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List of Acronyms

ABA	American Bar Association
AIJA	Association internationale des jeunes avocats
ASF	Avocats sans Frontières
CCBE	Council of Bars and Law Societies of Europe
CPI	Corruption Perceptions Indicator
DRC	Democratic Republic of the Congo
HDI	Human Development Indicator
IBA	International Bar Association
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
NGO	Non-governmental Organization
OHCHR	Office of the High Commissioner for Human Rights
RPF	Rwandan Patriotic Front
SCSL	Special Court for Sierra Leone
StPO	Österreichische Strafprozessordnung, Austrian Code of Criminal Procedure
UDHR	Universal Declaration of Human Rights
UIA	Union Internationale des Avocats
UN	United Nations
UNDP	United Nations Development Programme
UNHCHR	Office of the High Commissioner for Human Rights
UNICEF	United Nations Children's Fund

1 Introduction

1.1 Research interest

Post-conflict societies are faced with innumerable problems: By definition, their country has just emerged from an internal or external conflict, which might have claimed many lives and left survivors traumatized. Even the most basic infrastructure that might have existed prior to the conflict, such as hospitals, administrative buildings, courts and prisons might be destroyed. Trained personnel, such as doctors, nurses, governmental administrative personnel, but also judges and clerks might have been forced to flee the country, might still be too afraid to present themselves at their workplace or might just not receive their salary, which obviously decreases the incentive to work dramatically, in particular if those staff are sole bread winners in their families.

If atrocities have been committed during the conflict, their perpetrators are likely to still be on the loose within their communities, potentially still spreading fear and re-traumatizing victims. Any rebel groups that were active in the territory at times of the conflict might not have given up their arms and might continue to prey on the population, in particular in areas of rich natural resources, where the benefit from non-existing state or governmental structures can be extremely high. The police and military, in particular their command structure and higher ranking officers, might have been demounted, especially if the conflict brought about a regime change and police and military were felt to be associated with the former regime.

This explains why, in a worst case scenario, a post-conflict situation can mean that a traumatized population is confronted with no infrastructure, no trained personnel, no security institutions in place and rebels or criminal gangs on the loose.¹ Far too often,

¹ To understand the situation of the general public in the countries used as examples, the Human Development Indicator (HDI) can be used as initial guidance as it provides information on the development of a country by measuring its average achievements in health, knowledge, and income as three basic aspects of human development(see http://hdr.undp.org/en/media/FAQs_2011_HDI.pdf, 16/1/2012). Austria is ranked on position 19, the Democratic Republic of the Congo is on position 187 (which is the worst rank of all countries and territories included in the HDI, see

this worst case scenario happens in post-conflict situations.² Understandably, the impact of each of the problems outlined above on the society depends on how well the respective sectors were developed prior to the conflict and the extent to which they were damaged or destroyed during the conflict. Untying these multiple gordian knots to emerge from a post-conflict situation is extremely difficult, and these factors explain why both taking decisions on internal governance and providing international support are daunting tasks in these situations. However, they are crucial to facilitating the transition of a country or region from a post-conflict situation to a more peaceful, prosperous future.

The present study aims at examining one of the fundamental institutions needed to allow for this transition: the judicial system. As outlined above, judicial systems can be severely damaged or even destroyed during conflicts, in particular, if the judiciary is not or is not perceived as independent from the regime in place. Judges, lawyers and clerks can be removed from office, forced to flee the country or be killed during or following a regime change, which can leave a country with virtually no trained personnel able to conduct trials and advance procedures. Bar associations can be dismantled, leaving no independent (disciplinary) authority for lawyers and no one to establish whether someone has the required competencies to act as a lawyer. Courthouses can be damaged or destroyed, leaving no suitable place to administer justice and keep confidential information. Vital evidence and documents can be destroyed or lost, making it impossible to conclude pending trials or handle appeals. Furthermore, necessary infrastructure such as prisons might also have been destroyed.

While these developments would already render the re-establishment of a judicial system difficult that has functioned reasonably well and reasonably independent prior to a conflict, one might also have to face a post-conflict situation in which there was no functional independent judicial system prior to the conflict, and in which such a system would need to be built from scratch.

http://hdr.undp.org/en/media/FAQs_2011_HDI.pdf, 16/1/2012), Rwanda is on position 166 and Uganda on position 161 (see <http://hdrstats.undp.org/en/countries/profiles/AUT.html>, <http://hdrstats.undp.org/en/countries/profiles/COD.html>, <http://hdrstats.undp.org/en/countries/profiles/RWA.html>, <http://hdrstats.undp.org/en/countries/profiles/UGA.html>, 16/1/2012).

² For instance, in the Democratic Republic of the Congo, in Sierra Leone and in Somalia

The present study aims at finding elements necessary to re-establish and, where necessary, improve judicial systems that were in place prior to a conflict. It does not claim to offer a one-size-fits-all approach, neither for judicial systems that need to be rebuilt, nor for those that need to be established for the first time, as the conceptions of justice and judicial systems need to be adapted to a given social context and the most pressing requirements of the society. In particular, the study seeks to outline which challenges a judicial system is likely to face in a post-conflict situation and how these challenges could be addressed from within the government and from the point of view of providers of external, international support.

Furthermore, the study concentrates on how judicial systems can contribute to the transition to a more peaceful and prosperous future. It also examines their importance in state-building exercises to establish whether the re-establishment of judicial systems should be given a more prominent role to trigger development and stability.

1.2 Methodology

The methodology used for the present study will focus on a review of selected background literature and relevant case studies to determine which approaches can be used to re-establish certain elements of judicial systems. Most pertinent literature, in particular on state-building and post-conflict situations, is available in English, wherever sources are quoted in a different language and no official translation is available, translation is provided by the author. Legislation analyzed is to the greatest extent also available in English, either as official version as English is the official language of the state concerned (such as for Uganda and Rwanda) or as authorized official translation from the official language (such as for Austria).

With particular regard to the two countries used as case studies throughout the present paper, Rwanda and Uganda, a review of relevant legislation concerning the judicial system will be carried out and the legislation will be compared to that of Austria as European counterpart with, in the case of Rwanda and the Democratic Republic of the Congo, a similar legal system. This is by no means intended as a hegemonistic

exercise, it should only facilitate the reader's comparison of legal systems between the two continents.

While the present study does not aim at creating any ranking between countries emerging from post-conflict situations, the methodology used will facilitate the comparison of different concepts and approaches used to rebuild judicial systems. Given the very limited data available, a sound quantitative analysis cannot be carried out. Therefore, the present study aims at qualitatively comparing those concepts and approaches in order to determine which steps are the most promising to take in establishing a functional judicial system which is in accordance with at least the basic requirements of human rights and civil liberties.

Choosing which countries should be used as case studies has been a difficult decision. In the Great Lakes Region of East Africa, the neighbouring states of Rwanda and Uganda are similar in size and economic challenges and have both lived through violent periods, one even more than the other, some time ago. For choosing case studies, this is important as the results of post-conflict reconstruction are often not immediately visible, but become apparent only once time passes. This study does not aim at judging their political systems or civil liberties³, it concentrates only on the judicial system and the infrastructure needed to carry out trials and appeals.

However, it is clear that both Rwanda and Uganda are, at the time of writing in 2011, relatively stable states in the region as compared to the neighbouring Democratic Republic of the Congo (DRC) or the newest member state of the United Nations⁴, the Republic of South Sudan. While both of these states would also offer an extremely interesting opportunity for a case study, conflicts are too recent and the judicial system is too little developed and not sufficiently functional to allow for an analysis of which elements have been crucial in their establishment. Nevertheless, the DRC as both

³ For indicators of each country's political status, see Freedom House's Freedom in the World comparative and historical data, which compiles measurements of political rights and civil liberties from 1972 to 2011 (latest data available at the time of writing). For 2011, Austria is listed as free in relation to political rights and civil liberties, while Uganda is reported as partly free. Both the DRC and Rwanda are listed as not free. The chart is available under <http://www.freedomhouse.org/template.cfm?page=439,8/1/2011>.

⁴ See <http://www.un.org/en/members/growth.shtml>, 17/12/2011

Rwanda and Uganda's next-door-neighbour in a post-conflict situation will be used on occasions as example to contrast developments in those two states.

While in order to determine effective elements in re-establishing judicial systems, a certain amount of success in any state studied is necessary, it is important to bear in mind that, given the fact that each conflict and therefore also each post-conflict situation is different, the analysis could potentially reach different conclusions for other case studies. However, this does not counter the objectives of the study, as it aims to provide only the elements and tools that have proven successful in re-establishing judicial systems and not to furnish a complete solution to how to rebuild a judicial system. For each post-conflict situation, the tools and elements to be used from the kit available have to be chosen with great care and awareness to social and cultural contexts and expectations in order to develop a judicial system suitable for a particular state.

1.3 Structure of the study

The present study starts by describing functional and effective judicial systems and the elements of which they are constituted. It explains which basic structures need to be in place legally, politically and in terms of infrastructure for a judicial system to be able to reach a certain amount of fairness, functionality and effectiveness. It then proceeds to demonstrate the differences between transitional justice and judicial systems by explaining their different purposes and the possibilities of distinction between the two.

While the present paper is focused on conventional judicial systems and not on transitional justice mechanisms, it is important to understand the link and the potential synergies between the two systems. Therefore, as examples of transitional justice mechanisms and their possibilities of cooperating with a conventional judicial system, the cooperation between the International Criminal Court (ICC) and national judicial systems will be examined. Furthermore, international tribunals⁵, special courts⁶, truth

⁵ E.g., the International Criminal Tribunal for Rwanda (ICTR)

⁶ E.g., the Special Court for Sierra Leone (SCSL)

commissions and alternative options and their links and connections to the conventional judicial system will be briefly discussed.

The second part of the study focuses on post-conflict situations and their particular challenges to judicial systems. In particular, the different problems the judicial system often faces after a regime change or other dramatic change in government will be discussed. Furthermore, the different challenges posed by internal or external conflicts will be examined to determine whether they require different approaches in the re-establishment of a judicial system.

The study continues to examine re-establishment of judicial systems in the context of state-building exercises and their importance in facilitating a state's progression from a post-conflict situation to a more stable and peaceful future. Furthermore, the study discusses the international standards and norms⁷ that can be of use in deciding on how to rebuild or establish a judicial system. It then offers a series of recommendations for states and the international and donor community on which elements should be taken into account when approaching the re-establishment of a judicial system in a post-conflict situation. To conclude, an executive summary of the key findings of the study is presented.

⁷ E.g., the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Universal Declaration of Human Rights; and the UN Standard Minimum Rules for the Treatment of Prisoners

2 Functioning judicial systems and their requirements

Judicial systems play a far more important role in the daily life of a society as one would imagine at a first glance: Their primary task is to prosecute suspects and adjudicate perpetrators of crime to punish individuals. However, judicial systems also carry out tasks of specific and general crime prevention via deterrence, re-socialise and reintegrate offenders who have served their sentences and protect society from those that cannot be reintegrated. Thereby, they act as a safeguard to peace and stability in the society. These functions become crystal clear once a judicial system is non-existent or severely malfunctioning: If impunity reigns, the adherence to social and legal norms significantly decreases, leaving the population without protection from unlawful conduct by both the authorities and members of the society.

This is particularly evident with regards to the criminal justice sector, as it is the part of the judicial system that deals with the most imminent threats to life and security, most interventions in post-conflict judicial systems tend to focus on that sector.⁸ In addition, the verdicts for criminal justice offenders, such as being sentenced to imprisonment, are likely to have a higher impact on the civil liberties of the offenders and therefore require even more meticulous attention from and careful application by the judicial system.

However, it is important not to be oblivious to the implications the decisions of civil justice can have in post-conflict societies: For instance, establishing ownership over property can be particularly challenging in post-conflict situations⁹, especially if no written records of property have ever existed or if such records have been destroyed during the conflict. Yet, in particular when internally displaced persons (IDPs) or refugees return after the conflict to find their homes or agricultural property occupied by someone else, establishing such ownership can be crucial to the security and peace in a society and to the prevention of renewing the conflict. This is especially pressing following ethnic conflicts: If the returnees find their homes occupied by members of

⁸ See OHCHR : Rule of Law Tools for Post-conflict States : Mapping the justice sector (2006), p. 8

⁹ See *ibid*, p. 13

their former rival ethnic group (which is often the case, one group advances to the territory of the other after the first group fled), land conflicts can quickly reignite ethnic conflicts and lead to a deterioration of the situation as a whole.

As such, it is important to re-establish and render functional all sectors of the judicial system as quickly as possible after a conflict. However, because of the human rights and security implications, the starting point for any such exercise is likely to be the criminal justice sector.

2.1 Tasks of a functioning judicial system

While the structure of the judicial system is unique in each post-conflict situation, the Office of the United Nations High Commissioner for Human Rights (OHCHR) identified a total of 42 institutions that form part of the post-conflict rule-of-law sector.¹⁰ Out of these institutions, it selected three as being priorities for peacekeeping operations: the judiciary, the police and the prison service.¹¹ Because of the implications these institutions have on human rights and their interdependence, these are also the priority institutions that any effort to re-establish a judicial system in a post-conflict country needs to focus on, in addition with an effort to reduce the potential role of the military in conducting policing tasks. As such, the present study will comprise all of them when discussing the re-establishment of a judicial system.

The imminent question remaining is how to determine whether a judicial system is indeed a functioning one and, if not, how it can be rendered more efficient. Indicators that can be used to determine the quality and efficiency of a judicial system include, among others, the following:

- Time limits to detention before a suspect is brought before a judge¹² and their respect in practice
- Average duration of a trial
- Average time until a verdict is issued

¹⁰ See OHCHR : Rule of Law Tools for Post-conflict States, p. 5

¹¹ See *ibid*, p. 5 f

¹² See *ibid*, p. 2

- Average time until an appeal is heard
- Average time a judge serves in his or her position
- Average law education of judges, prosecutors and lawyers
- Ratio of judges per population.

Furthermore, OHCHR refers to the following benchmarks in assessing judicial and police systems:

- Ethnic diversity of key staff
- Racial diversity of key staff
- Gender diversity of key staff
- Financial resources dedicated to the judicial system (in percentage of the national budget)
- Objective appointment and promotion criteria
- Transparency in decision-making
- Accountability and applicability of professional codes of ethics and protections from external interference¹³

However, those indicators will often not be available in the immediate aftermath of a conflict, as trials have likely stalled or were not conducted according to human rights standards during the conflict. In addition, in many post-conflict situations, court files have gone missing or have been destroyed, which renders it impossible to trace individual cases to establish such individual indicators.

