Legal and Judicial Reform in Post-Conflict Situations and the Role of the International Community

CILC Seminar

THE HAGUE, 7 DECEMBER 2006

CENTER FOR INTERNATIONAL LEGAL COOPERATION

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Introduction

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Particularly since the end of the Cold War, the rule of law has increasingly been recognised as an important aspect of conflict resolution and post-conflict peacebuilding. Similarly, the absence of the rule of law is often implicated as a source of conflict, at the very least serving to perpetuate instability. Although there is a growing focus on the rule of law in post-conflict countries, there is little guidance on how to approach it, or how the adopted strategy should differ from that in non-conflict countries. The Center for International Legal Cooperation (CILC), dedicated to the reform and strengthening of legal systems in developing countries and countries in transition, felt that attention for the topic of "*Legal and Judicial Reform in Post Conflict Situations and the Role of the International Community*" was opportune at this moment. The seminar was organised on 7 December 2006, in order to contribute to the improvement of strategies aimed at building rule of law after a conflict situation and the role of the international community in this respect.

Marten Oosting, CILC Chairman and member of the Council of State of the Netherlands, presided over the conference. In his warm welcome to the guest speakers and all participants he explained that CILC organises annual seminars to bring the legal community and the development community together. By creating and stimulating dialogue between the legal and development community, CILC hopes to promote mutual understanding on issues, problems and opportunities. The seminar was realised with the financial support from the Netherlands Bar Association and the Royal Netherlands Embassies in Afghanistan and Rwanda.

The rule of law brings order to society. A properly functioning judicial system and police force can provide stability. Legal and judicial reform and the establishment of new legal entities to deal with justice issues in the post-conflict phase are thus important components of a peacebuilding effort. A recent study by Kirsti Samuels of the World Bank concludes that, despite two decades of experimenting, the field lacks common agreement on several issues; the goals of rule of law reform; how different aspects should be sequenced in order to avoid them counteracting each other and which strategies are effective. Samuels recommends, in relation to rule of law interventions, to make use of local agents of change and not to impose international norms and regulations on a society that does not readily accept foreign input. CILC prefers not to assist countries with rule of law projects if there is not an explicit demand from the country itself and an identified need for outside expertise that CILC experts can offer.

However, as will be outlined in this introduction, the numerous rule of law assistance programmes implemented in post-conflict or fragile countries have had few lasting results in the field of the somewhat intangible social-end goals associated with rule of law reform: (i) a government bound by law (ii) equality before the law (iii) law and order (iv) predictable and efficient rulings, and (v) human rights. Despite two decades of experimenting, still little is known about how to bring about these difficult and interdependent social goals. In the non-conflict development context, rule of law reform appears to have been slightly more successful. However, even in those cases, there is little solid analysis available in the literature of why those strategies were relatively effective, or how they could be adapted to post-conflict settings. It is clear that the difficulties countries face are heightened considerably in a post-conflict context, when the general capacity is depleted and the level of rule of law is low. Countries often face urgent law and order and dispute resolution problems.

The CILC chairman referred to another recent publication in his opening speech. In the book '*Can Might Make*

1 Project Manager, CILC until February 2007

Rights – Building Rule of Law after Military Interventions', by Jane Stromseth, David Wippman and Rosa Brooks, the authors emphasise that in order to maximise chances of success when building the rule of law after military interventions, interveners like CILC should accomplish a long list of tasks in collaboration with national actors. These tasks vary, from acknowledging the complexity of the rule of law and being clear about what it is that they are trying to achieve, to thinking creatively about building rule of law cultures, to ensuring that efforts to sustain accountability convey the right messages and that they enhance local capacity. The authors state that rule of law programmes are often disappointing because too many programmes are based on simplistic assumptions about the relationship between formal legal institutions and durable cultural change. As the book emphasises, policy makers and interveners have tended to conflate 'the rule of law' with the formal legal institutions that support the rule of law in complex democracies. As a result, far too many rule of law programmes have focused mainly on judicial training, law reform, and similar forms of technical assistance, failing to understand that these programmes alone cannot produce the rule of law.

Before all possible steps towards rebuilding the rule of law in a post-conflict country, the most importantly *conditio sine qua non* should be mentioned: SECURITY. The re-establishment of a secure environment constitutes an essential first step on the road to reconfiguring the political institutions of a state and building the rule of law after military intervention. CILC's seminar publication of last year seems to be once more much applicable to this topic. In that publication the state monopoly on violence was described as the only alternative to the 'war of all against all'; the bottom line of a pyramid of basic needs in a legal and judicial system.

CILC chose three different perspectives for this year's seminar. The first perspective is political and is set forth by the former Dutch Minister of Defence, Professor in International Organisations and current member of the Council of State of the Netherlands, Mr. Joris Voorhoeve. The second and third perspective is that of the countries concerned, Afghanistan and Rwanda. Two speakers shed light on the post-conflict reconstruction of the rule of law in their respective country. This allows us a look at Afghanistan, a country in which the resolution of armed conflict and armed international intervention has yet to be completed, and Rwanda, a country in which the conflict was resolved – without international intervention – already more than a decade ago. Mr. Mohammad Qasim Hashimzai, the Deputy Minister of Justice of Afghanistan writes about the problems Afghanistan faces to develop the justice sector while implementing the Afghanistan National Strategy on Justice. Mr. Johnston Busingye, President of the High Court of Rwanda, writes about the realities in Rwanda where the justice sector is being reconstructed after a tragic internal conflict.

Mr. Voorhoeve, who recently wrote an explorative report '*From War to Rule of Law*' for the Netherlands Scientific Council on Government Policy, analyses the role the European Community and its individual member states play or should play in enhancing the rule of law in post-conflict situations. As our first speaker he provided us with an overview of different aspects, steps and activities of peacebuilding programmes that help countries establish the rule of law after military interventions. Besides providing a legal framework in which the peacebuilding operations function, he mentions several preconditions that are imperative to successful peacebuilding. From there he goes on to present general recommendations for donor institutions on how to improve their efforts to assist a country to rebuild peace after conflict. Mr. Voorhoeve concludes his contribution with specific recommendations for the Dutch government. He concludes the Netherlands has a comparative advantage in the international context, with The Hague as the legal capital in the world and several institutions amongst which CILC, that carry out reform projects in transitional and developing countries.

The second speaker, Mr. Hashimzai, examines a situation in which violence has barely ended, or rather is still endemic. Forceful international intervention has taken place. He provides us with an insight into the present situation and the status of the judiciary in his country. The problems Afghanistan faces vary from corruption to the low level of education of judges and judicial personnel, to opium cultivation and land issues. The rule of law benchmarks in the National Development Strategy should be met before there can be any mention of a functioning judiciary in Afghanistan. Specific attention is paid to the role of the international community. Donor countries should fulfil the pledges they made; they should finance complete programmes and projects, while closely monitoring the situation and demanding transparency and accountability from their counterparts. Afghanistan is still in conflict and hopefully the situation will improve shortly so that the construction of a correctly functioning legal order will take place.

Although CILC has no interventions at this moment in Afghanistan, we are looking into the possibility of starting a form of cooperation as soon as the security

situation allows for the rebuilding of the justice sector.

