UN, would be the hand-over of all documents and all information deemed useful by a possible truth commission[73]. This could, in fact, indicate the genuine commitment of third States vis-à-vis the truth about the events in Rwanda. The refusal of the United States to hand-over some 12,000 documents to the international commission in the case of El Salvador, sets a highly regrettable precedent[74].

At the domestic level, reference should be made to *Law n° 02/98 of 22/01/1998 establishing a National Assistance Fund for needy victims of genocide and massacres committed in Rwanda between October 1, 1990 and December 31, 1994*[75], which is in part based on the fact that «*the Government in place during the genocide and massacres, and the administrative institutions played an essential role in the commission of these crimes, and by way of consequence, the obligations of the Rwandese State to help the needy citizens have particularly increased*». Especially orphans, widows and disabled persons are intended as beneficiaries of the Fund. As a priority, its assistance should cover education, health and housing needs. The Fund will operate parallel to the judicial approach: «*Claiming or receiving compensation from Courts does not prevent the Fund to assist needy survivors*» (article 16).

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[69] See, in this regard, VERHOEVEN, J., "Le crime de génocide: originalité et ambiguïté", *Revue Belge de Droit International*, 1991, n° 1, p.1-26.

[70] A proposal to extend the competence of the TPIR in this sense, was formulated by the president of Attorneys without Borders; see COOL, B., *Lettre ouverte sur la nécessité d'étendre la compétence du Tribunal International pour le Rwanda*, s.l., 1995, p.7.

[71] See, for example, regarding the "*Commission permanente des réclamations*", provided for by the *Accord entre l'ONU et le Gouvernement de la République Rwandaise sur le statut de la Mission des Nations Unies pour l'Assistance au Rwanda du 5 novembre 1993*: GASANA, N., *Génocide contre les Batutsi du Rwanda et crimes contre l'humanité perpétrés à l'encontre d'opposants. Que peut faire la justice internationale?*, Brussels, 15 January 1998, p.9.

[72] See, for example, the studies on the responsibilities of different international actors in the case of Rwanda (SENAT DE BELGIQUE, *Commission d'enquête parlementaire concernant les événements du Rwanda. Rapport. Annexe 6*, 1-611/13, 6 December 1997).

[73] HAYNER, P., "International Guidelines for the Creation and Operation of Truth Commissions: a Preliminary Proposal" in BASSIOUNI, C. and MORRIS, M., *op. cit.*, p.175.

[74] HUYSE, L., *Jonge democratieën en de keuze tussen amnestie, waarheidscommissie en vervolging*, Leuven, 1997, p.48.

[75] *Official Gazette of the Republic of Rwanda*, 1 February 1998, p.217.

4.4. The truth and reconciliation approach in declarations and ongoing initiatives

The need for a truth and reconciliation process, or at least certain aspects of such an initiative, has been raised on several occasions by different actors and authors in the Rwandan context. At no point, however, does it seem to have found an important enough place on either the national political agenda, or that of the international partners. Here, we will try to make an undoubtedly incomplete inventory, of some declarations, proposals and requests which go in the same direction as this paper. We hope that this will invite persons interested in the idea to come together and elaborate and harmonise their various proposals, as well as their follow-up strategy towards the actors concerned.

4.4.1. In declarations of cabinet members or senior civil servants

Without going into too much detail, we would first of all like to make reference, at this point, to the above-mentioned declaration of the prime minister during the Round Table conference in Geneva in June 1996, when he confirmed the government's intention to establish the commissions foreseen under the Arusha Accords, including an International Commission of Inquiry to investigate human rights violations committed during the war. In the logic of the Arusha Accords, it seems obvious that the mandate of such a commission should include not only the violations committed by the government, but also those of the former armed opposition, which has become the new government.

The Rwandan vice-president, Major General Paul Kagame, does not seem opposed *a priori* to an alternative approach for some categories of detainees: «*With regard to justice, we have to forge ahead, separate the cases of direct perpetrators of genocide from all the others. For the latter, we have to be innovative: they could contribute to the reconstruction of the country, repair roads, construct houses for the survivors, cultivate their own fields. Heavy labour could also be a punishment. Presently, the maintenance of 120,000 prisoners costs US$ 20 million per year, for which we receive assistance from the international community! This cannot continue in the long-term: we have to find other solutions; we will explain this to the survivors!*»[76]

Following an initial mission from the South African Truth and Reconciliation Commission to Kigali in September 1996, a delegation from the Rwandan government, headed by the Minister of Labour and Social Affairs, Mr. Pie Mugabo, visited South Africa in January 1997. The Minister of Transport and Communication, Mr. Charles Muligande, and the Prosecutor General of the Supreme Court, were also part of the delegation. The mission, which received financing from Belgium, sought to have Rwanda benefit from the experience of South Africa in the domain of national reconciliation and the compensation of victims of human rights violations.