Therefore, it is often necessary to look either at secondary data compiled before or during the conflict by external sources (such as the OHCHR in its reports, any information potentially made available by the International Committee of the Red Cross (ICRC) etc.) or to proceed with an assessment despite the lack of the aforementioned indicators.

¹³ See OHCHR : Rule of Law Tools for Post-conflict States, p. 32

However, it might be possible to compile data concerning the indicators established by OHCHR: As will be discussed below, a stock-taking exercise to assess the judicial system in place will need to be carried out in most post-conflict situations. This exercise can serve as an opportunity to collect such information, in particular with regards to the diversity and education of staff, the existence of transparent mechanisms for appointment and promotion and the application of professional codes of ethics. While this might not be sufficient to guarantee a detailed insight into the judicial system, it will help determine strengths and weaknesses of a judicial system and serve as a starting point to reviewing it in order to ensure its independence, functioning and efficiency.

The main task of a judicial system is to prosecute, try and adjudicate offenders. However, the consequences of its actions are by far more important than the straightforward taking of judicial decisions: In the criminal justice sector, punishments are imposed to prevent further crimes from being committed. On an individual level, they are meant to deter the offender from committing another crime. In addition, by being shown that offenders are punished, the general public is deterred from the commission of crimes. By taking these preventive measures, the criminal justice system contributes to the re-establishment and to the keeping of peace within a society. Furthermore, it extracts offenders that cannot be reintegrated from society, thereby protecting the general public from dangers by these convicted offenders. In the civil sector, the judicial system contributes to the establishment and keeping of peace by settling disputes and preventing e.g. looting through property laws and exploitation through labour laws.

Through these actions, the judicial system protects the population from attacks on life and freedom as well as from extortion and exploitation. However, parts of the judicial system can also play another role: Depending on the legal system and the courts in place, a court, in particular the highest ranks of courts, such as supreme courts, can also be seen as political institutions. Dahl describes the role of the Supreme Court of the United States as a legal, but also as a political institution.¹⁴ He explains the importance of the court, and therefore the judicial system, in a democracy by outlining that it serves

¹⁴ See Dahl, Robert A.: Decision-making in a Democracy: The Supreme Court as a national policy-maker. In: Epstein, Lee (ed.): Courts and Judges (1958), p. 485

as protection mechanism for minorities against tyranny by majorities.¹⁵ As such, in a democracy, where decisions are taken by the majority of the population, the judicial system has the additional function of preventing abuse of power by the majority towards the minority.

However, as the judicial system only intervenes once an infraction of rights has occurred or has been claimed, one might regard this as a little effective way of protecting minority rights. While it holds true that the judicial system will always be one step behind in protecting minority rights, it cannot be overlooked that judicial decisions will serve as precedents for the future, and as such, once an initial case has been completed and the precedent been established, it also serves as deterrent to other potential infractions.

Furthermore, Dahl describes the role of the Supreme Court as policy-making institution and points out that it forms part of the dominant national political alliances.¹⁶ While this will hold true for many post-conflict states as well, it is important to examine the appointment process for judges to the Supreme Court in order to understand to which extent their appoint is a political decision: If it is e.g. the president appointing the judges to the Supreme Court, as it is the case in the United States¹⁷, the decision is likely to be a very political one, as the president might and is likely to choose a candidate with similar political views to his or her own. If the decision on the candidates is taken by someone else or if the president is bound to suggestions made by others, the appointment process needs to be reviewed closely in order to determine political influence.¹⁸

¹⁵ See Dahl, Robert A.: *Decision-making in a Democracy*, p. 488

¹⁶ See *ibid*, p. 499

¹⁷ See *ibid*, p. 491

¹⁸ In Austria, the judges of the Constitutional Court are appointed by the president of the republic. However, the appointments have to be made according to suggestions made by the federal government, the National Council and the Federal Council (the two chambers of the Austrian parliament). The government has the right to suggest the president, the vice-president, 6 judges and 3 substitutional judges, the National Council suggests 3 judges and 2 substitutional judges, while the Federal Council suggests 3 judges and 1 substitutional judge, according to Art 147 Abs 2 of the Austrian Constitution. See [19](http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR40094816&ResultFunctionToken=c6deae98-b036-49c5-80f6-036dc4a5ede1&Position=1&Kundmachungsorgan=&Index=&Titel=&Gesetzesnummer=&VonArtikel=&BisArtikel=&VonParagraf=&BisParagraf=&VonAnlage=&BisAnlage=&Typ=&Kundmachungsnummer=&Unterzeichnungsdatum=&FassungVom=15.01.2012&NormabschnittnummerKombination=Und&IRisSeit=Undefined&ResultPageSize=100&Suchworte=ernennung+richter, 15/1/2012.</p></div><div data-bbox=)

In addition, the role of the Supreme Court needs to be reviewed within the legal system of any post-conflict state. Court decisions can be legally binding on different levels, depending on whether a country adheres to the civil law or to the common law system.

2.2 The Rwandan judicial system

During colonialism, the Germans and Belgians introduced legal systems similar to their own civil law legal systems.¹⁹ This includes the establishment of a judicial system similar to the ones found in civil law countries. After independence, rather than establishing an entirely new legal system, Rwanda kept the majority of this legislation in place, which explains why the current system is similar to the German and Belgian civil law systems.²⁰ However, customary law has also kept a certain influence.²¹ As a general tendency, it can be stated that the Rwandan legal system is currently undergoing a transition to becoming a merged system between common and civil law.²²

This change is in line with the general development in the political sphere of the country, in particular, with Rwanda joining the Commonwealth in November 2009²³ and with the adoption of English as an official language in 1994 and the ongoing move to have English replace French as language of instruction at schools: While the official reasons given for this change are economic ones, it is often interpreted as a move away from France following the 1994 genocide and as an accommodation to the English-speaking political elite in the country.²⁴

¹⁹ See http://www.nyulawglobal.org/Globalex/Rwanda.htm#_The_Judiciary, 16/12/2012

²⁰ See *ibid*, 16/12/2012

²¹ See *ibid*, 16/12/2012

²² See *ibid*, 16/12/2012

²³ See <http://www.thecommonwealth.org/YearbookHomeInternal/217016/>, 16/12/2012

²⁴ See <http://www.npr.org/templates/story/story.php?storyId=97245421>, 16/12/2012

The basic principles concerning the judiciary in Rwanda are enshrined in Chapter 5 of its constitution of 4 June 2003.²⁵ As such, article 140 of the constitution specifies that:

The judiciary is independent and separate from the legislative and executive branches of government. It enjoys financial and administrative autonomy.

*Justice is rendered in the name of the people and nobody may be a judge in his or her own cause.*²⁶

Furthermore, the same article states that judicial decisions are binding on all concerned parties independent of whether they are public authorities or individuals and that such decisions shall not be challenged through any other ways or procedures than those determined by law.²⁷ Through these principles, Rwanda sets out the basics for a modern, independent judicial system.

Rwanda's judicial system has undergone a series of changes and readjustments since the 1994 genocide. However, major changes did not take place until 2003, when the Supreme Court was restructured.²⁸ In 2006, Organic Law N014/2006 of 22 March 2006 modified the court structure by replacing Province Tribunals by High Instance Tribunals.²⁹ In addition, the Organic Law reduced the number of District Tribunals from 106 to 60³⁰, now called Primary Courts³¹.

The hierarchy of the ordinary court system consists of the Supreme Court, the High Court and its Chambers, the Intermediate Courts and the Primary Courts.³²

²⁵ Complete text available under :
http://www.amategeko.net/display_rubrique.php?ActDo=ShowArt&Information_ID=1434&Parent_ID=30694645&type=public&Langue_ID=An&rubID=30694745#30694745, 16/1/2012

²⁶
http://www.amategeko.net/display_rubrique.php?ActDo=ShowArt&Information_ID=1434&Parent_ID=30694645&type=public&Langue_ID=An&rubID=30694745#30694745, 16/1/2012

²⁷ See
http://www.amategeko.net/display_rubrique.php?ActDo=ShowArt&Information_ID=1434&Parent_ID=30694645&type=public&Langue_ID=An&rubID=30694745#30694745, 16/1/2012

²⁸ See <http://www.supremecourt.gov.rw/sc/reforms.aspx>, 16/1/2012

²⁹ See *ibid*, 16/1/2012

³⁰ See *ibid*, 16/1/2012

³¹ See <http://www.supremecourt.gov.rw/sc/Primarycourts.aspx>, 16/1/2012

³² See <http://www.supremecourt.gov.rw/sc/ordinaryjurisdiction.aspx>, 16/1/2012

Furthermore, there is a system of specialized courts, comprising the Commercial Courts, the Traditional Jurisdictions Gacaca, the Military Court and the Military Tribunal.³³ The Gacaca courts as an alternative option of transitional justice mechanisms will be discussed in further detail in section 3.3.1 below.

A 1999 report³⁴ by the United Nations Special Representative for Human Rights in Rwanda, Michel Moussalli, to the Economic and Social Council of the United Nations resumes the situation of the judicial system in Rwanda and points out several positive and negative developments: On the judicial system, Moussalli states that its functioning following the genocide continues to pose a major challenge, but also specifies that progress has been made.³⁵ He emphasizes the fact that the accused are now most often assisted by an advocate, following a change in the behaviour of Rwandan lawyers that now accept to represent them (following an intervention and funding received from Avocats Sans Frontières (ASF)).³⁶

Moussalli however deplores the lack of training, stating that only 15 out of 800, or 2 per cent, of magistrates have a law degree while most others only underwent three to six months training, and reports that the lack of infrastructure, such as transport to and from courts, still causes problems within the judiciary.³⁷ Furthermore, he states that the low salary level is often seen as an invitation to corruption.³⁸ On a particularly interesting note, Moussalli says that any interference in the independence of the judiciary, especially from administrative organs, should be resisted, thereby indicating that such interference occurs within the judicial system.³⁹ With regards to the conditions of detention, Moussalli deplores the overcrowding in detention facilities and the sanitary conditions therein which allow for the easy spread of diseases.⁴⁰ While the situation seems to have improved with the establishment of the Gacaca courts, prison conditions and fair trials remain an important issue in Rwanda.

³³ See <http://www.supremecourt.gov.rw/sc/specializedjuri.aspx>, 16/1/2012

³⁴ Complete text available under :

[http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.1999.33.En?Opendocument#I](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.1999.33.En?Opendocument#I), 16/1/2012

³⁵ See *ibid*, section E, 16/1/2012

³⁶ See *ibid*, section E, 16/1/2012

³⁷ See *ibid*, section E, 16/1/2012

³⁸ See *ibid*, section E, 16/1/2012

³⁹ See *ibid*, section E, 16/1/2012

⁴⁰ See *ibid*, section D, 16/1/2012

In 2004, Rwanda established a law relating to the Code of Ethics for the Judiciary, setting out legal obligations for judges to inter alia respect the principle of judicial independence.⁴¹ However, this law also poses problems in terms of restricting the political rights of judges, as it states in its article 21 that:

“A carrier [career, note by the author] judge is prohibited from joining political parties. He or she is not supposed to act as a member of any political party, or give speech in it, or give support to any political candidate or mobilise funds or give support to a candidate, a political organisation or political cause. He or she is however, permitted to vote like any other citizen but is not allowed to join political gatherings except those which invite the general population of his residence.”⁴²

While it is important that judges are politically independent and refrain from exposing suspects to preferential or degrading treatment depending on their and the suspects’ political opinions, it is problematic to render simple party membership or personal donations to a political party by a judge illegal as it might be an infraction on the rights to freedom of expression and freedom of association as set forth in articles 19 and 22 of the International Covenant on Civil and Political Rights⁴³, to which Rwanda is a party⁴⁴.

In a recent report of the Working Group on the Universal Periodic Review to the Human Rights Council of the United Nations in 2011, Rwanda pointed to its National Commission for Human Rights, which had been established and fulfilled the Paris

⁴¹ See articles 4 and 5, Law No 09/2004 relating to the Code of Ethics for the Judiciary, http://www.amategeko.net/display_rubrique.php?ActDo=all&Information_ID=1570&Parent_ID=30695474&type=public&Langue_ID=An&rubID=30695475, 18/1/2012

⁴² Article 21, Law No 09/2004 relating to the Code of Ethics for the Judiciary, http://www.amategeko.net/display_rubrique.php?ActDo=all&Information_ID=1570&Parent_ID=30695474&type=public&Langue_ID=An&rubID=30695475, 18/1/2012

⁴³ See <http://www2.ohchr.org/english/law/ccpr.htm>, 18/1/2012

⁴⁴ See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en, 18/1/2012

Principles.⁴⁵ In addition, and with particular regards to the judicial system, the Rwandan delegation stated that Rwanda had put in place Access to Justice Bureaux in all 30 districts which aim to provide free legal-aid services to vulnerable people.⁴⁶ Furthermore, it defended the system of Gacaca courts and stated that it had proven to work well for Rwanda.⁴⁷

However, Vandeginste points out that Rwanda has not yet successfully conducted a political transition process to ensure power sharing, inclusiveness, and better governance.⁴⁸ In addition, he points out that several leading figures, nearly all Hutu, have been forced to leave inter alia the judicial system in the years following 1994 (such as the Hutu president of the Cour de Cassation, Augustin Cyiza, who resigned under pressure in 1998, and the Hutu Minister of Justice, Faustin Nteziryayo, who resigned and fled in January 1999).⁴⁹

2.3 The Ugandan judicial system

Similar to the situation in Rwanda, where the legal system resembles the ones of the German and Belgian colonialists, the Ugandan legal system was created based on the British legal system and is therefore a common law system, in which influences of customary law exist⁵⁰. Chapter Eight of the Ugandan constitution of 1995 regulates the judiciary.⁵¹ Uganda provides for the principle of the independence of the judiciary in article 128 of the constitution, stating that:

⁴⁵ See Report of the Working Group on the Universal Periodic Review, 14/3/2011, p. 4, accessible at : <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/117/93/PDF/G1111793.pdf?OpenElement>, 17/1/2012

⁴⁶ See *ibid*, p. 4, accessible at : <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/117/93/PDF/G1111793.pdf?OpenElement>, 17/1/2012

⁴⁷ See *ibid*, p. 4, accessible at : <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/117/93/PDF/G1111793.pdf?OpenElement>, 17/1/2012

⁴⁸ See Vandeginste, Stef : Rwanda : Dealing with Genocide and Crimes against Humanity in the Context of Armed Conflict and Failed Political Transition. In : Biggar, Nigel (ed.) : Burying the Past. Making Peace and Doing Justice after Civil Conflict (2003), p. 252

⁴⁹ See Vandeginste, Stef : Rwanda : Dealing with Genocide (2003) , p. 256 and p. 279

⁵⁰ See <http://www.nyulawglobal.org/Globalex/uganda.htm>, 17/1/2012

⁵¹ Complete text of the constitution available under : http://www.parliament.go.ug/images/abridged_constitution_2006.pdf, 17/1/2012

(1) The courts shall be independent and shall not be subject to the control or direction of any person or authority.