The situation in Rwanda is quite different from Afghanistan. Not only because the violent conflict ended 12 years ago, but also because there was no international intervention in 1994. This is an important factor, seeing that foreign military intervention practically obliges the foreign power to assist in rebuilding the rule of law in post-conflict societies. Our third speaker, Mr. Busingye, provides us with a brief history of the country, the degradation of rule of law, the post-conflict situation in Rwanda and the immense effort to restore a justice system. He focuses specifically on the traditional *Gacaca* courts and the *Abunzi* mediation committees. These courts emphasise forgiveness and confession and might not live up to international standards, in the opinion of western scholars. Specific attention is drawn to the fact that the West has not resolved most if its past conflicts through courts of law, therefore too much negative criticisms from the West is unwarranted. In the end, according to Mr. Busingye, the *Gacaca* courts and *Abunzi* do not only administer justice but serve justice and contribute to nation building. This is of elementary importance when building the rule of law in a post-conflict state. The ordinary courts in Rwanda function well and the population has regained confidence in its judiciary system. All these successful efforts are due to the political will and commitment of the Rwandan government to invest in reform and in the reconstruction of the country and the rule of law. Ownership is a key word Mr. Busingy uses. He warns the international community not to drive other countries' development agenda; the country itself should drive the development train.

CILC is currently implementing a project that strengthens the law faculties at two universities in Rwanda. In 2007, CILC will start a project that aims to offer assistance in building the organisational capacity of the National Institute for Legal Practice and Development in Rwanda.

The seminar was concluded successfully. One conclusion was that the international community has a role to play, but should always contend with local needs and initiatives. In short, rebuilding the rule of law should be done through coordinated efforts. As one of the guest speakers concluded, we should invest in establishing the rule of law after a conflict. However, this effort should not be: too little, too late, too short, too fragmented and too foreign.

Building Rule of Law in War-Torn Countries

JORIS VOORHOEVE[1]

What can be learned from the many attempts at peacebuilding and rule of law reform? This paper draws on an explorative study, which was conducted for the Netherlands Scientific Council for Government Policy in 2006. We can merely attempt to give an overview, based on our reading of case studies (in 2005-6) and visits to a number of peacekeeping and peacebuilding operations (in the period 1984 – 2005). The recent, very sobering experience in Iraq and Afghanistan has not been included. However, this paper was written against the backdrop of the ongoing operations in those countries. These two unfolding cases and many other current hot spots in Africa deserve much further study. On this incomplete basis, it does seem possible to put forward some suggestions for future improvement of peacebuilding operations.

1.1 General conclusions

The observations in many peacebuilding programmes aimed at assisting countries to establish a rule of law after (civil) wars, can be summarised as follows: the efforts are too little, too late, too short, too fragmented and too foreign.

1. Peacebuilding should start with a thorough analysis of the history, politics, geography, culture, sociology and legal systems of the country concerned. All countries and wars are different. Experience of previous peace operations could provide guidance, but cannot offer solutions of the one-size-fits-all type. Before promises are made, a thorough feasibility study should be conducted. Some preliminary questions deserve answers; what restricted goals should be set and what might be attained during a limited number of years with the appropriate availability of funds and personnel.

2. Peacebuilding needs to respond to the domestic demand of the local and national NGOs for peace and justice. Domestic civil society must play a major role, and needs encouragement to develop and diversify. Donors should take these domestic needs and demands into account. They should impose neither the Westminster Model nor most other foreign inventions. If, for instance, most of the population believe in Islamic law, it is Islamic law that must provide the foundation for domestic peacebuilding and legal reform, even though those elements of domestic Islamic or other

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law are not in agreement with international human rights treaties, such as discrimination of women or harsh punishments. The reform should take place step by step in order to reach the human rights goals that have to be met for peacebuilding to be successful. The imposition of foreign laws and legal concepts is likely to fail after the donors leave. If the legal and justice sector is a heterogeneous mix of colonial heritage, local customary law, religious laws, communist laws and imported modern commercial law, the recipient government and political leaders must determine the desired nature of the future system. Foreign experts can analyse the options and give advice on their consequences, but generally they cannot make the choices that national leaders have to make.

3. A common feature of development aid programmes since they started in the 1960s and 1970s is that too little international attention is paid to the post-war police and the legal and judicial sector. After a war ends, donors typically withdraw quickly from the security sector and focus instead on the economic development of the country. They tend to leave other areas of activity 'within the domestic jurisdiction' of the government of the country, reasoning that the legal sector is very much the sovereign concern of the country, an area too political to meddle with, and not in their direct interest. This was an oft-repeated mistake, but since 1990 many assistance programmes have included legal and police reform. These efforts deserve to be stepped up.

4. Much of 'too late' is caused by lengthy donor deliberations about new aid programmes. Donors need time to account for ongoing activities that were not foreseen in their budgets. Besides, valuable months can be lost after a cease-fire. Undefeated warlords and war profiteers who are still at large continue to determine the scene for the new government and the police and judicial sector. Once international assistance arrives, many crucial positions are already taken. The old functionaries remain powerful. The formative phase or 'rebirth' of the country can go wrong. It is often impossible to correct the missed opportunities and mistakes made in the first weeks after the new start. This means that conclusion 1, which recommends a complete feasibility study, cannot yet guide the formative phase after a cease-fire. "First aid" policies should avoid long-term commitments. The relatively high risk of mistakes in quick-start programmes may be hard to avoid.

5. 'Too little, too late' also has another cause: it usually takes at least three months to free experts from ongoing tasks to send them abroad on a peacebuilding mission. Experts from various countries need to learn to work together. Particularly in the area of police assistance, the language skills and professional levels are often inadequate. Sometimes large numbers of 'experts' provided by some donor countries are hardly professional and should be rejected because of their lack of basic abilities. However, diplomatic considerations complicate the rejection of incompetent personnel. If international advisors do not establish much authority, they remain ineffective. A related problem is that many international officials who are accepted, continue to follow national directives, rather than their international superiors, who derive their powers from the UN, EU, or other organisations.

6. Poor donor coordination is a frequently heard criticism of international aid. Peacebuilding requires a coherent donor approach, coordinated by an influential international organisation or the largest, or most active, member of a group of like-minded states. Donors want different things due to different interests, notably their national foreign policy goals, or the aid resources they happen to have available. They differ on the diagnosis of what the recipient needs. As international assistance is not only a humanitarian but also an economic activity, even the most idealistic organisations and people want to emphasise their identities, plant their flags and criticise others' short-sightedness. It is a Herculean task to weld all international donors, large and small, official and private, into one well-oiled machine. For example, in Bosnia after 1995, some 450 donor organisations were working alongside each other. The representatives of the EU and UN had a hard time coordinating all these activities. Recipient governments are generally too weak and dependent to force donors to cooperate. The few national officials capable of organising productive donor visits and meetings may have a full-time job receiving foreign delegations of ministers, experts, parliamentary committees and other dignitaries. It is the donors who should shoulder more responsibility for getting their act together, not the recipients. If external powers and international organisations act in unison, the external influence and assistance for the improvement of the legal order in a particular country can be effective.

If one or more major power pursues different goals, such as increasing the imports of oil, gas, precious metals or minerals from that country, and continues to

support a "cooperative" corrupt regime in the country concerned, the influence of others, who are acting in favour of the rule of law, will be severely undermined. Increasing energy demand and competition among main importing states seriously undermines efforts to strengthen the rule of law and the human rights framework in many weak or corrupt states, due to two mechanisms. First, large export revenues strengthen the domestic regime and weaken reform-advocating donors who may also be dependent on these exports. Second, the quest for these natural resources divides foreign powers, by giving a premium to those who do not participate in the attempt to reform the regime. Coordination of the policies of major powers may become more difficult in the future vis-à-vis countries that possess energy and metal resources that are subject to rapidly intensifying competition.