On the occasion of a conference in Kigali in August 1997, the Minister of Justice, Mr. Faustin Ntezilyayo, commented on the South African model, by saying that «*The Truth and Reconciliation Commission on the South African model is an attractive option. I echo the desire to see such a Commission established, but I feel that it is premature. It is hard to say what is the official view. I am not the Prime Minister so I cannot give you the government view. My own view is that we want mechanisms over and above the institutions of justice, something which is in line with social justice, which is indispensable for society. I am far from feeling that a Truth and Reconciliation Commission is not useful. I think that it is necessary, whether it is done through a Unity and Reconciliation Commission or not. It is just as necessary as a Commission for Human Rights. Whichever way one approaches this, anything which helps to bring healing will be helpful. Would a Truth and Reconciliation Commission and a Unity and Reconciliation Commission be incompatible? Justice must have roots. We are not opposed to initiatives from outside the government. Initiatives from within the government and outside the government can come together.*»[77]

[76] (translated by the author) "Les Belges sont les bienvenus au Rwanda", Interview with vice-president Kagame by Colette Braeckman, *Le Soir*, 20 January 1998.
[77] "Comments in the Discussion of the Paper by the Minister of Justice", in NEWICK PARK INITIATIVE, *op.cit.*

Reference should also be made to the remarks of the Secretary-General of the Ministry of Justice, Mr. Gerald Gahima, on the occasion of the same conference: «*The Government has previously considered a Truth and Reconciliation commission but has considered it not appropriate for current conditions in the Country. No one has come forward to take responsibility for the genocide. (...) However this issue of a Truth and Reconciliation Commission can be revisited. I am not saying that we shall necessarily strictly apply the law because there are such large numbers that it would never be possible to try them all, nor punish them with the sanctions that the law normally applies. We have to take the situation as we find it in reality.*»[78] However, the Secretary-General feels that: «*Justice is not just an issue for the Ministry of Justice in this Country: it is an issue for the Cabinet. That is why it is not possible to delegate decisions about justice to a body which is outside the government.*» Gahima rightly underlines the differences between the Rwandan and South African contexts: «*There are differences between South Africa and Rwanda in terms of the nature of the crimes, the number of those involved, and the consequences for those who were the targets of the violence.*»[79]

4.4.2.In declarations of the political opposition

More of a movement than a real political opposition party, the project *Nouvelle Espérance pour le Rwanda* (NOUER or "New Hope for Rwanda") made an appeal to the president and vice-president of Rwanda for the installation of a truth commission: «*At nearly 18 months before the political deadline which you set for your transitional government, you should take at least two major initiatives. (...) The second would be the establishment of a Truth Commission which would bring out of anonymity all the victims of war crimes, crimes against humanity and the Rwandan genocide from 1 October 1990 to date. This institution, of which the role would be neither criminal nor judicial, would allow to find out the circumstances of the victims' death, tediously dismantle and patiently reconstruct the mechanisms, responsibilities, the ingredients and behaviour which led to the humanitarian catastrophe. This Truth Commission would be all the more necessary as it could dispel the climate and tendency of globalisation of criminal guilt between the ethnic groups.*»[80]

The royalist party UNAR, National Union of Rwanda, considers the South African approach as one of the instruments to resolve the present war in the country: «*(...) the war should be resolved through the political willingness on the part of the Rwandese Patriotic Front (RPF), which should prove its ability to adapt to the process of reconciliation, criminal justice and democracy. Having been one of the pillars of the fight for independence and national unity, the UNAR party demands that the government in Kigali overcomes its distrust of the hutu rebels and makes the promotion of justice and reconciliation a historic occasion, following the example of the people of South Africa*.»[81]