2) A person exercising judicial power will not be legally responsible for any act or omission in the exercise of that power.⁵²

While the first paragraph is clearly referring to the independence of the judiciary, the second paragraph is questionable as it could imply that, even if a judge knowingly abuses his power, he or she will not be held legally responsible, which would clearly be against the rule of law.

As set forth in article 129 of the constitution, Uganda's judicial system consists of a Supreme Court, a Court of Appeal, a High Court and lower courts as established by law by the Parliament.⁵³ Another article of the constitution which is important to the independence of the judiciary is article 144 concerning the removal from office of a judicial officer: While the age limits are common in many legal systems, article 144 para. 2 states that:

A judicial officer may be removed from office only for—

(a) inability to perform the functions of his or her office arising from poor health of body or mind;

(b) misbehaviour or misconduct; or

(c) incompetence.⁵⁴

However, neither the procedure to remove a judicial officer nor the commission or person permitted to do so is specified in the constitution, thereby leaving a legitimacy gap which might be used to dispose of politically unwanted judicial officers.

⁵² Ugandan Constitution, article 128, p. 31,
http://www.parliament.go.ug/images/abridged_constitution_2006.pdf, 17/1/2012

⁵³ Ugandan Constitution, article 129, p. 31,
http://www.parliament.go.ug/images/abridged_constitution_2006.pdf, 17/1/2012. Further information on the court structures and the judiciary in general is available under : <http://www.judicature.go.ug/>, 17/1/2012

⁵⁴ Ugandan Constitution, article 144, para. 2, p. 34,
http://www.parliament.go.ug/images/abridged_constitution_2006.pdf, 17/1/2012

During Idi Amin's rule, a Commission for Law Reform had been established in the Ministry of Justice.⁵⁵ However, this Commission lacked financial resources and was ineffective.⁵⁶ Following the entry into power of Museveni's NRM government, which stated as one of its objectives restoring the rule of law, revived the Commission and instated a High Court Justice as Commissioner in 1986.⁵⁷ Furthermore, the Commission for Law Revision, tasked with reviewing the legal structure and clearing obsolete laws and adding necessary amendments, was revived.⁵⁸

Uganda chose to opt for a truth commission to come to terms with the crimes committed since its independence. This truth commission will be discussed in further detail in section 3.3.2 below.

2.4 Comparison of indicators concerning the judicial systems

With regards to the indicators mentioned above, the time limits to detention before a suspect is brought before a judge in Rwanda are set forth in article 33 of the Code of Criminal Procedure:

[...]

If a person is caught red-handed or taken to be committing an offence, any person, in the absence of a judicial police officer, can arrest such an offender and immediately take him or her to the nearest Judicial Police Officer.

A Judicial Police Officer who receives the person caught red-handed must complete his or her criminal case file within forty-eight (48) hours and send it to a competent public prosecutor, who, in turn, if necessary, institutes a suit within forty-eight (48) hours in a competent court.

⁵⁵ See <http://countrystudies.us/uganda/59.htm>, 17/1/2012

⁵⁶ See *ibid*, 17/1/2012

⁵⁷ See *ibid*, 17/1/2012

⁵⁸ See *ibid*, 17/1/2012

For the purposes of investigation, the Prosecution Service can extend such a period to not more than twenty-four (24) hours.

The seized [seized, note by the author] Court must examine the case within fifteen (15) days from the reception of the case.⁵⁹

The possibility of private persons arresting offenders that have been caught red-handed as stated in the first phrase above is common to many legal systems. In Austria, this is set forth in § 80 StPO, which states that, inter alia, in such a case, a private person can arrest such an offender, but has to immediately inform the next organ of public order (such as a policeman or other).⁶⁰ However, the Austrian Code of Criminal Procedure states in the same article that the arrest is only allowed to happen in a way that is concurrent with the offences committed⁶¹, thereby protecting the offender from revenge or mob attacks from the general population, a protection clause which cannot be found in Rwandan law.

Uganda also allows the arrest of offenders or suspected offenders by private persons as set forth in articles 15 and 16 of the Ugandan Code of Criminal Procedure.⁶² In article 16, Uganda determines that persons arrested in such a way should be turned over to police officers without unnecessary delay, or, in the absence of a police officer,

⁵⁹ Article 33, Code of Criminal Procedure,
http://www.amategeko.net/display_rubrique.php?ActDo=all&Information_ID=1333&Parent_ID=30693517&type=public&Langue_ID=An&rubID=30693519#30693533, 18/1/2012

⁶⁰ See § 80 Abs 2 StPO,

⁶¹ See § 80 Abs 2 StPO,

⁶² See articles 15 and 16 of the Ugandan Code of Criminal Procedure,
http://www.ulii.org/ug/legis/consol_act/cpca1950211/, 18/1/2012

be taken to the nearest police station.⁶³ However, Ugandan law also does not foresee the protection of offenders from their private arresters.

Rwandan law provides for a maximum period of 48 hours of detention before a case is presented to the prosecutor and another 48 hours before the prosecutors institutes a suit in court, therefore giving a total period of maximum four days before a court is concerned with a detainee's case (which can be prolonged for another day for purposes of investigation). Subsequently, within 15 days, the court has to examine the case, thereby allowing for a maximum period of 20 days between the arrest of an offender caught red-handed and the court examination of the case.

Given the small size of the Rwandan territory and the infrastructure which has by now improved to be very good as compared to other countries in the region (in particular as compared to the DRC with its woeful standard of roads), transportation should not cause problems in meeting such deadlines established by law.

In Austria, a court has to decide within 48 hours after the reception of the detainee on whether a detainee should be put into pre-trial custody or whether he or she should be released.⁶⁴

Uganda states that suspected offenders (with the exception of suspects detained for murder, treason or rape) should be brought before an appropriate magistrate's court within 24 hours after his or her detention.⁶⁵ If it does not appear practicable to bring the person before an appropriate court within 24 hours, the police is supposed to start an inquiry and release the suspect on bond where possible.⁶⁶ Should it not be possible to release the suspect on bond, he or she is to be brought before a magistrate's court as

⁶³ See article 16, http://www.ulii.org/ug/legis/consol_act/cpca1950211/, 18/1/2012

⁶⁴ See § 174 Abs 1 StPO, [, 18/1/2012](http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR40120411&ResultFunctionToken=b52373ba-f8bb-4c17-9979-de42fa4ba57b&Position=1&Kundmachungsorgan=&Index=&Titel=stpo&Gesetzesnummer=&VonArtike l=&BisArtikel=&VonParagraf=174&BisParagraf=&VonAnlage=&BisAnlage=&Typ=&Kundmachungsnummer=&Unterzeichnungsdatum=&FassungVom=18.01.2012&NormabschnittnummerKombination=Und&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=)

⁶⁵ See article 17, Ugandan Criminal Procedure Code Act 1950 (Ch 116), http://www.ulii.org/ug/legis/consol_act/cpca1950211/, 19/1/2012

⁶⁶ See article 17, Ugandan Criminal Procedure Code Act 1950 (Ch 116), http://www.ulii.org/ug/legis/consol_act/cpca1950211/, 19/1/2012

soon as possible.⁶⁷ In addition, the officers in charge of police stations are required to report any arrests of persons without warrants to the nearest magistrate within 24 hours.⁶⁸

While, at a first glance, Uganda is providing for a clear and limited time-frame of 24 hours until a case is brought before a court, the remainder of the provision is increasingly indecisive, in particular when stating that, if it is not possible to release a suspect on bond, he or she should be brought before court as soon as possible, as this provision might lead to prolonged detention without judiciary oversight. However, and again given the relatively good infrastructure in most of Uganda, especially in Kampala and its surroundings, transportation of suspects to courts should not pose a problem.

Unfortunately, reliable data on real transfer times from the time of arrest to the time a court is concerned with a case is not publicly available for Rwanda or Uganda, thereby limiting the analysis above to an abstract legal analysis.

⁶⁷ See article 17, Ugandan Criminal Procedure Code Act 1950 (Ch 116), http://www.ulii.org/ug/legis/consol_act/cpca1950211/, 19/1/2012

⁶⁸ See article 18, Ugandan Criminal Procedure Code Act 1950 (Ch 116), http://www.ulii.org/ug/legis/consol_act/cpca1950211/, 19/1/2012

3 Transitional justice and the judicial system

3.1 Different approaches and tasks

By definition, post-conflict societies have faced traumatizing amounts of violence in their communities. To emerge from a post-conflict situation, apart from rebuilding the physical damage that might have been done, reconciliation is one of the most pressing goals to ensure that the cycle of violence can be interrupted.⁶⁹ However, as Rigby explains, a society trying to come to terms with its difficult past can be compared to the Western approach of helping victims deal with post-traumatic stress disorder: He suggests that for a post-conflict society to be able to progress and create new foundations, it is important assure a secure environment for victims to tell their story.⁷⁰ However, such a secure environment is often non-existent in post-conflict societies, and victims continue to be afraid of their persecutors. Whereas in a modern state with functioning institutions, any crimes that have been committed would be adjudicated by the domestic judicial system, in many post-conflict situations, the number of perpetrators and the extent of their crimes is too serious for the domestic, often non-existent or seriously challenged judicial system to deal with.

This leaves decision-makers at both the national and the international level in a difficult situation, as they need to establish an exit-strategy for the post-conflict state. As Rigby explains, two major strategies exist: firstly, amnesia, or subordinating everything to the peaceful transition to democratic rule, and secondly, the pursuit of justice, or the attempt to prosecute those guilty of perpetrating human rights abuses.⁷¹ The first option, amnesia, might work on a short-term⁷², but comes with the great handicap of leaving the perpetrators unpunished. Rigby continues to explain that the pursuit of justice, as it was first done with the Nuremberg and Tokyo Trials after World

⁶⁹ See Mobekk, Eirin : *Transitional Justice in Post-Conflict Societies – Approaches to Reconciliation*, in : Ebnöther, Anja H., Fluri, Philipp H (ed.). : *After Intervention : Public Security Management in Post-Conflict Societies – From Intervention to Sustainable Local Ownership* (2005) , p. 262

⁷⁰ See Rigby, Andrew: *Justice and Reconciliation. After the Violence* (2001), p. 1

⁷¹ See *ibid*, p. 2f

⁷² See *ibid*, p. 2f. Rigby explains that, in the case of Spain, collective amnesia of what happened during the rule of Francisco Franco has permitted the society to progress and emerge from its post-conflict situation.

War II⁷³, even though it is often criticised for being so-called victor's justice, helps prevent revenge and self-help justice and individualizes guilt, which is an important factor in avoiding to blame an entire society or an entire part of it for atrocities committed.⁷⁴ As the approach of pursuing justice has by far more consequences for the re-establishment of judicial systems in post-conflict situations, the present paper does not discuss the approach of collective amnesia to permit a transition to a peaceful society.

If the decision to prosecute the perpetrators is taken, additional mechanisms to address the crimes perpetrated during a conflict can be needed. Transitional justice aims at providing these additional mechanisms without replacing the domestic judicial system or the traditional mechanisms for conflict resolution which are in place. While the present study is focusing on the reestablishment of the judicial system to adjudicate offences not or not only related to the conflict experienced by any particular state and therefore does not intend to discuss the advantages and disadvantages of particular transitional justice mechanisms in detail, it is important to examine the links between transitional justice and ordinary judicial systems to fully appreciate their potential synergies as well as the potential pitfalls that their coexistence in any given context might cause.

Mobekk defines transitional justice mechanisms as such:

*Transitional justice mechanisms are created to deal with crimes that were committed during a conflict period, at a stage where the society is at the cusp of transition from a society of conflict to one of democracy and peace.*⁷⁵

Similarly, a report of the Secretary-General of the United Nations in 2004 defines transitional justice as comprising processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to

⁷³ See Rigby, Andrew: Justice and Reconciliation (2001), p. 175

⁷⁴ See *ibid.*, p. 4 f

⁷⁵ Mobekk, Eirin : Transitional Justice in Post-Conflict Societies (2005) , p. 261

ensure accountability, serve justice and achieve reconciliation.⁷⁶ The report further states that these mechanisms may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.⁷⁷

There is a vast array of different mechanisms and approaches to transitional justice. The best-known and most commonly used mechanisms can be separated into judicial and alternative mechanisms, as the definition used by the Secretary-General above indicates: Judicial mechanisms include the International Criminal Court (ICC), international tribunals and special courts as well as the use of local courts, whereas alternative mechanisms include the establishment of truth commissions and the use of traditional methods of justice rooted in the society concerned.⁷⁸

However, given the multitude of different mechanisms available, how should one decide on which mechanism is the right one to use in a specific situation? As Rigby explains, trials can be instrumentalized, might serve as morality plays and could, in certain situations, not be the best way of dealing with the subtleties of the past.⁷⁹ He suggests that a truth commission might, in certain circumstances, be the better choice of addressing past misdeeds, in particular, if the new regime lacks either the will or the means to prosecute the perpetrators of crime.⁸⁰

3.2 The international institutions of justice and national judicial systems

One of the most pressing issues is the coordination between the existing or specifically set up institutions of justice such as the International Criminal Court (ICC), international criminal tribunals or special courts, and the respective national judicial system in place or being established in a post-conflict country. As any potential crimes

⁷⁶ See para. 4 of report S/2004/616, p. 4 (available under <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>, 23/12/2011)

⁷⁷ See para. 4 of report S/2004/616, p. 4 (available under <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>, 23/12/2011)

⁷⁸ See Mobekk, p. 261

⁷⁹ See Rigby, Andrew: Justice and Reconciliation (2001), p. 6

⁸⁰ See *ibid*, p. 6 f.

are likely to have been committed either by or against nationals of the post-conflict country or on the territory of the post-conflict country, that country will usually have jurisdiction over these crimes based on the principles of either active or passive personality or on the principle of territoriality. However, as its judicial system might not be in a position to cope with the amount of trials that would need to be held, or it might not be wise to try certain high-profile suspects in the country in order to avoid disturbances of the public order or even a recurrence of the conflict, certain trials might have to be held elsewhere and under another jurisdiction.