7. Adding emergency and development projects to peacebuilding and rule of law support increases the participation of and the rewards for the population and local leaders and helps to overcome past divisions. Examples of this model are various basic needs projects (water, food, health care, shelter, education and employment). Rapid emergency aid may even determine the chance of success of the ensuing programme. A malnourished, desperate population may turn against international peacekeepers and foreign aid workers, yet side with local insurgents.

8. Peacebuilding programmes need to be evaluated more thoroughly during and after completion. Only a few donors have done so (notably Norway and Canada), and their experiences are varied. Our exploration of various cases has led us to conclude that similar mistakes are made over and over again.

9. Peacebuilding should be impartial in the sense that strict equality under the law is guaranteed. However, it should not be neutral in the sense of ignoring groups and persons who continue to disturb the peace and groups that are likely to strengthen it. Neutrality that turns a blind eye to war and hate mongers will most likely increase the risk of future violence by unwittingly aiding aggressor parties.

10. Peacebuilding takes at least ten years, as a rule of thumb, if not two or three decades. Donors should realise this before they start. Projects that are prematurely aborted because of donor fatigue or a short media attention span may end up doing more harm than good. 'Too short' is a predominant drawback of peacebuilding programmes. Donors respond to needs as they are reported on in the media, yet the media quickly turns to other newsworthy crises in the world. Policy makers in many western countries prefer 'quick fixes'. There is often little understanding of the historical roots of the problems to be solved. Most donor governments and electorates do not like long-term commitments, so results have to be measurable in the short run. Funds are limited and there are, indeed, so many other needs elsewhere. Most donors are satisfied with the appearance of results and are not worried about sustainability. Most diplomats and foreign experts serve just a few years in the recipient country. Programmes that fall apart after a few years are not their primary concern. Excuses are easy to find: the recipient country does not have a suitable culture, its people lack training, or corruption destroys 'the good work we did'. Moreover, donors become worn-out after a few years. A telling example is Haiti: after a successful peacekeeping mission, the US and other donors went home in 1996, thinking the new democratically elected leadership would carry on independently. Ten years later, Haiti was in shambles again. All the original faults in the social, justice and governance systems had returned, some even worse than before.

11. The military and police forces play a crucial role in the early stages of peacebuilding and rule of law reform, as they have to provide the country with the security that is needed for the return to normality and progress. The military role should decrease as soon as possible, and the role of police and civilians should gain importance as quickly as is feasible.

12. Private military and security firms have become frequent and important participants in many operations. Their work, responsibility and liability, need to be regulated in comprehensive contracts. As soon as possible, their tasks should be restricted to training and advising domestic security services. Private security services often serve for long periods of time to bolster the capacity of indigenous police and detention capacity. The legal liability and the responsibility for the use of arms should always be clearly regulated in the contracts.

13. The improvement of the justice sector should start with a profound analysis of the weakest areas in the system. Haphazard assistance to weak services may actually worsen the situation. If the police system is strengthened by international assistance, yet the judiciary and the pris-

ons remain as bad as they used to be, a well-intentioned programme to improve police capacity can actually lead to a strengthening of the means of suppression.

14. Various weapons, particularly small hand-held firearms and other heavier small arms, have to be collected and their possession has to be restricted so as to reduce the risk that group violence erupts again. Buy-back programmes and exchange for much desired goods (building materials, petrol, etc.) are required. This needs to be supported by a new international treaty that restricts the sale and transportation of small and light weapons to other actors than the legitimate authorities.

15. The resocialisation of child soldiers is a particularly difficult task for peacebuilding forces. In Africa, there are armies of very young children, orphaned by wars or kidnapped from their communities, who have not had a normal upbringing, but are brainwashed by beliefs that turned them into 'killing machines'. Crucial issues are: how to re-educate them, how to give them a normal sense of conscience and values, which is essential for a constructive civilian life. This presents a challenging therapeutic task for social psychologists. In this present brief study, the experience gained by realising this task was not evaluated. It is an extremely important question for peacebuilding missions in sub-Saharan Africa.

16. Large numbers of refugees and displaced persons end up or are driven together in or near many war zones, often for many years. They are 'stacked' in camps or enclaves, which often become overcrowded and turn into makeshift slum cities with very high levels of crime. Millions of people live there in limbo. The host country's resources and refugee aid organisations are usually not able to guarantee safety and a minimal rule of law. These camps become recruiting grounds for political extremism and violent crime. Criminals hide among the refugees and often go unpunished. Some receive asylum in other countries and conceal their war crimes. The often near explosive situation in these camps makes peace negotiations and peacebuilding very difficult. Sometimes the situation in these refugee camps leads to the spreading of civil war or state failure to bordering states.

17. Peacebuilding is not just about removing the causes of a distinct, individual civil war or imposing peace and the rule of law from the outside. Peacebuilding is also about encouraging the growth of domestic, local and national sustainable institutions, as well as the laws and attitudes needed for the nonviolent settlement of all kinds of conflicts, which will continue to arise in the future. It is this institution building, and the related training of nationals who can train other nationals of the next generation, which enables peacebuilding to reach its objective: the rule of law in a state of peace, in both senses of the word "state".

1.2 *Recommendations*

The exploration of the main questions that arise in peacebuilding operations in countries that have suffered from interstate war, civil war, contemporary armed conflict and other forms of massive political violence, leads to some general recommendations for donor institutions (i.e. donor governments, international organisations and NGOs).

1.2.1 Strengthen International Organisations for Peacebuilding

1. The new Peacebuilding Commission of the UN needs to reorganise its work in smaller subcommittees of leading donors to coordinate the often fragmented contributions of various institutions. The European Union and its members should provide leadership in this global institution by acting as a true union.

2. The European Union and its members form the largest source of funds for peacebuilding and rule of law support. To become the most effective actor as well, the EU needs to improve its decision making and efficiency. The unanimity rule slows down and weakens the potential beneficial influence of the EU. With 25 and soon 27 or even more members, it is necessary to move from unanimity on foreign affairs to consensus (near unanimity) and gradually to a qualified majority. This requires changes in the Nice treaty. Such changes may be possible in the next few years, when the damage to improved EU decision making caused by the French and Dutch rejection of the new constitutional treaty, can be repaired step by step. However, before such new legal possibilities are realised for the entire EU, the provisions in the Nice treaty for enhanced cooperation of at least 8 members might be applied for the purposes of post-conflict peacebuilding.

All EU member states should come to realise that they can be the strongest actor in the field of peacebuilding in the world once they overcome their fragmented decision making. Such a role of the EU would also improve the decision making in global international organisations that are important to the rule of law. A united EU could be the prime mover in the UN's new Peacebuilding Commission and in most international financial organisations. The latter have also become active in peacebuilding programmes and rule of law support.

3. The mandate of a peacebuilding operation should be determined separately from the prior military peace operation by the UN Security Council. Disagreement on the latter may hinder fair and broad burden sharing in the post-conflict phase. Civilian peacebuilding can usually count on much wider support than military peace operations.[2]

4. International and national donors would do well to set up peacebuilding funds within their own budgets to jump-start activities when needed and to encourage rapid cooperation in emergency aid, peacekeeping activities and development cooperation. The EU's financial instruments are quite extensive, but decision making is fragmented. Some bilateral donors such as the UK and the Netherlands, have set up peacebuilding funds in which development aid and peacekeeping expenses are joined. Their experience is encouraging. The slow and incidental manner in which many donor countries and institutions finance peace operations from regular budgets results in long delays at crucial moments, causing lost windows of opportunity after a cease-fire.