Some persons have put forward the idea of a collective confession from the Hutu community for the genocide against Tutsi as one of the prerequisites to a process of political negotiation. This does not seem realistic or opportune, as hundreds of thousands of Hutu were also killed - Which collective confession would be needed for these crimes against humanity? - and many Hutu are not guilty of anything. Moreover, who would be representative of such a diverse community? On the other hand, it seems necessary, in this context, for all movements and political parties to recognise the existence and to unconditionally condemn the genocide. This would not entail any collective responsibility nor would it reduce the gravity of the other crimes against humanity. On this point, Prunier has stated that the Resistance Forces for Democracy

[78] "What is understood by Justice in Rwanda today? What can be justified in Rwanda today by reference to lack of means, technical and human and what cannot. Paper presented by Gerald Gahima, Secretary-General of the Ministry of Justice", in NEWICK PARK INITIATIVE, *op.cit.*

[79] "Points made by Gerald Gahima in response to points raised during discussion of his paper" in NEWICK PARK INITIATIVE, *op. cit.*

[80] (translated by the author) NOUER, *Letter to the President and Vice-Président of the Rwandan Republic*, Lausanne, 20 December 1997. The letter is signed by promotors James Gasana et Nkiko Nsengimana. In its "*Propositions pour la relance du processus de réconciliation nationale*", published in May 1996, NOUER had already proposed the establishment of a Truth Commission (NOUER, *Les voies pacifiques de la résolution de la crise politique rwandaise*, Lausanne, 1995, p.22).

[81] (translated by the author) RUKEBA, C., *UNAR. Communiqué de Presse*, 15 décembre 1997.

(FRD), holds a special position among the other Hutu opposition movements: «*The originality of the FRD (...) has been their strong and clear talk about the genocide and their condemnation of it without hesitation. This position, which seems morally obvious for an outside observer, is in fact very rare in the Hutu community. (...) But the FRD straightforward condemnation of the genocide, if it has satisfied foreigners, has not attracted much support within the Hutu community*.»[82] The political platform of the FRD also foresees that a truth commission be set up «*to determine, with the aim of reconciliation based on the truth, the responsibilities of all parties in the Rwandan tragedy. The work and mandate of the Truth Commission are situated outside the judicial process, but constitute a valuable complement to it*»[83].

Reference must also be made to the press release of *Rwanda Pour Tous* on 21 November 1995, in which this association «*reiterates its condemnation of the genocide and all the crimes against humanity which were and still are committed in Rwanda*.»[84]. In a letter to the Rwandan president, Rwanda Pour Tous «*appreciates the steps taken by the international community to recognise the Tutsi genocide and to bring suspected perpetrators before the International Tribunal for Rwanda. It is also imperative that an international inquiry be held to classify the crimes committed by your organisation and its government since October 1990, and especially since April 1994*.»[85]

4.4.3.In declarations of the international community

In the following section, we have tried to summarise some positions and proposals of governments and intergovernmental actors. The national and international non-governmental organisations will be examined in the subsequent section.

The special envoy of the European Union, Mr. Aldo Ajello, seems undoubtedly among the proponents of an alternative and complementary non-judicial approach. Ajello draws his inspiration partly from his experience in Mozambique between 1992 and 1994: «*A discussion must be started, together with the Rwandan government, to find a solution, and more than a judiciary solution, as there cannot be solely a judiciary solution to genocide. One good example is the South African Truth and Reconciliation Commission, but there are many other mechanisms in the African tradition and culture. We must combine punishment and forgiveness. We must create and consolidate the culture of forgiveness while we put an end to the culture of impunity. Stopping the sense of impunity would entail that the masterminds of and the instigators of the genocide are punished. The rest, the broad mass of people implicated in the genocide, should be forgiven. In a sense, they themselves can be considered a secondary group of genocide victims, as they were misled by bad leaders*.»[86]

Belgium explored the idea of creating a Commission of Reparation for Rwanda, and has, in this context, financed the respective missions and exchanges between the Rwandan authorities and the South African Truth and Reconciliation Commission. Along with Switzerland and the Netherlands, among others, Belgium has also financed above-mentioned Newick Park Initiative which led to the organisation of a conference in Kigali in August 1997, on the role of the church in the restoration of justice in Rwanda.