In the subsequent paragraphs, certain institutions of international justice will be discussed; however, the listing below is by no means exhaustive. The paper will present only the most global institutions, such as the International Criminal Court, and other institutions of particular relevance to the states studied in more detail, such as the International Criminal Tribunal for Rwanda. In addition, the Special Court for Sierra Leone will be presented as it represents a hybrid court, a different transitional justice mechanism that could also be used as a model for other post-conflict states and comes with particular challenges and opportunities with regard to the cooperation with national judicial systems.

3.2.1 The International Criminal Court

The International Criminal Court with its seat in The Hague was established by the Rome Statute⁸¹ of 17 July 1998, which entered into force on 1 July 2002.⁸² To date, the Rome Statute has 120 States parties, among them Austria, the Democratic Republic of the Congo, and Uganda, while Rwanda has neither ratified the treaty nor acceded to it.⁸³

In comparing the ICC with other institutions of transitional justice, it becomes obvious that the ICC has an outstanding position: It is the only permanent institution set

⁸¹ Complete text available under: <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>, 21/12/2011

⁸² See <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Establishment+of+the+Court.htm>, 21/12/2011

⁸³ For a detailed list of all States parties to the Rome Statute, see <http://www.icc-cpi.int/Menus/ASP/states+parties/>, 21/12/2011

up to deal with issues addressed by transitional justice mechanisms, while other mechanisms, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) or Special Courts are Ad-hoc mechanisms specifically set up to deal with crimes committed in a certain territory in a certain period of time. Truth commissions and other instruments of transitional justice follow the same approach and are established to respond to clearly defined conflicts. In the international system, the ICC is the only stand-by institution of transitional justice, which makes it clear that temporality cannot be a defining factor for the distinction between a judicial system and a transitional justice mechanism.

The most important principle for the cooperation between the ICC and national judicial systems is the principle of complementarity as defined in article 1 of the Rome Statute, which states that the jurisdiction of the ICC shall be complementary to that of national criminal jurisdictions.⁸⁴ The complementarity in the Rome Statute is two-fold: The ICC is to try only the most serious crimes (see article 5⁸⁵) and the most high-profile suspects.

This leaves the task of dealing with the majority of suspects to the national criminal jurisdiction, but should ensure that high-profile suspects of the most serious crimes are tried at the ICC to ensure that they do not benefit from impunity because of their high standing in their respective communities, but also that they receive a fair and unbiased trial that is not politically motivated. At the same time, this also explains that, since the ICC is to deal only with crimes of this extent, it is likely to be involved in the administration of transitional justice following a conflict in the territory of one of the States parties to the Rome Statute. However, it is important to note that the involvement of the ICC does not preclude other options of transitional justice; a truth commission or other specific transitional justice mechanisms for suspects not to be tried by the ICC could nevertheless be established.

⁸⁴ See article 1, Rome Statute : <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>, p. 2, 21/12/2011

⁸⁵ See article 5, Rome Statute : <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>, p. 3, 21/12/2011

In practice, the cooperation between the national judicial system and the ICC needs to be extremely tight: Certain evidence will have to be collected by the national criminal justice system to be subsequently presented to the ICC, suspects need to be arrested by national law enforcement officials and their detention, at least at the initial stage of an investigation before transfer to The Hague can be arranged, needs to be within the national detention system.

3.2.2 The International Criminal Tribunal for Rwanda

Similar to the International Criminal Tribunal for the former Yugoslavia, established in 1993⁸⁶, the United Nations Security Council established an International Criminal Tribunal for Rwanda (ICTR)⁸⁷ through its resolution 955 of 8 November 1994⁸⁸. The ICTR was established under Chapter VII of the United Nations Charter and upon the request of the government of Rwanda⁸⁹ and has taken its seat in Arusha, United Republic of Tanzania, in accordance with Security Council resolution 977⁹⁰. Prosecutions at the ICTR started in January 1997⁹¹, almost 3 years after the beginning of the genocide in April 1994⁹².

The ICTR was established by a Security Council resolution as a subsidiary organ of the Security Council according to article 29 of the Charter of the United Nations⁹³.

⁸⁶ See <http://www.icty.org/sections/AbouttheICTY>, 22/12/2011

⁸⁷ The Secretary-General of the United Nations describes the legal basis for the establishment of the ICTR in his report S/1995/134, p. 2 (available under <http://www.undemocracy.com/S-1995-134.pdf>, 22/12/2011) : He states that the Security Council had determined that the situation in Rwanda continued to constitute a threat to international peace and security and that, notwithstanding the request from the Rwandese government to establish such a court, this decision was necessary to ensure the cooperation of Rwanda and all other concerned states during the entire life-span of the Tribunal. Furthermore, he claims that the establishment of the Tribunal based on a Chapter VII resolution was also necessary to ensure a speedy and expeditious method of establishing the Tribunal.

⁸⁸ See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement>, 22/12/2011

⁸⁹ See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement>, 22/12/2011, p. 2

⁹⁰ See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/050/66/PDF/N9505066.pdf?OpenElement>, 22/12/2011

⁹¹ See Bangamwabo, Francois-Xavier : International Criminal Justice and the protection of human rights in Africa. In : Bösl, Anton, and Diescho, Joseph (ed.) : Human Rights in Africa. Legal Perspectives on their Protection and Promotion (2009), p. 109

⁹² See Prunier, Gérard : The Rwanda Crisis. History of a Genocide (2010) , p. 213 ff

⁹³ See Gold, Maria : « No peace without justice » unter besonderer Berücksichtigung des Völkermordes in Ruanda (2005), p. 80. For article 29 of the Charter of the United Nations, see <http://www.un.org/en/documents/charter/chapter5.shtml>, 22/12/2011

Therefore, the statute of the ICTR is not a statute to be separately signed by the states that wish to participate, but it is annexed to Security Council resolution 955⁹⁴ and therefore binding for all UN member states⁹⁵. Interestingly, the ICTR and its “sister tribunal”, the ICTY, were the first international criminal tribunals to be established since the military tribunals of Nuremberg and Tokyo, at which individuals were held personally responsible for the crimes they committed during World War II, even if they were committed in obedience to superior orders or in the service of the state.⁹⁶ Rigby explains this by the fact that the intervention of the international community in the prosecution of the perpetrators of genocide and crimes against humanity was caused by a sense of shame and guilt by the major powers which felt that they had not done all they might have to prevent the occurrences of war crimes.⁹⁷

The ICTR’s jurisdiction is clearly defined in the statute as limited to crimes committed during the period 1 January to 31 December 1994⁹⁸, the year in which the genocide in Rwanda took place. Furthermore, the territorial jurisdiction is limited in so far as the tribunal only has jurisdictions over crimes committed in Rwanda or by Rwandans in its neighbouring states⁹⁹. Article 5 limits the personal jurisdiction to natural person, thereby excluding corporate bodies or organizations.¹⁰⁰ However, the most interesting limitation of the ICTR’s jurisdiction is the material limitation: articles 2, 3 and 4 of the ICTR’s statute determine genocide, crimes against humanity and certain violations common to the Geneva Conventions and the Additional Protocol II (such as e.g. the taking of hostages and pillage).¹⁰¹

⁹⁴ See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement>, 22/12/2011, p. 3ff

⁹⁵ See article 25 of the Charter of the United Nations, available under <http://www.un.org/en/documents/charter/chapter5.shtml>, 22/12/2011

⁹⁶ See Rigby, Andrew: Justice and Reconciliation (2001), p. 175 f

⁹⁷ See *ibid*, p. 172

⁹⁸ See article 7, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement>, 22/12/2011

⁹⁹ See article 7, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement>, 22/12/2011

¹⁰⁰ See Bangamwabo, Francois-Xavier : International Criminal Justice and the protection of human rights in Africa. In : Bösl, Anton, and Diescho, Joseph (ed.): Human Rights in Africa. Legal Perspectives on their Protection and Promotion (2009), p. 108

¹⁰¹ See articles 2, 3 and 4, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement>, 22/12/2011, p 3ff

As with all transitional justice mechanisms, the most interesting question for the present paper is that of the coexistence of the ICTR and national judicial systems. The ICTR's statute is quite clear on the cooperation and hierarchy of the tribunal and national judicial systems, in particular in article 8:

Article 8
Concurrent jurisdiction

- 1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.*
- 2. The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.¹⁰²*

This provision is crucial for the cooperation with a national judicial system, as it defines the ICTR's primacy over national courts of all states, not only over Rwandese courts. Even if a national court has already started trying a suspect, the ICTR can request them to defer their competence, something which is innovative as in most legal systems, once a trial has started and an accusation has become legally binding (even in front of a court that would not be geographically competent for the particular case), that court becomes competent and no other court is permitted to initiate proceedings¹⁰³. As

¹⁰² See article 8, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement>, 22/12/2011, p. 6

¹⁰³ See § 213 Abs 5, <http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR40050672&ResultFunctionToken=db6ec3ed-64c5-4a4e-a4e7-0ddb9bd573b2&Position=1&Kundmachungsorgan=&Index=&Titel=stpo&Gesetzesnummer=&VonArtikel=&BisArtikel=&VonParagraf=213&BisParagraf=&VonAnlage=&BisAnlage=&Typ=&Kundmachungs>

Gold points out, this principle has not been used in the Rome Statute of the International Criminal Court.¹⁰⁴

Article 9¹⁰⁵ sets forth one of the main principles for cooperating courts within the rule of law, “non bis in idem”, which states that no one shall be tried twice for the same offence. Article 9, para. 1, establishes that a trial by the ICTR excludes trial by national courts for the same offence, while para. 2 establishes that a person who has already been tried by a national court can only be tried by the ICTR under special circumstances, such as if his/her crime was characterized as an ordinary crime by the national court, if the national court’s proceedings were not impartial or independent or if the case was not diligently prosecuted.¹⁰⁶

As the ICTR’s statute is setting up a transitional justice mechanism, it does not address questions of ordinary, everyday criminality or petty crimes committed in 1994, which means that the Tribunal is not competent to try suspects for these crimes. This leaves the responsibility for such criminality within the Rwandese criminal justice system, which was understandably shattered by the end of the genocide.

It is interesting to note that both the ICC’s¹⁰⁷ and the ICTR’s¹⁰⁸ statute use the definition of genocide as established in article II¹⁰⁹ of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter, the Genocide Convention), which was adopted by the General Assembly on 9 December 1948¹¹⁰. With regard to the countries specifically taken into account for the present paper,

nummer=&Unterzeichnungsdatum=&FassungVom=19.01.2012&NormabschnittnummerKombination=U
nd&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=, 19/1/2012

¹⁰⁴ See Gold, Maria : « No peace without justice » unter besonderer Berücksichtigung des Völkermordes in Ruanda (2005) , p. 83

¹⁰⁵ See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement>, 22/12/2011, p. 7

¹⁰⁶ See *ibid*, 22/12/2011, p. 7

¹⁰⁷ See article 6, Rome Statute, <http://untreaty.un.org/cod/icc/statute/romefra.htm>, 19/1/2012

¹⁰⁸ See article 2, ICTR statute, <http://www.un.org/ict/statute.html>, 19/1/2012

¹⁰⁹ See <http://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf>, 24/12/2011, p. 280

¹¹⁰ Complete text available under: <http://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf>, 24/12/2011

Austria, the DRC, Rwanda and Uganda are parties to the Genocide Convention, while Sierra Leone is not.¹¹¹

3.2.3 The Special Court for Sierra Leone

Different from the ICC and the ICTR, the Special Court for Sierra Leone (SCSL) was set up by an agreement between the United Nations and the Government of Sierra Leone on 16 January 2002.¹¹² This excludes the participation of other states from the beginning, as they are not parties to the agreement (as it is the case for the Rome Statute establishing the ICC) or not obliged to cooperate with the court through a Security Council resolution, as it is the case for the ICTR.

In addition, and due to its bilateral status between the government of Sierra Leone and the United Nations, the statute does not foresee any articles on mutual legal assistance or extradition, which might prove difficult in cases in which suspects have fled the country. In these cases, the SCSL would have to draw upon bilateral or multilateral conventions to which Sierra Leone and the state in which the alleged offender is present are parties. Unfortunately, this might greatly delay prosecution and might enable some offenders to avoid trial if they have fled to countries which are not parties to any conventions permitting mutual legal assistance or extradition to Sierra Leone for the purpose of prosecuting and trying a suspect at the Special Court.

Article 1, para. 1, of the agreement provides details on the establishment of the court:

¹¹¹ For a detailed list of all states parties and signatories to the Convention and their dates of ratification/accession/signature, please see: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en, 24/12/2011

¹¹² For the complete text of the agreement, see <http://www.sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176>, 23/12/2011

Article 1
Establishment of the Special Court

*1. There is hereby established a Special Court for Sierra Leone to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.*¹¹³

Article 1, para. 1, establishes that the SCSL is to prosecute persons for serious violations of both international humanitarian law and Sierra Leonean law, thereby allowing the court to prosecute certain crimes under the national law of Sierra Leone¹¹⁴, something that neither the ICC nor the ICTR can do. Article 2 on the composition of the SCSL and the appointment of judges indicates that some judges are to be appointed by the Secretary-General, while others will be nominated by the government of Sierra Leone.¹¹⁵ This indicates a further difference between the Special Court and the transitional justice mechanisms discussed above. As Bagamwabo points out, this mix of jurisdiction and composition characterizes the SCSL as a so-called *hybrid court*.¹¹⁶

As the Special Court has jurisdiction over serious violations of Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, it is particularly important to examine the cooperation of the SCSL with the national judicial system. To this end, the statute of the Special Court is following a two-tiered approach: Firstly, it includes an article on concurrent jurisdiction (article 8), which is extremely similar to the article governing concurrent jurisdiction in the statute of the ICTR. Article 8 states that the SCSL and national courts shall have concurrent jurisdiction, but that the SCSL shall have primacy over the national courts and can formally request the deferral

¹¹³ <http://www.sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176>, 23/12/2011, 23/12/2011, p. 1

¹¹⁴ See Bangamwabo, Francois-Xavier : International Criminal Justice and the protection of human rights in Africa. In : Bösl, Anton, and Diescho, Joseph (ed.) : Human Rights in Africa. Legal Perspectives on their Protection and Promotion (2009), p. 112

¹¹⁵ See <http://www.sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176>, 23/12/2011, 23/12/2011, p. 1f

¹¹⁶ See Bangamwabo, Francois-Xavier : International Criminal Justice and the protection of human rights in Africa. In : Bösl, Anton, and Diescho, Joseph : Human Rights in Africa. Legal Perspectives on their Protection and Promotion (2009), p. 112

of competence by a national court at any stage of the procedure.¹¹⁷ Secondly, to avoid confusion as to which crimes under Sierra Leonean law can be prosecuted by the SCSL; the statute provides an exhaustive list of crimes under Sierra Leonean law in its article 5 that the SCSL shall have the power to prosecute:¹¹⁸

Article 5
Crimes under Sierra Leonean law

The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law:

- a. Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31):*
 - i. Abusing a girl under 13 years of age, contrary to section 6;*
 - ii. Abusing a girl between 13 and 14 years of age, contrary to section 7;*
 - iii. Abduction of a girl for immoral purposes, contrary to section 12.*
- b. Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:*
 - i. Setting fire to dwelling - houses, any person being therein, contrary to section 2;*
 - ii. Setting fire to public buildings, contrary to sections 5 and 6;*
 - iii. Setting fire to other buildings, contrary to section 6.¹¹⁹*

In line with the particular nature of the crimes committed in Sierra Leone, the statute of the SCSL singles out crimes of child abuse, property destruction and arson as the serious violations of Sierra Leonean law to be prosecuted by the Special Court. This demonstrates that, even though the hybrid court has the power to prosecute certain crimes committed under Sierra Leonean law, it is, true to its nature as transitional justice mechanism, not dealing with ordinary criminality either, leaving those trials again to the national judicial system.