5. The UN Stand-By Agreement System for military peacekeeping units earmarked by member states for UN duty needs to be further enlarged with many more police units, civilian administrators and technical engineering experts, as well as prosecutors, judges, trainers of legal personnel and other experts. They are often in short supply and can only be freed for international service after several months. Police, legal and judicial reform assistance is obviously not an activity, which can be simply added

2 Advisory Council on International Affairs, *Failing States*, The Hague, 2004.

to a military peacekeeping operation. It requires professional expertise and management of individual experts' work to achieve the best results. Such personnel need to be prepared and trained for international operations well in advance. It is necessary to have three systems of rapidly deployable police officers who can monitor, advise and train local police forces. These should be available at the national, the regional and the global level.

6. It is recommended that the UN, the EU and individual donors set up pools of police and justice sector experts who are prepared for rapid international duty. This can be achieved by pre-arranging selection and training for possible missions and making "headquarter formations" beforehand, much like the SHIRBRIG formula, which was designed for military peacekeeping.[3]

7. Consideration should be given to establishing a global rule of law support fund, attached to an influential international donor organisation such as the EU or the World Bank, to coordinate and finance legal reform programmes in peacebuilding operations.

8. An important question in peacebuilding programmes is: who takes the lead and who will be in charge or the "coordinator"? Generally, a representative of the UN Secretary General should perform this task. It can be delegated or mandated to a special envoy of another major international organisation, such as the World Bank, the EU, UNDP or – in the peacekeeping phase – to the NATO.

Donors should meet immediately after a cease-fire to establish donor coordination and divide responsibilities in the aid structure. This aid coordination meeting also requires agreement on the division of tasks and specialities, i.e. which donors will do what: security sector reform, police reform, justice sector reform, assistance to transitional justice, restoring infrastructure, etc. Donors' comparative advantages and interests have to be taken into account from the outset. In the beginning, due to international media attention, many donors will be inclined to do a little bit of everything. This just adds to the confusion, as well as partly clarifying the short duration of many aid programmes.

9. It is recommended that donors conclude agreements with recipient governments (or, if there is no government available, with the interim administration) on long-term (ten year) plans on what is to be achieved, who will help with what, and which donors will take over certain assistance tasks after a number of years. Pre-arranged rotation of tasks among donors for the medium and longer term helps to finish the long-term tasks.

The peacekeeping operation in Bosnia (since 1995) is an example of long-term involvement and rotation of leadership in peacekeeping operations. The leading contributions of the US and the leadership of NATO were phased out in 2004, when the EU took over.

10. It is recommended that the UN prepare a standard mandate for interim administration that can be adapted to specific circumstances when the need arises. Such interim administration does not need to be implemented in all cases by the UN itself. The UN can delegate it to regional organisations or coalitions on the basis of a UN mandate. These groups of states should, however, report regularly to the Security Council.

11. Expertise centres for constitutional reform should be set up by a number of international organisations that are able to detach advisors on short notice from different academic and governmental institutions to assist the negotiators in their efforts[4]. A related recommendation is to formulate, within the framework of the UN, standards for a constitution of a pluralistic state that guarantees basic human rights, and is adaptable to national circumstances.

12. If all OECD countries implemented the internationally agreed goal that development aid should be 0.7% of the GNP, the volume of available aid would almost triple. An additional $150 billion would be available each year. In fact, the level of development assistance could rise even more, if many non-OECD countries (formerly developing countries which have become middle income countries), also pitched in. They have

3 SHIRBRIG is the Stand-by High Readiness Brigade, a group of a dozen countries that have earmarked military units for rapid deployment in UN peacekeeping operations under pre-arranged multinational headquarters. The units have trained together. SHIRBRIG's responsibilities are in principle limited to actions under Chapter 6 of the Charter and the member states reserve the right to refuse participation in specific actions.

4 Like the Venice Commission of the Council of Europe.

Overview of peacebuilding activities

Joris Voorhoeve

	Task	Activities	Main Organisations
1.	Ending violence	Political and diplomatic actions to establish a cease-fire and facilitate a peace agreement. Deterrence of war, civil war and terrorism through military security	UN, NATO, regional organisations or ad hoc coalitions
2.	Emergency assistance	Food, medicine, water, shelter	Red Cross, NGOs, UN-agencies, regional organisations
3.	Disarmament, demobilisation, reintegration and de-mining	Reduction of weapons and troops; collection and destruction of munitions; charting mine fields; demining of roads	UN, NATO, regional security organisations
4.	Economic reconstruction	Restarting the economy; encouraging employment; reducing poverty; Reconstruction of infrastructure; Return of investors	World Bank, IMF, Specialised UN organisations, EU, bilateral donors
5.	Tribunals; transitional justice; reconciliation	Trials of war criminals;Reconciliation programmes and 'truth commissions'; Trauma assistance, especially for women, children, wounded soldiers	Legal assistance organisations; social and religious organisations; educational institutions; local government and media
6.	Legal order	Monitoring, advising and training of police and prosecutors; training of judges; renewal of laws; renewal of the prison system; renewal of courts; trials of war crimes suspects	UN, regional organisations, NGOs, bilateral donors, war crimes tribunals, International Criminal Court
7.	New (democratic) government	New constitutional order; elections for new leadership at local, regional and national level; political party formation	UN, regional organisations, OSCE, IDEA, various NGOs and bilateral aid
8.	Refugee return	Return and resettlement of refugees and displaced persons	UNHCR, World Bank, OCHA, bilateral donors, NGOs

similar aid capabilities once they reach a per capita annual income of, say, € 5000. There is no good reason to apply the UN donor target of 0.7% of the national income (GNP) only to so-called western industrialised countries. Middle income and energy exporting countries with high revenue relative to their population have aid capabilities that are proportional to their wealth.

13. The resources for peace operations could also be greatly increased if the reorganisation of armed forces that started after the end of the Cold War, and which is not yet completed in a number of OECD countries, were accelerated in order to expand the expeditionary capacity for peacekeeping and peacebuilding. The same applies to populous non-OECD countries with professional armed forces that are trained to abide by the rule of law, such as India.

14. As "good government" is required to create respect for and enforcement of human rights, which is the ultimate purpose of peacebuilding operations, an international manual with standards of good governance could help civil servants, media commentators, educators, field workers and others to improve conditions in various countries. Such a manual would ideally be adopted by UN organisations. Several elements are already available or can be derived from international treaties on human rights, the convention against corruption, and many other treaties and codes of conduct. National administrative law in several OECD countries also contains the rules, which should gradually become applicable in less organised societies. Academic institutions could help design such a UN Convention on Good Governance. Ideally, good governance should be codified by the United Nations[5] in a single set of internationally accepted norms, if possible in treaty form.

1.2.2 Develop a Comparative Advantage for the Netherlands

The constitutional task of the Netherlands' government is to strengthen the international legal order. But in countries in chaos, where a national legal order does not function, the international legal order cannot function either. Therefore, it follows that helping to build or improve the national legal order in other countries is central to fulfilling the wider constitutional task of strengthening international law.