The first (in 1997, to the General Assembly) and second (in 1998, to the UN Commission on Human Rights) report of the Special Representative of the UN Commission on Human Rights, Mr. Michel Moussali, only refer to the judicial approach and recommend that the international community provides technical assistance so that all detainees may have a legal dossier in the shortest time possible, and so that the trials against the genocide suspects can take place at a

[82] PRUNIER, G., *op.cit.*, p.372.
[83] (translated by the author) FORCES DE RESISTANCE POUR LA DEMOCRATIE, *Plate-Forme Politique*, Brussels, March 1996, p.72.
[84] (translated by the author) RWANDA POUR TOUS, *Communiqué de Presse*, Brussels, 21 November 1995.
[85] (translated by the author) GASANA, J., *Lettre au Président de la République Rwandaise*, Brussels, 21 March 1996.
[86] AJELLO, A., "Opening Statement" in STIFTUNG WISSENSCHAFT UND POLITIK, *op. cit.*, p.38. See also: CROS, M.F., "La petite idée d'Aldo Ajello pour ramener la paix entre frères ennemis", *La Libre Belgique*, 24 December 1997; BEIRLANT, B., "Rwanda heeft nood aan cultuur van vergeving", *De Standaard*, 12 January 1998.

faster pace, without, obviously, violating fair trial standards. No reference is made to a possible complementary non-judicial approach[87].

In its resolution of 15 April 1997, the UN Human Rights Commission «*reiterates its request that all states concerned cooperate fully (...) to ensure that all those guilty of the crime of genocide, crimes against humanity and other grave violations of human rights committed in Rwanda are brought to justice (...)*»[88]. In its resolution of 21 April 1998, the UN Human Rights Commission did not make any reference to a truth and reconciliation initiative either[89].

In his 1996 and 1997 reports, the former Special Rapporteur of the UN Commission on Human Rights, Mr. Degni-Ségui, makes no reference to possible complementary non-judicial approaches to the legal proceedings against presumed perpetrators of genocide and crimes against humanity[90]. The idea is not mentioned either in the High Commissioner for Human Rights report to the UN Commission on Human Rights of March 1997[91] nor in the report to the General Assembly of October 1997[92], nor in the report to the UN Commission on Human Rights of February 1998[93].

4.4.4. In private initiatives

In December 1996, a group of 24 Christians from different Rwandan and foreign churches, met in Detmold (Germany), and published the "Detmold Confession". The underlying idea of this initiative was that a reconciliation of the Rwandan people is only possible when its different components recognise the suffering of others, confess their own crimes and ask the victims pardon. Therefore, the Hutu Christian participants recognised that "their people" («*les leurs*») had oppressed the Tutsi in different ways since 1959 and confessed to the crime of genocide. The Tutsi Christians asked to be pardoned for the repression and blind revenge which "their people" («*les leurs*») carried out against the Hutu population, outside the context of the the right to self-defence. The Western Christians confessed to having discriminated among persons, to have favoured violence and to have abandoned the Rwandan people on numerous occasions[94]. The Detmold Confession gave rise to numerous reactions[95]. From the perspective of our study, the Detmold Confession has at least this major merit: it shows that the "truth" in the Rwandan context, comprises different elements (and not only genocide against Tutsi for example), for which different actors have a certain responsibility. Each should assume his or her responsibility in order to enable a real reconciliation within society. Despite some interpretations, it seems clear to us that, by juxtaposing certain violations and responsibilities, the Confession did not at all seek to justify nor equate the genocide and other massive human rights violations. However, the truth behind the various atrocities at the centre of this collective confession, has not been told: which acts are included, committed when, where and by whom[96]? As our two reference authors have

[87] *Report of the Special Representative of the Commission on Human Rights on the Situation of Human Rights in Rwanda*, A/52/522, 22 October 1997 and UN COMMISSION ON HUMAN RIGHTS, *Report on the situation of human rights in Rwanda submitted by the Special Representative, Mr. Michel Moussali, pursuant to resolution 1997/66*, E/CN.4/1998/60, 19 February 1998.
[88] (underlined by the author) UN COMMISSION ON HUMAN RIGHTS, *Situation of human rights in Rwanda*, Resolution 1997/66, 15 April 1997, para.18
[89] UN COMMISSION ON HUMAN RIGHTS, *Situation of human rights in Rwanda*, Resolution 1998/69, 21 April 1998.
[90] Documents E/CN.4/1996/68 of 29 January 1996 and E/CN.4/1997/61 of 20 January 1997.
[91] UN COMMISSION ON HUMAN RIGHTS, *Report of the High Commissioner for Human Rights on the activities of the Human Rights Field Operation in Rwanda*, E/CN.4/1997/52, 17 March 1997.
[92] GENERAL ASSEMBLY, *Report of the United Nations High Commissioner for Human Rights on the Human Rights Field Operation in Rwanda*, A/52/486, 16 October 1997.
[93] UN COMMISSION ON HUMAN RIGHTS, *Human Rights field operation in Rwanda. Report of the United Nations High Commissioner for Human Rights*, E/CN.4/1998/61, 19 February 1998.
[94] The Detmold Confession has been published in *Dialogue*, n° 195, January 1997, p.58.
[95] GASANA, J.K.; NZACAHAYO, P., *La Confession de Detmold. Une réponse creuse à un problème profond*, Lausanne, July 1997. See also 8 reactions published in *Dialogue*, n° 197, March - April 1997, p.34-62.
[96] See also, the comments of René Lemarchand in STIFTUNG WISSENSCHAFT UND POLITIK, *op. cit.*, p.93-95.