¹¹⁷ See article 8, <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnD1MJeEw%3D&>, 23/12/2011, p. 3f

¹¹⁸ See <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnD1MJeEw%3D&>, 23/12/2011, p. 2f

¹¹⁹ <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnD1MJeEw%3D&>, 23/12/2011, p. 2f

3.3 Truth commissions and alternative options

Rigby points out that truth commissions are often adopted by regimes that lack the will or the means to prosecute the perpetrators of political crime, or in cases in which the policy of forgiving and forgetting is not viable because of the depth of division and the level of bitterness in the society concerned.¹²⁰ He then continues to provide an overview over the conditions generally associated with such a situation by stating that a truth commission might be the best way to progress if

- 1) the number of those complicit in past evils is such that, should they be prosecuted, there would not be a basis for future reconciliation
- 2) a significant proportion of those who would be targeted by any purge are from one particular ethnic group or community, as a purge in these conditions might provide the basis for future social and political division
- 3) the new regime is not confident that it is able to carry out a purge.¹²¹

Rigby further explains that such conditions are likely to prevail if the new regime has come to power through some negotiated process which involved either the likely targets of a potential purge and/or their patrons rather than through a victory over the previous regime.¹²²

Rwanda and Uganda both resorted to traditional or alternative mechanisms to address crimes committed during the conflicts. While Rwanda adapted the traditional mechanism of the so-called Gacaca courts to deal with certain crimes committed during the genocide in 1994, Uganda established two separate truth commissions to investigate crimes. For the purposes of this study, only the second truth commission, the Commission of Inquiry into Violations of Human Rights established in 1986¹²³, will be examined, while the first commission, the Commission of Inquiry into the

¹²⁰ See Rigby, Andrew: *Justice and Reconciliation* (2001), p. 7

¹²¹ See *ibid.*, p. 7

¹²² See *ibid.*, p. 7

¹²³ See <http://www.usip.org/publications/truth-commission-uganda-86>, 8/1/2012

Disappearance of people in Uganda, established in 1974¹²⁴, will not be discussed in further detail.

3.3.1 Rwanda: The Gacaca courts

As Ingelaere points out, a Western-style legal system was established in Rwanda during the colonial period, while the Gacaca courts as traditional mechanisms for conflict resolution at the local level continued to exist.¹²⁵ For the judicial system, the change was drastic, as the new legal system brought along the introduction of written law and a new court system that was declared hierarchically superior in view of the traditional institutions in place.¹²⁶ The introduction of written law, which is an absolute necessity in civil and common law systems, poses particular challenges: Laws need to be publicized and disseminated to become effective, they need to be known and understood by the population and the legal professionals, a task which becomes more complicated the higher the illiteracy rate in a country is¹²⁷.

The consequences of the 1994 genocide on the judicial system were devastating: judges had been killed or forced to flee the country, by the time the Rwandan Patriotic Front (RPF) took over power on 4 July 1994¹²⁸, the ordinary (meaning, Western-style) justice system was virtually non-existent.¹²⁹ Given the fact that there were extraordinarily high numbers of persons suspected to have participated in the genocide killings present in the country, this was particularly problematic as they could not be tried as it usually would have been the case without a judicial system in place. However, even as the judicial system started to work again, it became quickly overloaded with prosecuting the genocide suspects¹³⁰ (in 1999, five years after the end of the genocide,

¹²⁴ See <http://www.amnesty.org/en/international-justice/issues/truth-commissions>, 11/1/2012

¹²⁵ See Ingelaere, Bert: The Gacaca Courts in Rwanda. In: Huyse, Luc/ Salter, Mark (ed.): Traditional Justice and Reconciliation after Violent Conflict. Learning from African Experiences (2008) , p. 34

¹²⁶ See *ibid*, p. 34

¹²⁷ Even for the period of 2005 – 2008, UNICEF indicates an adult illiteracy rate of only 70%, stating that almost one third of the adult population is not literate (see http://www.unicef.org/french/infobycountry/rwanda_statistics.html, (8/1/2012).

¹²⁸ See Ingelaere, Bert : The Gacaca Courts in Rwanda (2008) , p. 31

¹²⁹ See *ibid*, p. 35

¹³⁰ See *ibid*, p. 35

approximately 130.000 persons were still imprisoned for offences related to the genocide¹³¹).

Therefore, and given the fact that prosecutions at the ICTR did not start until 1997 (as outlined above), Rwanda had to resort to additional mechanisms in order to address the crimes committed during the genocide. As explained above, traditional justice in pre-colonial Rwanda was based on Gacaca courts established in the communities. While they had never ceased to exist during the colonization, the newly introduced Western-style legal system had taken primordial responsibility for judicial decisions in that time (see above). Nevertheless, following the breakdown of the judicial system in the aftermath of the genocide, the use and establishing of Gacaca courts was encouraged to address minor disputes within the population.¹³²

However, citing a 1996 UNHCHR report on the Gacaca courts, Ingelaere states that, in the initial years after the genocide, it was an absolute taboo to talk about killings during the Gacaca sessions.¹³³

When it became clear that the new judicial system could not cope with the vast number of trials it would have to conduct¹³⁴, Gacaca courts¹³⁵ were rethought and remodelled to deal also with certain crimes committed during the genocide (contrary to the jurisdiction of the ICTR, Gacaca courts have a temporal jurisdiction to try those crimes against humanity and genocide committed between 1 October 1990 and 31 December 1994, thus encompassing a far broader timeline.)¹³⁶ Similar to the standard procedure used in truth commissions, the defendants must give as much detail as possible and apologize in public (all Gacaca sessions are mandatory to attend for all adults in a community).¹³⁷

¹³¹ See *ibid*, p. 37

¹³² See Ingelaere, Bert : *The Gacaca courts in Rwanda* (2008) , p. 35

¹³³ See United Nations High Commissioner for Human Rights (UNHCHR), *Gacaca: Le Droit Coutumier au Rwanda* (1996), in : Ingelaere, Bert: *The Gacaca Courts in Rwanda* (2008), p. 36

¹³⁴ See Ingelaere, Bert : *The Gacaca Courts in Rwanda* (2008), p. 45

¹³⁵ For more information, see the official website of the Gacaca courts : <http://www.inkiko-gacaca.gov.rw/En/EnIntroduction.htm>, 16/1/2012

¹³⁶ See Ingelaere, Bert : *The Gacaca Courts in Rwanda* (2008), p. 38f

¹³⁷ See *ibid*, p. 39 and 55

Since their reinvention, Gacaca courts have become the most important instrument of transitional justice in Rwanda.¹³⁸ The cooperation between Gacaca courts and Western-style courts is similar to the one between international courts or tribunals and national courts: The most high-profile suspects, in the case of Rwanda the persons who occupied positions of leadership, and, interestingly, rapists, are to be tried by the ordinary court system, while all other suspects are to be tried by a Gacaca court.¹³⁹

Of the 818.564 persons to be tried for genocide related crimes, approximately one tenth, or 80.000 people, are placed in this first category of high-profile suspects to be tried by the classical court system.¹⁴⁰ The scope of the trials to be undertaken and therefore its toll on the judicial system is enormous, in particular when comparing the number of high-profile suspects to the Rwandan population, totalling at approximately 11.3 million in 2011.¹⁴¹

Contrary to the judges in a classic judicial system, Gacaca judges do not require legal education or training, but are only required to be persons of integrity; however, they did receive a short training on the law and procedures to be applied.¹⁴² This lack of legal education and training is extremely problematic, given that the right to a fair trial can be compromised if the judge did not undergo legal education. This is particularly problematic since the Gacaca courts are entitled to try suspects for crimes of genocide or crimes against humanity, which, in a classic court system, are usually to be tried in front of a jury.¹⁴³

¹³⁸ See *ibid*, p. 45

¹³⁹ See Ingelaere, Bert : *The Gacaca Courts in Rwanda* (2008), p. 40 f

¹⁴⁰ See *ibid*, p. 42 f

¹⁴¹ See <https://www.cia.gov/library/publications/the-world-factbook/geos/rw.html>, 11/1/2011

¹⁴² See Ingelaere, Bert : *The Gacaca Courts in Rwanda* (2008), p. 41 and 49

¹⁴³ In Austria, the crime of genocide is criminalized in §321 StGB and has to be tried by a jury, the highest existing trial of first instance, according to §31 Abs 2 StPO (see [http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR40124595&ResultFunctionToken=82d2ec63-7eae-49f3-960e-2c37315bb299&Position=1&Kundmachungsorgan=&Index=&Titel=stpo&Gesetzesnummer=&VonArtikel=&BisArtikel=&VonParagraf=&BisParagraf=&VonAnlage=&BisAnlage=&Typ=&Kundmachungsnummer=&Unterzeichnungsdatum=&FassungVom=11.01.2012&NormabschnittnummerKombination=Und](http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR12029871&ResultFunctionToken=b5091dc4-8666-4277-9fd8-969cc6ecf2f9&Position=1&Kundmachungsorgan=&Index=&Titel=stgb&Gesetzesnummer=&VonArtikel=&BisArtikel=&VonParagraf=&BisParagraf=&VonAnlage=&BisAnlage=&Typ=&Kundmachungsnummer=&Unterzeichnungsdatum=&FassungVom=11.01.2012&NormabschnittnummerKombination=Und&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=v%c3%b6lkermord, 11/1/2012, and <a href=)

Ingelaere points out that the ordinary Rwandan citizen prefers the Gacaca courts over the classical judicial system and the ICTR, as those are institutions that do not convey the idea of a justice of proximity, which tends to be better accepted.¹⁴⁴ The Gacaca courts are helping Rwanda coming to terms with the genocide in the fact that they reduce the backlog of genocide-related cases¹⁴⁵ and prisoners awaiting trial even after more than 17 years after the genocide have passed. However, while the legal qualifications of the Gacaca judges to deal with such serious issues remain questionable, survivors also feel that the state is the only one to benefit from Gacaca trials, as imprisonment and community service are regarded as being to the benefit of the state rather than to the benefit of the individual survivors.¹⁴⁶

In addition, the fact that the Gacaca courts are not able to address crimes committed by the RPF and revenge killings by Tutsi civilians often leads to the impression of victor's justice in the eyes of the Hutu community¹⁴⁷, thereby adding further to the ethnic split of the population instead of aiding reconciliation among the two primary ethnic groups of the country, the Hutu and the Tutsi. Gacaca court sessions hold another complication for many of the women victims in the communities: As the sessions are public and attendance is mandatory¹⁴⁸, it is very difficult for the Gacaca courts to deal with sexual violence in the required privacy for the victim.¹⁴⁹ As it is the case with other judicial systems¹⁵⁰, proceedings in the Gacaca courts can be held without the attendance of the public if required; however, Ingelaere explains that this

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¹⁴⁴ See Ingelaere, Bert : The Gacaca Courts in Rwanda (2008), p. 51

¹⁴⁵ See *ibid*, p. 52

¹⁴⁶ See *ibid*, p. 48

¹⁴⁷ See *ibid*, p. 55 f

¹⁴⁸ See *ibid*, p. 190

¹⁴⁹ See *ibid*, p. 184

¹⁵⁰ In Austria, court sessions can be conducted without the attendance of the public in case this is required as e.g. aspects concerning the personal sphere of a suspect, victim, witness or third person are to be discussed (see §229 Abs 1 Z 1 StPO, [47](http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR40092959&ResultFunctionToken=e48d05a1-53b8-4034-a962-f5fc8f76adc9&Position=1&Kundmachungsorgan=&Index=&Titel=stpo&Gesetzesnummer=&VonArtikel=&BisArtikel=&VonParagraf=&BisParagraf=&VonAnlage=&BisAnlage=&Typ=&Kundmachungsnummer=&Unterzeichnungsdatum=&FassungVom=11.01.2012&NormabschnittnummerKombination=Und&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=ausschluss+der+%c3%b6ffentlichkeit, 11/1/2012).</p></div><div data-bbox=)

does not seem to facilitate the proceedings given the local embedding of the Gacaca courts.¹⁵¹

Nevertheless, the Gacaca Courts have been successful in trying a high number of suspects and reducing the number of prisoners in Rwanda, thereby also improving their detention conditions as prisons are less overcrowded than prior to the Gacaca trials. As the Rwandan delegation to the Working Group on the Universal Periodic Review pointed out, the number of genocide convicts serving time in Rwandan prisons in 2011 had decreased to approximately 38.000 persons, with the remaining convicts reintegrated into their communities.¹⁵² The level of reintegration remains questionable however; and while the Rwandan government insists that there have not been any revenge killings in the communities, it remains to be seen whether the reintegration has been as successful as announced or whether the situation resembles more a powder-keg on which a lid has been placed.

To conclude, while the Gacaca courts have proven to be important instruments of transitional justice in Rwanda and greatly facilitate the coming to terms with the crimes committed during the genocide, it is equally important to remember and work on the inadequacies this system has in terms of fair trial guarantees and legal qualifications. In Rwanda, mass atrocities required an additional response outside the pre-established judicial system; however, the guarantees of that system need to be respected also in alternative forms of justice.

This is particularly true for transitional justice courts are authorized to sentence and imprison persons. Other forms of transitional justice mechanisms that are conceived as clearer alternatives to the judicial system, such as truth commissions, need to respect the fair trial guarantees just as much as the judicial system needs to; however, they are less likely to infract those guarantees as they tend not to be able to imprison or sentence people in a similar way to the judicial system.