The Netherlands enjoys a reputation of having a modern legal order. The presence of the International Court of Justice, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Court and other international legal institutions, offers the country an institutional and reputational advantage compared to many other countries. The Hague takes pride in the term "legal capital" of the world (a phrase coined by UN Secretary-General Boutros Ghali). There are many renowned training and research institutes for international legal activities, such as the participants of the Hague Academic Coalition (HAC) – the T.M.C. Asser Institute, the Grotius Centre for International Legal Studies, the Institute for Social Studies, the Institute for International Relations 'Clingendael', the Carnegie Foundation and the Hague Institute for the Internationalisation of Law, the European Centre for Conflict Prevention, and in Leiden the Center for International Legal Cooperation (CILC) which carries out reform projects in developing and transitional countries, the Van Vollenhoven Institute, and the Study and Information Centre on Human Rights (SIM) in Utrecht.

1. A country the size of the Netherlands cannot be prominently active in all fields of international assistance. Concentration on rule of law assistance in peacebuilding operations can be further developed into a speciality within the above mentioned comparative advantage. This can be financed with relatively small amendments in the Official Development Assistance (ODA) budget, partially at the cost of some lower priority economic assistance to developing countries. (See point 3 below.)

2. The task of post-conflict peacebuilding is almost unlimited in geographical and functional terms. It is therefore necessary to concentrate on currently accepted tasks and to bring them to a reasonably successful conclusion. For the future, it is necessary to clearly prioritise particular tasks, in relation to national, EU, NATO and UN interests. Among the many deserving cases, it is important to bring peacebuilding in the Balkans to a satisfactory conclusion. This operation was started by the EU in 1991 and has not yet led to a lasting result. In the meantime, many additional urgent assignments have been taken on, particularly in Afghanistan and Africa. It is important to bring as many as possible to acceptable conclusion, or to find other donors willing to take over

5 See Hirsch Ballin, WRR report *Ontwikkelingsbeleid en Goed Bestuur*, nr. 58, 2001, pp. 232-4

the Dutch contributions after a number of years (rotation of responsibilities among donors) before other important duties are added to the agenda.

3. Peacebuilding deserves to be the focus of development aid. Socio-economic progress that reduces poverty is not possible during (civil) war. A reorientation of development cooperation is recommended in order to assist in building institutions for stable states and for the rule of law and peaceful conflict settlement. The allocation of the development budget does not need to be influenced so strongly by international statistical criteria and the ranking orders of Official Development Assistance. It would be better if the allocation of funds followed the policy choices of the donor: what is most urgent and deserves our support? This is not an argument against elaborate and intensive efforts in the field of development aid. Rather, it is a reason to increase international aid, as the tasks of peacebuilding are immense.

Funds for peacebuilding assistance can be established through re-allocation of present budget items and through an increase of "Other Official Flows" (in addition to concessional Official Development Assistance). Other Official Flows ("non-ODA") was set as a proportion of the Gross National Product (0.3%) in 1995, but this benchmark was abandoned in 1999, which resulted in a gradual decline of non-ODA funds. It is recommended to set such a benchmark again, so as to facilitate active participation by the Ministries of Justice, Interior, and Education in joint policies for the promotion of the rule of law in peacebuilding programmes.

4. In the broad field of peacebuilding, the Netherlands can best focus on support for rule of law institutions, particularly the police and judiciary. The comparative advantage of the Netherlands and The Hague lies in the rule of law. To further develop this comparative advantage, it is recommended to establish a Hague Centre for Peacebuilding. The building blocks for such a centre are already available in The Hague Coalition of International Law and various other institutions mentioned above.

5. In most peacekeeping missions and the ensuing peacebuilding operations, the lack of professional police with international peacekeeping experience is an significant obstacle. It is recommended to increase the size and training of the Netherlands' Military Police (*Marechaussee*) for international missions, relative to other expeditionary forces.

6. It is recommended that the joint policy paper of 2005 on "Peace Building after a Conflict" of the Ministries of Foreign Affairs (Development Cooperation) and Defence is followed by a joint policy paper of the Ministries of Justice, Interior, and Education, Culture and Science. The purpose would be to define an active role of the justice department in international legal reform and training assistance, of the interior department in police monitoring, advice and training, and of the education department in developing academic institutions in the Netherlands with an up-to-date analytical and training capacity for international reform of the legal sector.

The Reality and Challenges of Legal and Judicial Reconstruction in Afghanistan

MOHAMMAD QASIM HASHIMZAI[1]

1. Introduction

Afghanistan has endured invasion, civil war, and extreme leftist and rightist take-overs. The country's infrastructures were badly affected. The judiciary lost it capacity to provide justice for the people. Following the toppling of the Taliban regime and the restoration of some normality, the government managed to work on a strategy to pave the way for improvement of the state's affairs.

Afghanistan's National Development Strategy (ANDS) is drafted in light of the United Nation's Millennium Development Goals (MDGs). The ANDS was approved by the government and presented to the Donor Conference on Afghanistan where it was endorsed and financial pledges were made. ANDS covers three major areas:

- Security
- Governance, rule of law and human rights
- Economic and social development.

Here I would like to speak about governance, rule of law and human rights.

Prior to discussing this point I would like to say a few words about the present situation and the status of the judiciary.

1.1 Low level living standard of judges and judicial personnel

As a post-war conflict society, Afghanistan has not yet revived its economy. The country's development budget is mostly financed by foreign aid. Civil servants, including judges and other judicial personnel, do not receive the minimum wage and as a result their prestige and living standards are badly affected.

1.2 Lack of transparency in the proceedings and manner of rendering decisions

The courts still use the old format of rendering decisions. The parties' arguments, the reasoning of the court and decisions are written down by hand in three copies, two are given to the parties and another is kept for the registry. This practice is time-consuming and deprives others of access to judicial decisions, specifically the reasoning of the court.

1.3 Obtaining formal documents from courts is expensive, difficult and requires the completion of a long since out-dated process

Completion of land conveyances, wills, powers of attorney etc. is expensive due to the high tax rate and court charges. Again, all of these documents are written and processed by hand in several copies. Shortage of personnel is another factor, which brings about the dissatisfaction of the people. As a result, parties prefer to prepare

1 Deputy Minister of Justice of Afghanistan

customary documents and thus bypass the courts and official registration. One can imagine the problems if courts consider future disputes between the parties.

1.4 Low level legal and jurisprudential knowledge of judges and judicial personnel

Due to the unwarranted political interference in the law colleges' curriculum by leftist and extreme rightist regimes, the university curriculum has lost its flavour and effectiveness. The prosecutors and defence lawyers experience problems preparing their briefs that meet the required standards.

At this point I would like to highlight three major challenges confronting the government and the judiciary:

2. *Corruption, land issues, opium cultivation*

2.1 Corruption

Corruption, which harms the poor, has severely weakened the backbone of the judiciary, depriving the people from affordable and easily accessible justice.

Four fundamental causes of corruption can be cited:

A. **The low level salary** of judges and government employees: there are not enough financial resources in the country's budget, although it is in a better shape than previous years, it still cannot pay the minimum salary to its personnel. This factor can cause temptation towards corruption. Plans are underway to assist judges indirectly by providing them with residential houses, particularly in the provinces.

B. **The non-existence of the system of law reporting**: in most circles, law reporting is regarded to be an instrument to check and effectively control corruption, while simultaneously providing material for research, legal education of students and the public. It plays a major role in securing consistency in judicial decisions and in exposing the loopholes of and shortcomings in laws. The judiciary in Afghanistan needs to set up a system of law reporting. Through this system it can take a major step towards the development of law and thereby indirectly curb corruption.

C. **Low level legal knowledge of judges and judicial personnel**: the system of spoon-feeding, which is currently exercised in training institutions has proved to be inadequate to meet the need in society for well-trained lawyers. A system of Socratic or an analytical method of teaching is required to remedy this situation.