pointed out, determining the truth constitutes the first step in the entire process. This seems to us to be the main handicap[97] of the Detmold Confession as an instrument of reconciliation[98].

The *Newick Park Initiative*, the international branch of the *Relationships Foundation* has been mentioned several times throughout this paper. Meetings were held in June 1996, December 1996 and August 1997. The latter focused on the role of the church in the restoration of justice in Rwanda. The participants, in this context, «*took notice of the existence and operation of the Truth and Reconciliation Commission in South Africa and found this experience interesting. They recommend that the churches in Rwanda and the Rwandese State considers about the need for, and the possibility of, setting up a similar process in Rwanda*»[99]. Professor Jeremy Sarkin launched some concrete ideas with regard to the implementation of "this similar process". In order to set up the Commission, Professor Sarkin emphasized that it should be established by law. Consequently, this initiative cannot only be limited to the civil society. In order to guarantee its legitimacy towards diverse sections of the population, the composition and appointment of members of the Commission should not be done by the Government. The commissioners should be appointed by a panel made up of a representative of the Secretary-General of the UN, the Secretary-General of the OAU, the President (of the Commission) of the European Union, the government, the Catholic church, the Anglican church and human rights organisations. The committee should also take a decision concerning the objectives of the commission's tasks, the mandate *ratione temporis*, *ratione loci* and *ratione materiae*. Sarkin rightly adds that the international community should allocate important financial resources to the activities of such a commission, in order for it to attain its objectives[100].

Within the context of a study concerning conflict management in Central Africa, COPRI (*Copenhagen Peace Research Institute*) published a study on, among other things, the needs of a judicial system in transition[101]. The study first studies the possible role of customary law, and in the first place, the *gacaca*, in the settlement of past scores and reconciliation, in a context of genocide and crimes against humanity[102]. According to the author of the study, Doctor Christian Scherrer, this would, in any event, require that the *gacaca* remains independent from the public administration, but is modified to meet present needs, including the participation of women and youth representatives in the system which is traditionally monopolised by "wise old men". The forum of the *gacaca* would serve as a basis for the local activities of the truth and reconciliation commissions. In the meantime, a national truth commission would be set up, initially through the establishment of an advisory and consultative body composed of respected independent personalities. COPRI's proposal to develop this project did not receive donor financing. Traditional justice in the form of the *gacaca* may indeed be able to play an extremely important role in grassroots conflict management, especially in cases concerning the ownership of houses, land and cows, including conflicts which are directly linked to the events of the genocide. This undoubtedly inspired the legislator when drafting the Organic law of 30 August 1996, which, in article 14 d) only provides for civil compensations by means of an amicable settlement, as a "punishment" for persons in category 4 (persons who committed offences against properties)[103].

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[97] Others are: the Confession seems to isolate the ethnic dimensions of the violent acts committed without indicating how the ethnic group is used as an instrument in a fight for political power. Moreover, it makes no reference to the crimes committed within the same ethnic group: for example, the president of the Interahamwe, Robert Kajuga, was Tutsi. It does not state either that numerous Tutsi civilians survived the Rwandan genocide thanks to a Hutu.

[98] After the second meeting of the signatories to the Detmold Confession, the clarification was made that «*the confession does not generalise culpability in the criminal sense. The latter can only be individual*». (Declaration published in Chimay on 31 December 1997) (translated by the author).

[99] "Déclaration" in NEWICK PARK INITIATIVE, *op. cit.*

[100] SARKIN, J., "Lessons from other Commissions around the World. The Mechanics of a Commission for Rwanda", in NEWICK PARK INITIATIVE, *op. cit.*

[101] SCHERRER, C., *Central Africa: Conflict Impact Assessment and Policy Options*, Working Paper Copenhagen Peace Research Institute, n°25, 1997.