¹⁵¹ See Ingelaere, Bert : *The Gacaca Courts in Rwanda* (2008), p. 184

¹⁵² See Report of the Working Group on the Universal Periodic Review, 14/3/2011, p. 4 f, accessible at : <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/117/93/PDF/G1111793.pdf?OpenElement>, 17/1/2012

3.3.2 Uganda: The Commission of Inquiry into Violations of Human Rights

Uganda, following the atrocities committed during the rule of Idi Amin, opted for a truth commission as a mechanism of transitional justice to investigate potential human rights violations. The Commission of Inquiry into Violations of Human Rights was set up by the Minister of Justice/Attorney General through a legal notice of 16 May 1986 and was given a large time-frame to investigate, starting with independence on 9 October 1962 till 25 January 1986, when Museveni came into power¹⁵³.¹⁵⁴ It also had a particularly broad mandate and was tasked with inquiring into:

[...]

- *the causes and circumstances surrounding the mass murders and all acts or omissions resulting in the arbitrary deprivation of human life, committed in various parts of Uganda;*
- *the causes and circumstances surrounding the numerous arbitrary arrests, consequent detentions without trial, arbitrary imprisonment and abuse of the powers of detention and restriction under the Public Order and Security Act, 1967;*
- *the denial of any person of a fair and public trial before an independent and impartial court established by law;*
- *the subjection of any person to torture, cruel, inhuman and degrading treatment;*
- *the manner in which the law enforcement agents and the state security agencies executed their functions, the extent to which the practices and procedures employed in the execution of such functions may have violated the human rights of any person and the extent to which the state security agencies may have interfered with the functioning of the law-enforcement agents;*
- *the causes and circumstances surrounding the massive displacement of persons and expulsion of people including*

¹⁵³ See <http://www.usip.org/publications/truth-commission-uganda-86>, 11/1/2012

¹⁵⁴ Complete text available under

<http://www.usip.org/files/file/resources/collections/commissions/Uganda86-Charter.pdf>, 11/1/2012

Uganda citizens from Uganda and the consequent disappearance or presumed death of some of them;

- *the subjection of any person to discriminatory treatment by virtue of race, tribe, place of origin, political opinion, creed or sex, by any person acting under any written law or in the performance of the functions of any public office or public authority;*
- *the denial to any person of any other fundamental freedoms and rights prescribed under Chapter III of the Constitution of Uganda or the un-lawful interference with the enjoyment by any person in Uganda of the said freedoms and rights;*
- *the protection by act or omission of any person that perpetrated any of the aforesaid things, from due process of law;*
- *any other matter connected with or incidental to the matters aforesaid which the Commission may wish to examine and recommend.*¹⁵⁵

The mandate of the truth commission includes several tasks directly related to the judicial system in place during Idi Amin and Milton Obote's rule, in particular the denial of a fair trial and the arbitrary detentions or detentions without trial. The commission itself was to determine where and when to hold its meetings, and whether these meetings were to be public, partly public or private.¹⁵⁶ This provision can help protect the privacy of victims and witnesses if meetings are conducted in private.

However, the commission was to report back to the Minister of Justice, which could lead to its interpretation as dependent on the government rather than being an independent instrument of transitional justice. In addition, the commission ran into serious financial trouble which hampered its work, at one point, it was only to continue working thanks to a donation of the Ford Foundation to the Ugandan government.¹⁵⁷

¹⁵⁵ <http://www.trial-ch.org/en/resources/truth-commissions/africa/uganda.html>, 11/1/2012

¹⁵⁶ See <http://www.usip.org/files/file/resources/collections/commissions/Uganda86-Charter.pdf>, p. 3, 11/1/2012

¹⁵⁷ See <http://www.usip.org/publications/truth-commission-uganda-86>, 11/1/2012

While the commission's report of 1994 was not widely disseminated, its major conclusions and recommendations became known: The commission has found evidence of widespread arbitrary detention and recommended the repeal of laws allowing detention without trial as well as the incorporation of human rights education into school and university curricula as well as into the training programs of the army and security forces.¹⁵⁸

While those findings and recommendations form a starting point for addressing human rights violations, there is, as newspapers criticize, no inquiry into potential human rights violations committed under the current president Yoweri Museveni's rule.¹⁵⁹ In addition, the Commission of Inquiry is also criticized by some as being a "[...] political strategy to provide legitimacy to the current government."¹⁶⁰ This casts a shadow on the work of the Commission of Inquiry and, alongside with the fact that, even 17 years after its end, the report is not widely disseminated, raises questions about its effectiveness.

¹⁵⁸ See <http://www.usip.org/publications/truth-commission-uganda-86>, 11/1/2012

¹⁵⁹ See <http://www.ugandacorrespondent.com/articles/2011/07/we-need-a-new-inquiry-into-post-1986-atrocities/> (of 1/8/2011), 11/1/2012

¹⁶⁰ <http://www.trial-ch.org/en/resources/truth-commissions/africa/uganda.html>, 11/1/2012

4 Post-conflict situations and their specific challenges to judicial systems

While post-conflict situations all share common characteristics, it cannot be disregarded that each post-conflict situation is different and unique. The historical context, the composition of society, the resources in terms of infrastructure and education, the judicial system in place before and during the conflict as well as the conflict itself are distinct in every post-conflict situation. Therefore, also the challenges the judicial systems are experiencing in post-conflict situation vary from country to country and from conflict to conflict. This implies that no one-size-fits-all approaches and no such solutions can be implemented for all judicial systems in post-conflict situations.

Nevertheless, there are certain challenges that most states in post-conflict situations share, and they are worth being examined in more detail as any ways of addressing such challenges might serve as building blocks of a comprehensive response, which can be fine-tuned and adjusted to the particular post-conflict situation in order to in re-establish a judicial system in any particular case. OHCHR determines the following challenges as reappearing frequently in post-conflict situations:

- a dysfunctional judicial system whose staff members have either left the country or are completely discredited in the eyes of the public,
- a police which has been part of the problem as violators of human rights, and whose staff has either fled or is completely rejected by the population,
- overcrowded prisons in which brutality has reigned and people have been detained for years without charge or trial,
- a shattered, terrified local civil society which lacks resources and whose most effective leaders have either been killed or forced into exile
- corruption and trafficking is rampant

- landmines pose a great danger and limit the freedom of movement and economic activity, in particular with regards to agriculture.¹⁶¹

This non-exhaustive list demonstrates that judicial systems in post-conflict situations are faced with much more challenges than one would initially expect. These challenges lie on several different, although interdependent, levels. The most important challenges to a judicial system in a post-conflict situation can be examined on three levels:

Firstly, on the legal level, as a judicial system might not have the required independence, or as legislation might not be compliant with international standards for human rights and treaties that the state concerned is a party to. Secondly, the judicial system might not be sufficiently staffed or staff might be not suitable to carry out its assigned tasks because of a lack in training, its affiliation with the crimes committed during the conflict or rampant corruption. On the same level, the qualifications or lack of qualified defence lawyers can be situated. As OHCHR points out, in many post-conflict states, an independent defence bar does not exist, in particular if there are not enough lawyers and most of them are concentrated in the capital, as it was the case in Rwanda and as it is the case in the Democratic Republic of the Congo.¹⁶² Thirdly, the required infrastructure to render the judicial system efficient and fair, such as accessible (both in terms of roads and in terms of landmine-free surroundings) and suitable court houses and prisons, might never have existed or might have been destroyed during the conflict.

On the legal level, if the basic principle of the independence of the judiciary is not respected, the population will not be able to trust the judiciary and will not approach it for help as the judiciary will always be regarded as part of the regime and as controlled by it. People will not accept its rulings as fair, as favouritism and political gain are likely to be influencing judicial decisions greatly.

¹⁶¹ See OHCHR : Rule of Law Tools for Post-conflict States, p. 5

¹⁶² See *ibid*, p. 11

Similarly, if the legislation in place is not in accordance with international human rights standards and treaties by which the state in question is bound, the decision taken and the punishments inflicted by the judicial system will be regarded as illegal. In addition, if judicial decisions contradict these standards and norms, they are likely to be regarded as cruel and inhumane by both the local population and the international community.

Therefore, should the initial review have resulted in the conclusion that the judicial system is not independent, the provisions regarding the establishment of the judiciary, which are likely to be found in the constitution or a legal framework of similar rank, should be reviewed to ensure the independence of the judiciary. Furthermore, if national legislation is out-dated or infracts international human rights standards, the necessary amendments to render it compliant with those standards need to be made. If such amendments are being made, it is of crucial importance to ensure their communication not only to the legal professionals concerned, such as judges, prosecutors and lawyers, but also to the general population in order to enable it to hold the judicial system accountable.

In determining the strategy to adopt to re-establish a judicial system, it is important to start addressing by a stock-taking exercise: Trying to understand how the judicial system worked before and during the conflict needs to be the starting point of any efforts to re-establish a judicial system. OHCHR explains this in the context of peacekeeping operations¹⁶³; however, their argument is equally valid in any other post-conflict situation, even when there is no peacekeeping mission present to work on the re-establishment of a judicial system. Mapping the judicial system not only on a qualitative level regarding the court structure, appellate courts, the categorization of crimes and the procedures in place, but also on a quantitative level regarding the number of courts in place, their staffing and caseload, is of crucial importance to planning the re-establishment of a judicial system and to making informed decisions on how to approach this task.¹⁶⁴ In addition, understanding any potential role the judiciary

¹⁶³ See OHCHR : Rule of Law Tools for Post-conflict States, p. 1

¹⁶⁴ See *ibid*, p. 10

and the police have played in the conflict is crucial¹⁶⁵, as only such knowledge about the institutions and subsequent changes to their behaviour will help the state concerned emerge from its post-conflict situation.

The staffing of the judicial system is of utmost importance. If judges and prosecutors, but also court clerks and administrative personnel do not have the required training and corruption is widespread among them, the judicial system will be regarded as inefficient in the best case and as partial, unfair and nepotistic in the worst case.

Therefore, the stock-taking exercise has to continue with regards to the personnel working within the judicial system, from the judges to the prosecutors, court clerks and administrative personnel as well as to the lawyers. Concerning the officials already serving, a vetting exercise to determine their suitability for continuing in office as suggested by OHCHR¹⁶⁶ can be of great help in establishing an independent judicial system and in ensuring that the renewed system is not seen as a continuation of the old, potentially oppressive or opportunist judicial system. Officials who have committed crimes before or during the conflict have to be removed from office and replaced by new recruits. However, it can be a case-by-case decision on whether or not to remove certain officials, as e.g. corruption tends to be so widespread in certain post-conflict situations that it will be difficult to find officials that have never accepted a bribe.¹⁶⁷ Concerning new recruits, the appointment process has to be reviewed¹⁶⁸ and vetted to guarantee that it is fair and offers equal opportunities to all applicants.

In order to remove incentives for corruption, the salary system of the judicial personnel should be reviewed and the regular payment of salaries should be ensured. However, this is likely to pose a problem as states in post-conflict situations tend not to

¹⁶⁵ See OHCHR : Rule of Law Tools for Post-conflict States, p. 5

¹⁶⁶ See *ibid*, p. 34

¹⁶⁷ Taking the DRC as example, it is currently ranked as the number 168 out of 183 countries surveyed by Transparency International's Corruption Perceptions Index, which ranks states and territories according to their perceived levels of public sector corruption, indicating that the perceived level of corruption in the DRC is extremely high (see <http://cpi.transparency.org/cpi2011/results/>, 15/1/2012). As the index is based on perceived public sector corruption, this can be taken as an indicator that corruption within the judicial system is also likely to occur. Should a vetting exercise take place, it could be necessary to establish threshold limits concerning the amounts of bribes extorted starting from which officials need to be removed from office. Rwanda is ranked as on position 49, Uganda on position 143 in the 2011 Corruption Perceptions Index (<http://cpi.transparency.org/cpi2011/results/>, 15/1/2012).

¹⁶⁸ See OHCHR : Rule of Law Tools for Post-conflict States, p. 34

be extremely affluent or extremely punctual in their salary payments. Nevertheless, regarding the importance of the judicial system, this should be made a priority. International donors could help improve the situation by either imposing such a condition on their bilateral or multilateral aid or by concentrating their direct aid to the judicial system also on the payment of salaries. In addition, any existing codes of conduct for the judicial personnel should be reviewed or if they do not exist, the option of introducing such codes of conduct could be discussed.

Once the vetting exercise has taken place, a review of strengths and weaknesses of the existing staff will reveal in which areas capacity-building could be required. In accordance with the Paris Declaration on Aid Effectiveness¹⁶⁹, the indications for which areas require capacity-building should come from the post-conflict country¹⁷⁰. International organizations and donors should then carefully plan their training activities on these matters to reach out to the officials in the most efficient way, structuring training along practical cases that the officials are likely to encounter in their daily work.¹⁷¹

In addition to training courses, it might prove successful to adopt a mentoring approach, which would see donors send highly specialized personnel, such as judges or prosecutors, but also court administrators, to post-conflict states for a certain period of time, e.g. six months to one year, to provide on-the-job training and advice on ongoing cases. While this requires significantly more commitment from the donors (as the mentor will have to be replaced in his or her own professional activity at home), it is likely to yield better results than short, general training courses. However, the mentoring activities should not replace the training courses entirely to ensure the participation of all the judicial personnel concerned and to create a common level of knowledge among all the personnel on which any future training or on-the-job advice can be built. For the mentors to become effective as quickly as possible, it is desirable for them to have intimate knowledge of the post-conflict states judicial system as well as on the conflict in order to structure their activities in the most beneficial way and to avoid pitfalls. Mentors with a background in a similar legal system, in particular

¹⁶⁹ Complete text available under: <http://www.oecd.org/dataoecd/30/63/43911948.pdf>

¹⁷⁰ See <http://www.oecd.org/dataoecd/30/63/43911948.pdf>, p. 13

¹⁷¹ See OHCHR : Rule of Law Tools for Post-conflict States, p. 35

regarding the differences between common law or civil law systems, are likely to be more effective as they are familiar with the specific challenges posed by the system in place.