D. **Low level of accountability**: the hierarchy of courts alone cannot check deviation and misapplication of the law by lower courts. A code of conduct and a high level of accountability can, to a certain extent, check corruption.

2.2 Land issues

The questionable legitimacy of legal documents, problems in developing land policy to ensure a transparent, accessible and sustainable system of land ownership administration, and safe record keeping are all challenges for the judiciary.

Because of the years of crisis and weak governments, the land registry books around the country were compromised. Some ownership documents had been interfered with to benefit criminals. Such a situation has caused problems for courts when considering disputes between parties to distinguish genuine from forged ownership documents with certainty.

In most regions, individuals have occupied public owned land and now forged documents are being presented to claim individual ownership.

2.3 Opium cultivation

This is a major challenge facing the three organs of the state. The international dimension of this challenge is a cause for concern for the international community as a whole.

Afghanistan has produced 6,100 tones of opium this year, which is a 49% increase (compared to last year), covering 4% of the cultivated areas. Despite efforts to decrease the production, the result is disappointing and it is a cause for alarm.

The following reasons can be cited as major factors in the failure of the eradication of poppy crops:

1: insecurity, corruption and poverty.

2: intimidation of peasants by networks of powerful opium traders with an international network.

3. *What the international community can do to help*

First of all, the donor countries should honour the pledges made at the London Conference to help Afghanistan build the justice sector:

To ensure projects undertaken are financed until the completion and tangible results are achieved.

To end the cherry-picking practice, i.e. merely financing a single component of a project, as such practices would not help to reach the ANDS benchmark.

To ensure contractors observe the principle of transparency and accountability.

To ensure the rule of law benchmarks in the ANDS are met. The benchmarks consist of 3 main components:

1. By the end of 2010, the legal framework, as required by the constitution, as well as by civil, criminal and commercial law, will be in place; distributed to all judicial, legislative and educational institutions; and made available to the public.
2. By the end of 2010, a functioning institution of justice will be fully operational in each province of Afghanistan.
3. A review and reform of monitoring procedures relating to corruption, lack of due process, and miscarriage of justice will be initiated by the end of 2006, and fully implemented by the end of 2010. By the end of 2010, reform will strengthen the professionalism, credibility and integrity of key institutions of the justice system (i.e. the Supreme Court, the Ministry of Justice, the Attorney General's Office, the Ministry of Interior and the National Directorate of Security).

Reality and Challenges of Legal and Judicial Reconstruction in Rwanda

JOHNSTON BUSINGYE[1]

1. Introduction

Rwanda, like most African states, did not escape the wave of colonisation that affected most developing countries. Rwanda was first colonised by the Germans prior to the First World War. The Germans held control over the present territories of Rwanda and Burundi as one protectorate and employed an indirect rule method whereby they relied on the traditional leadership, rather than directly administering the territory themselves. When British and Belgian troops occupied German East Africa during the First World War, the territory fell under Belgian control in 1916. From that moment until independence, Rwanda was under Belgian rule and influence. The Belgian authorities made all legislation governing the country. The mainstay of criminal and civil legislation were the civil and criminal codes of the then Belgian Congo that were introduced in the territory and became fully applicable in 1951. Though criminal law had universal application, written civil laws applied only to whites. Customary law continued to apply to the natives of the territory[2].

2. The degradation of the rule of law in Rwanda and the struggle for its restoration

During the time leading to independence, the traditional monarchy was forcefully removed, and when Rwanda attained independence on 24 November 1962, it was confirmed as a republic. The human rights situation continued to deteriorate in post-independent Rwanda as a single party state had been established by 1963, replacing the pluralist democratic state envisaged by the independence constitution. The politics of exclusion, ethnicity and oppression was born with the independent state of Rwanda. This kind of politics continued until 1973, when the constitution was amended to allow an indefinite term of office for the president as well as an extension of the tenure of the National Assembly. The military took advantage of the state of affairs and took over the government shortly after the amendment. It abolished even the few remaining institutions of the civilian government, suspended parts of the constitution and the state fell firmly into the hands of the military that further perpetrated the politics of ethnic and regional exclusion, as well as oppression. By the time the Rwanda Patriotic Front (RPF), composed mainly of Rwandans who had been denied their rights and citizenry over the decades, took over, there were mega cracks in the

1 Johnston Busingye is the President of the High Court of the Republic of Rwanda.

2 For details about Rwandan Legal History, see William A. Schabas and Martin Imbleau, *Introduction to Rwandan Law*, Les Editions Yvon Blais Inc. Quebec, 1997.

county's body politique. The regime had then shed all semblances of the rule of law and human rights. The stage had been set for confrontation and the subsequent genocide of 1994.

I need to point out here that the RPF was, way before 1994, a political organisation with a clear political agenda for the transformation of Rwanda from a single party, ethnic-based, aid dependent, heavily indebted, little-known, tiny dictatorship, into a multi-party, non-ethnic, self-sustaining and respected democracy at the very heart of Africa. This agenda formed the basis of the political – and eventually the armed – struggle, and of political negotiations. Though it has continued to grow and adapt, that original vision is still very much our national vision.

At the end of the 1994 genocide, the government inherited the remaining structures and systems of the former regime as well as the agreements that the former regime had signed with the Rwandan Patriotic Front as the basis for governing the country, more specifically in the areas of constitutionalism and the rule of law. This was caused by the deterioration over the years of the state of the rule of law in the country. Due to the political pressure that was building up on the regime in Rwanda from outside and within, the military had come up with a constitution in June 1991, allowing Rwanda to function as a multi-party democracy with an elected president, a national legislative assembly and an independent judiciary. Under this constitution, the president appointed judges after proposition by the Minister of Justice and endorsement by the Supreme Council of Magistrates. This 1991 constitution was substantially modified by the Arusha Peace Agreement, in the form of seven documents that had been signed between the government of Rwanda and the Rwanda Patriotic Front from October 1990 to August 1993. The Arusha Peace Agreement provided for the creation of transitional institutions; a broad based transitional government; a transitional national assembly; substantial reduction of the presidential powers and enhanced powers of the Prime Minister and lastly, the entrenchment of the existence and powers of the Supreme Court. Participation in these institutions was distributed among various political parties, including the then ruling party and the Rwanda Patriotic Front.

There were political forces in the country at the time which were not in favour of the power sharing arrangements in the Arusha Peace Agreement. The foot dragging to implement the Arusha Peace agreement and the rapid escalation of extremist fifth columns were the harbingers of the 1994 genocide. The 1994 genocide further eroded the strength and capacity of the remaining weak institutions by way of killing hundreds of thousands of people who served in them, while many others fled the country. When the *genocidaire regime* fell in 1994, the new transitional government found, not very surprisingly, that there had literally been no progression in legal or judicial institutions. The former government had not hidden its intentions never to develop these institutions. Most legislation was imported and remained the same as at the time of independence. There had been a deliberate fusion of the judiciary, legislature and the executive. There were no minimum educational requirements for occupying most positions in the judiciary, and most legislative and appointment powers were derived from the executive. After the 1994 genocide, only 5% of the personnel in the justice sector – particularly the judiciary and prosecution – were qualified lawyers. All infrastructures had been destroyed and most qualified staff were dead or had fled the country; yet there were more than 150,000 genocide cases that had to be dealt with. Furthermore, hundreds of civil and criminal cases were finding their way into the courts, which compounded the backlog.