[102] The *gacaca* system would have been spontaneously reactivated in at least 20 communes, where it has been useful in reconciling the local population.

[103] According to article 14, in the event that an amicable settlement cannot be found, "*the rules pertaining to criminal proceedings and civil actions shall apply. If the accused is sentenced to a term of imprisonment, the sentence is suspended*". Some authors have denounced the impunity which property offenders enjoy: see, for example, NSANZUWERA, F.X., *La justice traditionelle rwandaise et la Commission "vérité et réconciliation": pistes de*

Traditionally, however, the *gacaca* only played a limited role in criminal matters[104]. Consequently, the *gacaca* seems poorly placed to determine responsibilities for acts of genocide. All the more so since it is a collective process, one can hardly imagine how one could involve the killers in this traditional justice[105]. One could also wonder if major changes (such as those proposed by COPRI at the level of the composition of the gacaca) would be compatible with the traditional character of this justice (and therefore, with its popular support).

Attorneys without Borders (ASF), through its project "Justice for All", is one of the most actively involved actors in the present judicial approach. In its annual report for 1997, ASF states that there has been a considerable reduction in the pace of trials at the end of 1997[106] and the association adds that «*whether it is civil parties or defendants, the parties to the trials suffer, in any case, from the slow pace of proceedings* »[107]. ASF concludes, among other things, that «*the total number of persons detained in Rwanda, cannot be tried in a reasonable time frame. Alternative solutions must be put into place so that the judicial power may focus on more serious offences. (…) Justice cannot form the only response, but should be placed in a more global political context of prosecution and compensation. The implementation of complementary mediation procedures should be a priority for further study*»[108].

5. CONCLUSION AND RECOMMENDATIONS

5.1. The notion of truth in judicial and non-judicial approaches

Throughout the above-mentioned analysis and proposals of truth and reconciliation initiatives, truth telling is seen as a key issue. Discovering this "collective truth" through a truth and reconciliation initiative is not only necessary, but can also differ from the "juridical truth" of an exclusively judicial approach. As an example, reference can be made to the presumption of innocence, one of the core fair trial standards in a judicial approach. Even if tens of persons died on a hill, the "juridical truth" of innocence will remain intact as long as the guilt of one or more individual perpetrators has not been established. The judicial approach (whether at the national level or that of the ICTR) may therefore eventually not lead to the establishment of any criminal responsibility for the events which took place on this hill. The non-judicial approach would be totally different: it would be perfectly possible, even without passing judgement on the criminal responsibility of certain individuals, to try and reconstruct the truth surrounding the events and to record them for the collective memory of the nation. In other words: the task and approach of a judicial police inspector could be very different from the activities of a truth commission, even if they are dealing with the same reality. This "non-judicial" truth, on condition that it is determined by a respectable and independent organisation, is not only a prerequisite for reconciliation and the re-establishment of social harmony, but is also a protection against all forms of revisionism and/or negationism[109].

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solutions pour que la justice au Rwanda lutte contre l'oubli et cimente la réconciliation nationale, Brussels, May 1997, p.6.

[104] «*The gacaca, therefore, deals with minor criminal cases, and decides as if it were cases of civil responsibility*.» (REYNTJENS, F., "Le *gacaca*, ou la justice de gazon au Rwanda", *Politique Africaine*, December 1990, p.34) (translated by the author).

[105] «"*Our main goal is to have society reconcile with itself. There is no room for the killers in the process," an elderly man in Rusororo said, "I do not think that the 'Gacaca' would have the power and means to arrest them or have them recognise the crimes committed*"» (KAYIGAMBA, J.B., *Rwanda-Politics: Courtyard Justice Heals the Nation*, IPS, 13 October 1997.) (underlined by the author).

[106] In some way, this is also due to an improvement in the competence of magistrates who are becoming increasingly demanding with regard to forms and principles, often causing hearings to be postponed (AVOCATS SANS FRONTIERES, *Rapport Annuel 1997*, Brussels, 1998, p.10).

[107] (translated by the author) *ibid.*, p.6.

[108] (translated by the author) *ibid.*, p.27.

[109] AFRICAN RIGHTS, *op. cit.*, p.1164.

5.2. Recommendations

In this study we have not entered into the details regarding the implementation of a possible truth and reconciliation initiative for Rwanda. We have, rather, sought to clarify the framework within which a project for such initiative would need to be placed.