To ensure that potential future applicants have all the required competencies, the curricula of law faculties should be reviewed and modernized where necessary.¹⁷² This holds especially true if, in the first step of the stock-taking exercise, the review of legislation, legislation has been determined as out-dated or as contradicting human rights standards and has been updated or amended accordingly. OHCHR presents several examples of OSCE or United Nations staff teaching classes in law faculties in several post-conflict countries, including Rwanda, themselves, and reiterates the importance of working with law professors in order to ensure the sustainability of this effort.¹⁷³

If a bar association exists in the post-conflict state, it is important to imply it early in the re-establishment process to ensure the participation in and acceptance of the new system by the lawyers. As for the judicial personnel, a vetting exercise for lawyers could help improve the system, in particular if lawyers have been part of the oppressive system (as it was the case in Rwanda, as OHCHR points out¹⁷⁴). If no bar association exists, the introduction of an independent association might be worth discussing, in particular with regards to the induction of new lawyers and the disciplinary powers over its members that a bar association can have.¹⁷⁵

In addition to the vetting and capacity-building exercises, monitoring should be brought in to ensure the performance of the judicial system. In this regard, OHCHR explains that any attempts to influence a jurist's behaviour or the outcome of cases, as well as allegations of corruption and extortion should be recorded, investigated and documented, while the same holds true as well for any attacks or other violence directed at anyone working in the legal system.¹⁷⁶

¹⁷² See OHCHR : Rule of Law Tools for Post-conflict States, p. 25

¹⁷³ See *ibid*, p. 25 f

¹⁷⁴ See *ibid*, p. 24 f

¹⁷⁵ See *ibid*, p. 25

¹⁷⁶ See *ibid*, p. 7

On a very practical level, the infrastructure at the disposal of the judicial system needs to be examined and readjusted. In particular, prisons and detention centres are likely to pose an enormous challenge in post-conflict situations¹⁷⁷: While there are frequently more detainees following the conflict, the conditions in prisons are often completely deteriorated, the buildings are overcrowded, there is poor or little food, access to clean drinking water might be limited and diseases might be spreading without medical control.¹⁷⁸ In addition, many prisons pose serious risks to detainees, in particular if they are held without their families' knowledge and without access to lawyers.¹⁷⁹ The discussion of the United Nations Standard Minimum Rules for the Treatment of Prisoners below will explain that detaining juveniles together with adults and men and women together exposes prisoners to great risk and has to be avoided, yet this is often standard practice in post-conflict countries.

While it will be almost impossible to immediately render prisons and detention centres compliant with international standards, this problem needs to be tackled immediately as overcrowded detention centres with poor standards are against international human rights. In doing so, in particular in adapting the infrastructure and in building new detention facilities, the financial support and technical know-how of international organizations and donors is required. Even if this support is given, the adaptation and rebuilding will require a certain amount of time during which detainees have to remain in the old, unsuitable buildings.

Nevertheless, their detention conditions can be improved immediately through a complete abolition of torture in prisons and through regular visits by medical staff. In addition, no incommunicado detention should be allowed and regular visits by family and lawyers should be facilitated. Furthermore, the ICRC, which is present in most post-conflict countries, should be allowed to conduct regular visits in accordance with its mandate.¹⁸⁰

¹⁷⁷ See OHCHR : Rule of Law Tools for Post-conflict States, p. 19

¹⁷⁸ See *ibid*, p. 19

¹⁷⁹ See *ibid*, p. 19

¹⁸⁰ See <http://www.icrc.org/eng/who-we-are/mandate/index.jsp>, 15/1/2012

Furthermore, the case handling and documentation system needs to be examined and potential amendments need to be made. If possible, files that have been lost during the conflict should be retrieved or reconstructed. However, the reconstruction of files holds a great danger if no detailed, reliable information is available. If the necessary information has been lost, the release of the detainee and the non-prosecution of suspects will be the most likely result in order to prevent system abuse and protect the population from arbitrary judicial decisions and arbitrary detention. While it will be impossible to set up a state-of-the art, electronic file management system in most post-conflict countries given the fact that there often are no computers or even electricity in the court buildings (if those exist), donors should focus on the supply of required material such as paper, binders, typewriters etc. to the administration. This is the case for both the court administration and the administration of law enforcement, as particularly in detention facilities, the meticulous record-keeping decides over whether a person who has served his or her sentence is being released on time or not.

Another challenge to the judicial system is the role of the military: OHCHR explains that, in states that are emerging from a conflict, the armed forces have often played a role in the administration of justice – and their role has usually been a negative one.¹⁸¹ However, following the theory of the separation of powers according to Montesquieu, the judiciary, the legislative and the executive should be separated in a state.¹⁸² Modern democracies follow this dogma in a refined version. While the three functions are separated, there are inter-related checks and balances¹⁸³ in order to ensure the adherence to the highest standards of human rights and independence. OHCHR continues to explain that the interference of the military in court cases usually consists of intimidation of judges and prosecutors or usurpation of the police function, while the armed forces also arrest and detain civilians.¹⁸⁴

¹⁸¹ See OHCHR : Rule of Law Tools for Post-conflict States, p. 17

¹⁸² See <http://press-pubs.uchicago.edu/founders/documents/v1ch10I.html>, 19/1/2012

¹⁸³ See <http://qje.oxfordjournals.org/content/112/4/1163.abstract>, 19/1/2012

¹⁸⁴ See OHCHR : Rule of Law Tools for Post-conflict States, p. 17. Rwanda provides for this separation in article 140 of its constitution by stating that « ... The Judiciary is independent and separate from the legislative and executive branches of government. It enjoys financial and administrative autonomy. » (http://www.amategeko.net/display_rubrique.php?ActDo=ShowArt&Information_ID=1434&Parent_ID=30694645&type=public&Langue_ID=An&rubID=30694745#30694745, 16/1/2012)

The usurpation of police functions by the military poses a particular problem, as this is a systemic challenge that cannot be addressed by simply removing individuals responsible for arbitrary arrests or for the intimidation of a judge from the armed forces. While the military often expands its functions in a crisis and in its immediate aftermath, it is important that, as soon as a certain state of calm and quiet is achieved, the military renounces to these additional tasks, accepts its much-diminished role in law enforcement and returns to concentrating on its core tasks of national defence and emergency relief¹⁸⁵.

However, as it is the case in most post-conflict situations, the military is likely to want to contain exercising these additional powers, in particular if there are militia groups active in the state territory. This is only one of the reasons why the demobilization, disarmament and reintegration (DDR) of militia groups, which threaten the instable balance of peace in a post-conflict society, is of crucial importance.¹⁸⁶

The entire process of re-establishing the judicial system should be accompanied by a communication campaign aimed at the general population in order to inform them of the changes taking place in the judicial system. Furthermore, the population should be informed of the procedure established to complain about officials not complying with their duties or acting against the law. In addition, monitoring of the results of the reform, in particular through the observation of trials and pre-trial procedure¹⁸⁷, should take place to ensure compliance with the newly established standards and to provide on-the-job advice on the new procedures whenever necessary.

If there is a peacekeeping mission in place, the mission might conduct such monitoring activities. If this is not the case, the international community, in particular international organizations such as the United Nations, but also international lawyers' associations such as the Union Internationale des Avocats (UIA)¹⁸⁸, the International

¹⁸⁵ See OHCHR : Rule of Law Tools for Post-conflict States, p. 31

¹⁸⁶ See *ibid*, p. 18

¹⁸⁷ See *ibid*, p. 6

¹⁸⁸ See http://dlh.uianet.org/index.php?id=8&L=1&id_dossier=1, 19/1/2012

Bar Association (IBA)¹⁸⁹, the Association Internationale des Jeunes Avocats-International Association of Young Lawyers (AIJA)¹⁹⁰, the Council of Bars and Law Societies of Europe (CCBE)¹⁹¹ and the American Bar Association (ABA)¹⁹² can be of great help in monitoring progress. While the constant monitoring through field-based assessors with detailed knowledge of local processes is preferable to ensure continuing improvements and feed-back as well as on-the-job training to stakeholders, short assessment missions focusing on the progress made since the last visit can also be successful.

While this strategy can be applied and adjusted to most post-conflict situations, one of the primary requirements for the successful re-establishment of an independent and fair judicial system remains the same: The political will to establish such a system needs to be present, otherwise, all efforts by civil society and the international community will not be sufficient to ensure its establishment and functioning. On a political level, it can be difficult to judge whether a post-conflict state is willing to make this effort and render the judiciary independent and functional, but does not manage to do so because of structural and financial constraints or whether any lukewarm efforts to establish such a system are merely concealing the fact that the government is, for whatever reason, not interested in having an independent judiciary.

In carrying out this assessment, it is important to keep in mind the reasons and roots of the conflict, as internal conflicts, such as civil war, and external conflicts, such as classic inter-state war, can have completely different consequences for the internal institutions of a state, including the government and the judicial system. Nevertheless, it is safe to say that democratic governments tend to be interested in establishing an independent judicial system, whereas dictators might prefer to be able to use the judiciary to their own benefits. While regime changes might initially make it difficult to determine whether a government adheres to democratic standards or not, the re-

¹⁸⁹ See http://www.ibanet.org/Human_Rights_Institute/About_the_HRI/HRI_Activities/trial_observations.aspx, 19/1/2012

¹⁹⁰ See http://www.aija.org/modules/aija_commission/index.php?id=17, 19/1/2012

¹⁹¹ See <http://www.ccbe.eu/index.php?id=10&L=0>, 19/1/2012

¹⁹² See http://www.americanbar.org/groups/human_rights/projects.html, 19/1/2012

establishment of a judicial system requires more than enough time to let all implementing partners understand each other's intentions and ideas.

However, if a new regime proves to be undemocratic, the international community and the donor countries or agencies should continue their efforts in coordination with the civil society. While it might not be possible to achieve a perfectly independent and efficiently functioning judicial system, adherence to basic human rights standards and the improvement of detention conditions can be achieved also under a government that might not be the gold standard in terms of democratic behaviour.

5 Rebuilding judicial systems as integral part of state-building initiatives

5.1 State-building and the judicial system

While the judiciary, as explained above, has to be independent from any undue influence by the government or other state or non-state-actors, it can nevertheless play a crucial role in successful state-building: One of the most important problems in many post-conflict states, such as the DRC, is complete impunity for perpetrators of crimes. This is the case for serious offences, such as crimes that fall under the jurisdiction of the ICC, as well as for murder, rape and petty crimes that are committed at the time of the conflict or in the post-conflict situation, but do not have any links to the conflict and are part of everyday criminality in many post-conflict states.

The only way to end impunity and establish the most basic functions of a state is by re-establishing a functioning, independent judicial system to address everyday criminality, in addition to which transitional justice mechanisms might be instituted as required to handle crimes committed during the conflict. This is particularly true as other state functions, such as for example the provision of medical care, can be outsourced and provided by e.g. non-governmental organizations during and in the immediate aftermath of a conflict. NGOs can train the judicial personnel and contribute to the reconstruction of the necessary infrastructure; however, they cannot provide any substitution of a judicial system. While the international community might do so with its institutions of transitional justice, these do not address everyday crime or crime that was not committed in connection with a conflict, thereby leaving an institutional gap that can only be filled by the state itself.

A functioning judicial system reduces the incentive to take extrajudicial measures, such as revenge on the perpetrators of crimes that might have been committed during the conflict or already in the post-conflict period, and thereby greatly increases a state's chances to achieve a certain level of internal security. Jones et al. show also how a malfunctioning, weak and corrupt judicial system can increase the prevalence of

organized crime, political assassinations, but also petty crime, in addition to extrajudicial killings.¹⁹³ Furthermore, the establishment of a functional, predictable judicial system is crucial to the attraction of external investment, which is something most post-conflict countries are aiming to do, by providing investors with the possibility of having their claims enforced if they are based on correct interpretations of the law.

However, re-establishing such a system as part of a state-building exercise can be a daunting task: As Fukuyama explains, establishing a rule of law requires work on laws, courts, judges, a bar and enforcement mechanisms throughout an entire country¹⁹⁴, which might be particularly difficult should the country concerned be of a major size (such as e.g. the DRC) and have very little to no infrastructure at all in place. Fukuyama even goes so far as to calling the establishment of a rule of law “one of the most complex administrative tasks that state-builders need to accomplish”¹⁹⁵.

However, this formulation demonstrates that establishing the rule of law, and therefore a judicial system, is non-negotiable in state-building exercises if the international community wants them to be effective. Without the establishment of a rule of law, however difficult it might be and however modest it is likely to be at the beginning, no post-conflict state will be able to progress from its current status.

To determine the role of the judicial system in state-building, it is important to start with defining a state itself. The Convention on Rights and Duties of States, adopted on 26 December 1933 by the Seventh International Conference of American States at Montevideo, Uruguay, entered into force on 26 December 1934.¹⁹⁶ In its article 1, it defines a state as follows:

The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined

¹⁹³ See Jones, Seth G., Wilson, Jeremy M., Rathmell, Andrew, and Riley, K. Jack : *Establishing Law and Order After Conflict* (2005) , p. 3

¹⁹⁴ See Fukuyama, Francis : *State Building. Governance and World Order in the Twenty-First Century* (2005) , p. 80

¹⁹⁵ See *ibid*, p. 80

¹⁹⁶ See <http://www.oas.org/juridico/english/sigs/a-40.html>, 21/12/2011

*territory; c) government; and d) capacity to enter into relations with the other states.*¹⁹⁷

While this treaty was negotiated at a Conference of American States and excluded the rest of the world and does not have any parties that are not American States¹⁹⁸, the definition set forth in article 1 gained wider recognition. Fischer and Köck reiterate the opinion that a state exists if the trias of a permanent population, independent power and a defined state territory is present; however, they argue that the fourth criterion, the capacity to enter into relations with other states (or the capacity to act in accordance with public international law, as they phrase it) cannot be regarded as constitutive as the incapacity to act according to public international law would mean a lack of sufficient state organization, which by definition contradicts the existence of a state.¹⁹⁹ As the definition using only the trias of a permanent population, independent power and a defined state territory is widely accepted in public international law, the present paper is using this definition.

With regard to state-building, several definitions have been used throughout the relevant literature. Fukuyama defines state-building as the creation of new government institutions and the strengthening of existing ones²⁰⁰, while Chesterman provides more detail on his definition by stating that:

[...]

*state-building refers to extended international involvement (primarily, though not exclusively, through the United Nations) that goes beyond traditional peacekeeping and peacebuilding mandates, and is directed at constructing or reconstructing institutions of governance capable of providing citizens with physical and economic assistance.*²⁰¹

¹⁹⁷ <http://www.oas.org/juridico/english/treaties/a-40.html>, 21/12/2011

¹⁹⁸ For the status of ratification, see <http://www.oas.org/juridico/english/sigs/a-40.html>, 12/11/2011

¹⁹⁹ See Fischer, Peter, and Köck, Heribert Franz : *Völkerrecht. Das Recht der universellen Staatengemeinschaft* (2004) : p 111.