Despite the devastating consequences of the 1994 genocide, Rwanda quickly embarked on major social, legal, judicial, political and economic reforms aimed at restoring the country, not only to normality, but also at reclaiming the country's dignity to the level that all civilised nations and human beings that inhabit them, enjoy or should enjoy. It is important at this point to point out that in the course of these reforms, Rwanda has, first and foremost, conceived and owned the agenda. Secondly, it has enjoyed the support of international partner assistance, without which probably the pace would not be as fast. The reforms are national in nature and as such cannot to be justly treated in a paper like this, which specific purpose it is to examine the reality and challenges of legal and judicial reconstruction in Rwanda. Our legal and judicial reforms are predicated on a new dispensation based on constitutionalism and the rule of law. From 2001 to 2003, there were reforms in the legal sector, ranging from constitutional review, law review, as well review of existing institutions and the creation of new ones.

The promulgation of the Rwandan constitution as was approved by the referendum of 26 May 2003; and as amended to date, meant a radical reform of state institutions as well the establishment of new ones. A new independent bicameral parliament composed of a

chamber of deputies and a senate was established. For the judiciary, which falls in the wider sector of justice, these reforms led to the enactment of new legislation and to the establishment of new courts, procedures, structures, standards including academic and professional qualifications, as well as regulatory and administrative frameworks. The reforms have therefore affected the judiciary itself as well as other services that complement it, such as the prosecution as well as other organs, which exercise judicial or quasi-judicial functions. Today, the judiciary is appointed through an independent process that begins in the Superior Council of the Judiciary for all judicial officers and later requires the approval of the parliament in the case of judges of the Supreme Court. A Superior Council of the Prosecution has also been established and minimum requirements dictate all judicial and prosecution officers need a first degree in law.[3] As of now, the country has moved from 5% qualified staff in the justice sector to over 99% qualified staff, while the few who were retained without a degree in law are in the process of obtaining one. Very few remain in the final stages of their undergraduate studies.

Rwanda has had to deal with the trial of the perpetrators of the 1994 genocide. This is particularly a big challenge given the fact that the architects of the genocide made literally everyone a direct or indirect participant. The country has had to embark on reforms that ensured not only popular participation, but innovation, justice, cost-effectiveness, as well as unity and reconciliation, to tackle this crime. It led to the flooding of national prisons with suspects, while there is a very weak and inefficient judicial system in existence.

3. The judiciary: urgent expectations of the Rwandan after the genocide

Having had a glimpse at the Rwandan pre-genocide and post-genocide picture of the state of the rule of law, it is important to note from the outset that Rwanda faced a very special situation after the genocide for normal cases and therefore needed special interventions. The questions for the ordinary Rwandan were numerous: *Is there justice? What kind of justice? Should it be an eye for an eye? When will this justice come? Who will administer this justice?* Up till now questions like these remain.

The Rwandan government, though, believing in and continuing to administer and strengthen the orthodox system of justice, decided to look at the Rwandan society and to seek internal solutions where the orthodox justice system had clearly failed. One of these internal solutions was the establishment of local Rwandan courts to try genocide cases. These are the famous Gacaca courts. Gacaca courts derive from traditional Rwandan jurisprudence, where traditionally communities were directly involved in solving their conflicts. The Gacaca courts exact different penalties including compensation, but most importantly, they emphasise the aspects of confession and forgiveness as a way to heal the wounds of the genocide and to forge ahead as a nation.

Gacaca courts have had their fair share of criticisms, among others, they would fall short of international standards. As a nation, Rwanda is aware that the Gacaca courts have weaknesses, given the fact that they are new, indigenous, lack adequate resources, are working in an environment poisoned by the genocide, and are controlled by western media. Some western scholars do not even bother to remove their western context lenses when they are looking at Gacaca. Rwanda's conflict has roots and a unique history, as do most, if not all, societal conflicts. Unfortunately, western post-conflict history seems to be so removed from contemporary western intellectual memory, that today's scholars probably no longer remember that the West had its fair share of conflict, much of which was not resolved through courts of law. However, it is pleasing to note that the Gacaca courts are solving far more cases than the International Criminal Tribunal for Rwanda, or even the ordinary Rwandan courts. Through the Gacaca courts, ordinary Rwandans take part in the administration of justice, and see justice being done, while at the same time contributing to building a new nation. Therefore, there is a need to recognise the tremendous positive contribution of the Gacaca courts and to ensure that they are supported and made more efficient.

Gacaca courts started functioning in Rwanda on a pilot basis from 19 June 2002[4] in 118 sectors (Mirenge). In

3 See articles 62 – 96, 140 – 159, and 160 – 166 of the Rwandan Constitution 2003 relating to the Legislature, Judiciary and Prosecution.

4 *Raporo Y'igenzura n'ikurikirana ry'inkiko Gacaca ku ruhare rwazo mu bumwe n'ubwiyunge bw'Abanyarwanda kuva zatangizwa kugera muri Gicurasi* 2005. Translated as "*Report on the monitoring and evaluation of the role of Gacaca Courts in the process of Unity and Reconciliation among Rwandans from the pilot phase to May* 2005" National Unity

this pilot phase[5], the number of confessions was 2,883 and there were 555 releases . For the Gacaca activities from 3 March 2005 to 31 December 2005, the total amount of trials were 6,734. Verdicts returned were 6,267, verdicts not returned 467. There were 1317 appeals, 642 verdicts returned on appeal, 695 acquittals and 2,039[6] community service sentences. It is important to note that the Gacaca process starts with collecting information before proceeding to actual trials. It can be seen from these figures that in a period of three years, the Gacaca court resolved over 96,000 cases. Also, there is a remarkable improvement in the functioning of the system, based on the results of the pilot phase. It is important to note that the 2006 Gacaca trials are ongoing and better results may be forthcoming.

The tables below give a quick comparison of the work of Gacaca on the one hand, and the International Criminal Tribunal for Rwanda (ICTR) and Rwandan ordinary courts on the other. The first trial at the International Criminal Court for Rwanda started in January 1997.

Genocide trials in ordinary Rwandan courts

Year	Number of persons judged	% capital punishment	% life imprisonment	% prison terms	% acquittals
1997	379	30.8	32.4	27.7	8.9
1998	895	12.8	31.9	32.6	21.7
1999	1,306	11.0	30.6	35.3	20.9
2000	2,458	6.6	25.0	46.0	15.4
2001	1,416	8.4	26.1	40.7	22.0
2002	727	3.4	20.5	47.2	24.8
Total	7,181	9.5	27.1	40.5	19.1

In the same spirit of ensuring that justice is accessible to all and that people play a meaningful role in the delivery of justice, the government of Rwanda established mediation committees locally known as Abunzi, which are based at the lowest level of the community and have the mandate to hear all disputes that fall within their jurisdiction. These mediation committees ensure that disputes are sorted out at the community level. In addition, they strive, as much as possible, for reconciling the parties and ensuring that communities have access to justice even within the confines of their localities, without going to court. There is no doubt that the mediation committees like the Gacaca courts are composed of ordinary citizens, with limited means and facilities to enable them to do their work. However, at this time it is important to look at how we can positively criticise these systems, review them and support them to deliver justice to the people. This statement is made advisedly, given the fact that even the orthodox systems of justice are touted, as the best have gone through various stages of development to reach their present level. This is notwithstanding the fact that the orthodox systems of justice still retain their own weaknesses and are continuously reformed and supported.