1. International (human rights) law must be respected, whether through a judicial or non-judicial approach. This therefore means that the principle of universal jurisdiction for acts of genocide, must be maintained (and moreover, should be more strenuously applied). An unconditional amnesty for acts of torture is unacceptable. Additional arrests, ongoing detentions and trials should respect the standards laid down under international law.

2. A truth and reconciliation initiative cannot only operate at the level of civil society or traditional justice. The authorities (at the level of the legislative, executive and judicial power), should at least give their support and recognise the authority of this initiative.

3. A truth and reconciliation initiative must remain independent from the public administration and political actors. This has several consequences at level of the composition of an initiative as well as at the level of its mandate, operation, financing and reporting[110].

4. Information and the wider involvement of the Rwandan population are required[111]. The civil society and "respectable" political opposition movements should be invited, from the start, to participate in the elaboration of the truth and reconciliation initiative.

5. In the Rwandan context, it seems inevitable for foreigners to participate in an active manner in such an initiative. A comparative study of successes and failures of the international Truth Commission in El Salvador would be highly desirable.

6. Its mandate should cover violations committed by the former government and the former opposition, as well as the current government and the current armed opposition. The example of the ANC in South Africa is of enormous value.

7. The initiative should include elements such as investigations and reconstruction of events, the identification and prosecution of (some of) those responsible, redress and compensation of victims, as well as prevention. The judicial and non-judicial approaches should be combined. One could, for example, exclude the purely non-judicial approach for those crimes which fall under category 1 as defined by the Organic law of 30 August 1996 (planners, instigators, supervisors and leaders of the genocide and other crimes against humanity).

8. Truth telling is a *sine qua non* prerequisite for any measures of pardon. Releasing detainees on the basis of their age or their health may be justified for humanitarian reasons, but do not do justice if the truth concerning the role which these persons played remains unknown. Does this explain in part, the protests of some survivors[112] against these releases?

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[110] Recommendations 2 and 3 correspond to what Hayner summarises as «*political backing and operational independence*» (HAYNER, P., *op. cit.*, p.174).

[111] Some eyewitnesses have denounced the enormous distance between the population and the judicial approach at the level of the ICTR: «*They are incapable of approaching those who have experienced the genocide. They do not know how to ask the right questions. They have a behaviour and opinions which hurt people. The Rwandans had placed great hope in the ICTR. They are very disappointed.*» (SIBOMANA, A., *Gardons espoir pour le Rwanda*, Paris, 1997, p.166) (translated by the author).

[112] According to official sources, in December 1997 and January 1998, 48 former prisoners who were released, would have been killed, the majority being in the Butare prefecture. (AFP, *Des prisonniers libérés assassinés dans le sud du Rwanda*, 6 January 1998, and REUTERS, *Rwandans kill 24 genocide suspects in mob justice*, 3 February 1998). Towards 15 October 1997, 1,239 persons would have been liberated because of the decision of the government to free presumed genocidiares who: were ill, old, minors or did not have a dossier (UNHRFOR, *Preliminary information on the human rights situation and activities of HRFOR in October 1997*). There were also demonstrations in Gikongoro in November 1997 (UN DHA IRIN, *Update n° 297 for Central and Eastern Africa*, 21 November 1997).

9. Measures which preclude the discovery of the truth and which impede inquiries or the identification of perpetrators are unacceptable. On the contrary, solutions could be adopted at the level of execution of sentences or in the form of a pardon or alternative sanctions[113].

10. Unlike other cases, pressure of time is unfortunately an important factor in the Rwandan context. The current detentions make a non-judicial approach urgent.

The point of view of some national and international actors regarding a truth and reconciliation initiative has been summarised. We are fully aware of the relatively weak position of the international community to be too demanding or reproachful in the domain of justice. The tribunal which this international community has put into place to try those responsible for genocide and crimes against humanity, has not (yet) met the expectations of the Rwandan population. Nevertheless, the present situation is too serious not to give high priority to the development of a complementary non-judicial approach. Donors should seize the occasion of a round table conference, a thematic consultation, bilateral negotiations or diplomatic initiatives, to get this process further developed.

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[113] «*Punishment is negotiable - the Truth is not.*» (WERLE, G., "Without truth, no reconciliation. The South African Rechtsstaat and the Apartheid past" in *Verfassung und Recht Uebersee*, n° 1, 1996, p.72).

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