With regards to Gacaca and Abunzi, it can be practically demonstrated that these are innovative and cost-effective means of delivering justice to the people. Through them Rwanda is rekindling age-old values of integrity, honesty and humility. Through them we want those men and women who still take pride in those values – and they are the majority – to resolve their disputes quickly, cheaply and happily and to go about their business. Litigation is very expensive the world over. It should be noted, however, that these means are neither an end in themselves nor an absolute substitute to the orthodox justice system, which we have all come to embrace, but a pragmatic and contextualised way of dealing with conflict and the demand for justice.

& Reconciliation Commission (NURC) May, 2005 P.1 (Unpublished document in Kinyarwanda).

5 "The Achievements in *Gacaca* courts." accessible at http://www.inkiko-*gacaca*.gov.rw/pdf/Achievements in *Gacaca* Courts.pdf
Accessed 25/9/2006.

6 Ibid.

Summary of detainees by ICTR[7]

Detainees on trial	26
Awaiting trial	12
Awaiting transfer	12
Pending appeal (Arusha)	7
TOTAL DETAINEES IN ARUSHA	57
Serving sentences (Mali)	6
TOTAL DETAINEES	65
Released	7
Died	2
Number of accused whose cases have been completed	31
Number of judgements rendered	25
TOTAL ARRESTS	72

4. *The ordinary courts*

As was already indicated, Rwanda has reformed and entrenched the ordinary courts in the constitution, with a view to ensuring efficiency and the delivery of justice to the people. These ordinary courts are the Supreme Court, the High Court of the Republic, the Courts of Grand Instance, and the Courts of Lower Instance. It is these courts that are staffed by lawyers who are either judges, prosecutors, registrars or other personnel in the service of the judiciary. These courts are duly established by the constitution as well as by various other organic laws, which govern their organisation, work and jurisdiction.

In their set-up and in the execution of their duties, the constitution ensures the independence of the courts from other organs of the state. However, at the same time they are enjoined to render justice in the name of the people, as well as to render judgements that are binding on all individuals and public authorities, except when challenged in accordance with the law[8]. Therefore, the judiciary in Rwanda cannot be said to operate under different circumstances compared to many other countries as far as the legislation and the set-up are concerned. The judiciary in Rwanda has come a long way from the time of post-independence degradation and the devastation of the 1994 genocide. At this present moment, it can be said to conform to certain well-known principles, such as:

Independence – this should not only connote independence from the other organs of the state, but also the independence of the judges in the way they adjudicate cases; such as being independent in thought, independent of the parties with regards to the matters before them and maintaining the expected position of a neutral arbiter to whom one goes seeking and expecting justice.

Impartiality – though this is also linked to independence, usually the judiciary and the judges may have their own individual bias with regards to matters that come before them. If a judicial officer is to administer justice, impartiality is not a choice but a mandatory principle, which must be reflected right from the start of the case; the relation and reaction to the parties; the expressions in court; up to the text of the judgement that eventually will be delivered.

Ethics – this is important and indeed, all judiciaries have almost similar codes of ethics, which govern their conduct, with rules on how they should relate to litigants, incompatibilities and similar matters, in which a judicial officer is expected to behave. The proper observation of ethics is a key pillar to ensure the delivery of justice, given that a judicial officer will consider it unethical to condone or even perpetrate a miscarriage of justice. Ethics that are codified in legislation or incorporated in learned writings are the backbone of the judiciary. A judiciary that casts its ethics aside is an enemy of the people. The Rwandan judiciary today has a written code of ethics and the population has regained confidence in it.

Security of tenure and remuneration – this pillar has a very important role to play if the others above are to be realised. Judicial officers should be protected in their positions so that they are not easily dismissible like other public servants. It is this sense of security that contributes to the trust and confidence in the deliverance of justice. On the other hand, the judicial officers need to receive adequate pay in order that they are not manacled by the pursuit of basic needs for survival. Although little pay is no justification for corruption, an impecunious judicial officer remains a sitting target for corrupt parties.

7 Source: http://69.94.11.53/default.htm

8 Article 40 of the Constitution of Rwanda, 2003.

Rwanda has been able to address questions of security of tenure and remuneration. The issue of remuneration is continuously being reviewed, depending on the financial means of the country.

5. *National vision and political will*

We in Rwanda believe that separation of powers, democracy, power-sharing, checks and balances, the rule of law, judicial independence, civil liberties and a good human rights record are absolute prerequisites for peace and stability, investor and donor confidence, rapid socio-economic growth and constitutionalism. We have been, and still are, collectively committed to achieving these goals. It is a duty to ourselves and to future generations; it is not just a demand of our development partners. We are also aware that these are processes, not events and require massive political will on the part of the political management of the country now and in the future.

The success and achievements in the justice sector in Rwanda have been a result of the political will of the government of Rwanda to reform all sectors, and most importantly, to reconstruct the country. Post-conflict society demands just this. The state must deliberately create, empower and support institutions that will in turn introduce the much-needed checks and balances. Without this political will, nothing much would have been achieved and probably we would be in a worse situation than we were after the 1994 genocide. As a judicial officer, allow me to say that the political will and commitment to transform Rwanda into a rule of law, judicial independence and human rights example today is probably the highest and most sincere since independence. But also allow me to say that building these adaptive changes takes time, it requires negotiations, hearts and minds, resources, immense patience, sacrifices, trade-offs etc. Rwanda has performed her best in twelve years. Others can probably achieve things faster, it is a question of objective conditions. But let us also, while not justifying any shortcomings or unnecessary delays, reflect on the fact that in terms of man-hours, twelve years does not add up to more than three years.

6. The way forward

Finally, the legislature and the judiciary in Rwanda still face challenges. All the sectors face these challenges and this calls for an unwavering focus so as to be able to cope with the trends of modern technology, jurisprudence and globalisation. The justice sector must be able to use modern technology for purposes of court and case management, research and communication. It is the duty of management to train everybody in the sector so they will be a technologically competent person and then to give every user his/her own facilities in order to put their skills to use. Obviously, Rwanda can do this, since others have. Already, a rock-solid foundation for modernisation, competition and excellence is laid. The country has put domestic as well as partner resources to very good use and the results are in the open. Corruption and bureaucracy levels are the lowest in the region. Reform of all commercial and business legislation is seriously underway, preparing the country to be a choice destination for international investment, trade, banking and commercial justice.

The political will and the ownership by Rwandans of their own development agenda, and the collaboration and support from development partners are essential elements of the eventual success. This success will be manifested by the development and transformation of Rwanda into a modern nation based on principles of democracy, separation of powers, respect for human rights and the rule of law. But the foundations of a great legal and judicial future are already firmly and clearly in place.

7. The international community

The international community has been very supportive of Rwanda's efforts from the mid-nineties to date. Our partnership is one I would like to recommend to other developing states, in the singular sense that the international community does not, and will not, conceive, own and drive a country's development agenda. If that were the case, most ex-colonies would have developed politically, socially and economically as their former colonial masters. The past 40 years have pointed in a completely different direction. Interestingly, this pattern does not seem to change. In the absence of a capable, effective and result-focussed state, the international community, NGOs, faith-based organisations, and well-connected private companies continue to outdo each other in trying to define, own, drive and allocate resources of poor countries' development procses.

Rwanda has conceived, owned and driven her own development agenda. So far, the results are pointing in the direction of growth, successful debt repayment numbers, investor confidence, but to mention a few. Our partners have supported us in debate, financing, and accountability. Others are going the extra mile to showcase our story. To them we are very grateful.

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