²⁰⁰ See Fukuyama, Francis : *State-building* (2005) , p. xvii

²⁰¹ Chesterman, Simon : *You, the People. The United Nations, Transitional Administration, and State-Building* (2004) , p. 5

He then continues to describe that state-building in his terms includes quasi-governmental activities as well as human rights and rule of law technical assistance²⁰², which frames the judicial system as a sector that might require technical assistance in a state-building exercise.

Caplan, on the other hand, defines state-building as referring to “efforts to reconstruct, or in some cases to establish for the first time, effective and autonomous structures of governance in a state or territory where no such capacity exists or where it has been seriously eroded”.²⁰³

All the definitions share the common point of view that state-building can start with two different scenarios: firstly, if there have been no institutions in place prior to the state-building efforts, the construction of such governance institutions or structures needs to be addressed, or secondly, if there have been weak institutions in place, they need to be strengthened in order to become effective. Chesterman is the only one to directly address the implication of international actors; however, while Fukuyama and Caplan do not incorporate the international aspect in their definitions, they are not excluding the fact that international involvement in state-building exercises might occur or might even be necessary. In practice, in almost all, if not in all, state-building efforts, the international community will be involved either through the United Nations, the African Union or other international organizations or through direct bilateral technical assistance delivered from states.

The present paper is focused on the first case of state-building, as both in Rwanda and Uganda, a judicial system and governance institutions were established prior to the conflicts, even if they were in dire need of improvements. However, additional institutions can be established also in these countries, be it transitional justice structures to deal with the additional amount of trials to be held as consequence of the conflict (such as the gacaca courts in Rwanda) or other governance structures that are supposed to be of a more permanent nature.

²⁰² See Chesterman, Simon : *You, the People* (2004), p. 5

²⁰³ Caplan, Richard : *International Governance of War-Torn Territories. Rule and Reconstruction* (2005), p. 5

While the implication of the international community has major benefits, such as the fact that donors are making funds and qualified personnel available, this involvement does not come without drawbacks: Fukuyama points out one of the key issues concerning the reestablishment of judicial systems by stating that “[t]he international community knows how to supply government services; what it knows much less well is how to create self-sustaining indigenous institutions.”²⁰⁴ This is particularly true when it comes to the judicial system. As Jones et al. explain, it is difficult to strengthen rule-of law institutions externally²⁰⁵ and the construction or the re-establishment of justice systems can be extremely difficult, in particular in countries that suffer from little formal rule of law at the beginning of the reconstruction period.²⁰⁶

Having determined the importance of the judicial system in state-building exercises, the question on how to best address this issue in practice remains to be solved: As described above, there are several levels that are important to the reconstruction of judicial systems: the required infrastructure needs to be available, trained personnel needs to be recruited, and a sound legal base needs to be established for judges to work with.

To start the internationally-aided reconstruction of a legal system in general, thus including the judicial system, Jones et al. propose a three-tiered approach:

- 1) Determine whether a previous rule of law can be drawn on
- 2) Deploy fully trained personnel from a pre-established, fully recruited pool of criminal justice personnel
- 3) Reconstruct and train personnel to comprise and indigenous criminal justice system²⁰⁷

²⁰⁴ Fukuyama, Francis : *State-building* (2005) , p. 56

²⁰⁵ See Jones, Seth G., Wilson, Jeremy M., Rathmell, Andrew, and Riley, K. Jack : *Establishing Law and Order After Conflict* (2005) , p. 15

²⁰⁶ See *ibid* , p. 22

²⁰⁷ See *ibid* , p. 58f

The first step, the stock-taking exercise, needs to be carried out with great political sensitivity: While a legal system might be in place, it might be necessary to decide its substitution by a different system or different laws governing certain particular issues to avoid association with the previous regime (this might prove to be the case in particular with regime changes or transition from a dictatorship to a democracy). In general, the constitution and other high-ranking laws are more likely to be replaced in a transitory phase than other, less political and more practical rules.

While the second step, the immediate deployment of fully trained personnel, might greatly advance the re-establishment of a judicial system, as of today, there is no such pool of trained personnel available. Furthermore, even trained professionals would require the necessary time to familiarize with the potentially new legal system and its traditions before being able to deliver high-quality legal work.

The third step, the training of personnel to constitute an indigenous criminal justice system, is of particular importance, as it is the only way for a judicial system to become fully independent of donors and technical assistance providers. There are several initiatives aiming at training the personnel and building additional capacities, such as the American Bar Association's Rule of Law Initiative²⁰⁸, which also has a specialized segment on judicial reform.²⁰⁹ In terms of Jones et al.'s three-tiered approach to re-establishing judicial systems, it is important to note that step three can be carried out even without the deployment of fully trained professionals from a pre-established pool as foreseen by step two. Until such a pool ever becomes reality, capacity building will have to happen without such deployments.

Fukuyama also points out that there is another factor that matters in all state-building exercises, in particular when it comes to institutional reform, stating that their success depends also on the domestic demand for institutions and their subsequent creation out of whole cloth rather than by importing or adapting foreign models to local

²⁰⁸ The Rule of Law Initiative has ongoing programs in the DRC and Uganda (e.g., the establishment of mobile courts or « audiences foraines », as they are called, for sexual violence), while a previous program covered Rwanda. See <http://apps.americanbar.org/rol/africa/>, 21/12/2011

²⁰⁹ See http://apps.americanbar.org/rol/programs/resource_judicial_reform.html, 21/12/2011

conditions.²¹⁰ He also points out that, should such domestic demand be lacking, it would have to be created externally, such as through conditions attached to donor programs, or through the direct exercise of power.²¹¹

On a national level, the key governmental actors to be involved in the re-establishment of the judicial system are likely to be the Ministry of Justice and the Ministry of the Interior (for law enforcement issues). On a civil society base, bar associations and potentially judges' associations have to be involved in order for them to be able to serve as independent disciplinary and oversight body, which might also be responsible for ensuring compliance with required qualifications of the legal professions.

On the international level, institutions such as the United Nations Development Program (UNDP, for issues concerning democratic governance²¹² and general capacity building²¹³) and the United Nations Children's Fund (UNICEF, for all issues involving juvenile delinquents, such as e.g. juvenile justice courts in the DRC²¹⁴). OHCHR is available for technical assistance in human rights matters.²¹⁵ Furthermore, international non-governmental organizations such as the American Bar Association²¹⁶ can be implementing projects on training and qualifications of personnel or on rebuilding or rehabilitating the necessary infrastructure.

Furthermore, the protection of victims and witness, but also of court officials is of utmost concern. As shown by the Iraqi example, judges might be reluctant to try serious cases involving powerful criminals for fears of their own and their families' safety.²¹⁷ Therefore, in the re-establishment of a judicial system, the state concerned

²¹⁰ See Fukuyama, Francis : *State Building* (2005) , p. 47f

²¹¹ See *ibid*, p. 48

²¹² See <http://www.beta.undp.org/content/undp/en/home/ourwork/democraticgovernance/overview.html>, 21/12/2011

²¹³ See <http://www.beta.undp.org/content/undp/en/home/ourwork/capacitybuilding/overview.html>, 21/12/2011

²¹⁴ See http://www.unicef.org/protection/drcongo_57798.html, 21/12/2011

²¹⁵ See <http://www.ohchr.org/EN/Countries/Pages/WorkInField.aspx>, 19/12/2012

²¹⁶ See <http://apps.americanbar.org/rol/>, 19/1/2012

²¹⁷ See Jones, Seth G., Wilson, Jeremy M., Rathmell, Andrew, and Riley, K. Jack : *Establishing Law and Order After Conflict* (2005) , p. 137

needs to take into account any potential threats against its judicial personnel, and elaborate ways and strategies to effectively tackle such threats.

5.2 International standards and norms

As each post-conflict situation is different from the ones experienced before and the ones likely to happen afterwards in terms of the conflict experienced, the social context and the systems in place before, during and after the conflict, it is impossible to devise a blueprint of international standards and norms that, if implemented, will catapult a society from a post-conflict situation to a peaceful and thriving environment. This holds true not only for the reconstruction of political and social life, infrastructures and basic services, but also for the re-establishment of judicial systems. Additionally, as Fukuyama explains, “[...] the development of formal institutions is strongly affected by cultural factors”²¹⁸.

However, internationally or multilaterally agreed upon standards and norms can be of great help for states or the international community looking for indicators on how to best re-establish or reform any given system. With regard to the reestablishment of the judicial system, we are yet again faced with its particularity: Almost any society will have a certain - formal or informal - mechanism in place to deal with unwanted social behaviour. While those mechanisms might not be respecting human rights and basic liberties, it is necessary to closely examine them when deciding on how to structure or restructure the formal judicial system established by the state as people might not trust the new, “western” judicial system if it cannot be explained in relation to the established local mechanism or if it contradicts the local mechanisms without explanation of why this is the case.

This means that any structural changes to an existing judicial system or any implementation of a new judicial system have to be carried out with great awareness to both cultural and social issues in order for the new system to be accepted by the society and international standards in order for the new or revised system to respect universal human rights and other norms.

²¹⁸ See Fukuyama, Francis : *State Building* , p. 40

Given the fact that each judicial system is different and that, for reason of adaptation to any particular context, it is preferable not to simply import the judicial system of another country (which would be easy to do, but would cause enormous problems of incongruence with other state institutions and procedures), certain international standards can be used to determine important pillars of a new judicial system.

Notwithstanding more specific instruments that might be available on a regional or bilateral basis, the most important international standards and norms in this exercise are the Conventions and Instruments of the Organization of the United Nations, such as the Universal Declaration of Human Rights²¹⁹ and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment²²⁰. However, given that the prison system as part of the law enforcement system has close links with the judicial system, the United Nations Standard Minimum Rules for the Treatment of Prisoners²²¹ will also briefly be discussed as they offer important indications for what a prison system needs to take into account.

Further international instruments available that are important in this context, but will not be discussed in detail in the present study include the following:

- the Basic Principles on the Independence of the Judiciary²²²
- the Basic Principles on the Role of Lawyers²²³
- the Guidelines on the Role of Prosecutors²²⁴
- the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power²²⁵
- the United Nations Standard Minimum Rules for the Administration of Juvenile Justice²²⁶

²¹⁹ Complete text available under: <http://www.un.org/en/documents/udhr/>, 16/12/2011

²²⁰ Complete text available under: <http://www2.ohchr.org/english/law/pdf/cat.pdf>, 16/12/2011

²²¹ Complete text available under: <http://www2.ohchr.org/english/law/pdf/treatmentprisoners.pdf>, 16/12/2011

²²² Complete text available under: <http://www2.ohchr.org/english/law/indjudiciary.htm>, 15/1/2012

²²³ Complete text available under: <http://www2.ohchr.org/english/law/lawyers.htm>, 15/1/2012

²²⁴ Complete text available under: <http://www2.ohchr.org/english/law/prosecutors.htm>, 15/1/2012

²²⁵ Complete text available under: <http://www.un.org/documents/ga/res/40/a40r034.htm>, 15/1/2012

- the Basic Principles and Guidelines on the Right to a Remedy and Reparation for the Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law²²⁷
- the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment²²⁸
- the Convention on the Rights of the Child²²⁹ (particularly important when discussing juvenile justice, as this issue is often not addressed in post-conflict judicial systems and law enforcement institutions)
- the International Covenant on Civil and Political Rights²³⁰
- the International Covenant on Economic, Social and Cultural Rights²³¹

5.2.1 The Universal Declaration of Human Rights

Following the atrocities of the World War II, the General Assembly of the Organization of the United Nations (UN) embarked on the ambitious journey to develop a catalogue of minimum human rights to be granted to everyone regardless of their nationality, gender or origin. On 10 December 1948, it passed resolution 217 A (III)²³², by which it adopted the Universal Declaration of Human Rights.²³³ The adoption of the Universal Declaration of Human Rights is celebrated every year on 10 December and this day has subsequently been named “Human Rights Day”.²³⁴

As resolution of the General Assembly, the Universal Declaration of Human Rights does not constitute a legally binding instrument of public international law.²³⁵ However, as a declaration of the world forum of all states, it expresses a strong political obligation for all participating states to concur with it. The fact that the Universal Declaration of Human Rights (UDHR) is still controversial, in particular with regards to

²²⁶ Complete text available under: <http://www.un.org/documents/ga/res/40/a40r033.htm>, 15/1/2012

²²⁷ Complete text available under: <http://www2.ohchr.org/english/law/remedy.htm>, 15/1/2012

²²⁸ Complete text available under: <http://www.un.org/documents/ga/res/43/a43r173.htm>, 15/1/2012

²²⁹ Complete text available under: <http://www2.ohchr.org/english/law/crc.htm>, 15/1/2012

²³⁰ Complete text available under: <http://www2.ohchr.org/english/law/ccpr.htm>, 15/1/2012

²³¹ Complete text available under: <http://www2.ohchr.org/english/law/cescr.htm>, 15/1/2012

²³² UN Document symbol A/RES/217 (III) A ; complete text available under : <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement>, 17/12/2011

²³³ See <http://www.un.org/en/documents/udhr/history.shtml>, 17/12/2011

²³⁴ See <http://www.un.org/en/events/humanrightsday/2011/>, 18/12/2011

²³⁵ See also Fischer, Peter, and Köck, Heribert Franz : *Völkerrecht* (2004) , p. 248.

the debate on whether the human rights set forth in the Declaration are westernized human rights and not universal human rights, as they claim to be, was demonstrated during the preparation to the second World Conference on Human Rights in Vienna in 1993.²³⁶

Austria became a member of the United Nations in 1955; the Democratic Republic of the Congo was admitted a few months after its independence in 1960, while Rwanda and Uganda both joined the UN in 1962 shortly after their independence.²³⁷ None of the states mentioned were thus participating as independent state and member of the United Nations in the drafting of the Universal Declaration of Human Rights.²³⁸

The UDHR holds obligations for states on several levels, which may require amendments in the criminal code or a review of certain practices in law enforcement and judicial systems. While several articles of the Universal Declaration of Human Rights are relevant to judicial systems, the most important ones are articles 8 to 11:

Article 8.

*Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.*²³⁹

Article 8 obliges the judiciary as well as any other tribunals to offer effective remedies for any violations of fundamental rights. This provision might prove particularly difficult to implement for countries in post-conflict situations, as

²³⁶ See Higgins, Rosalyn : The Continuing Universality of the Universal Declaration. In : Baehr, Peter, Flinterman, Cees and Senders, Mignon (ed.): Innovation and Inspiration : Fifty Years of the Universal Declaration of Human Rights (1998) , p. 17ff

²³⁷ Rwanda became formally independent from Belgium on 1 July 1962 (see Prunier, Gérard : The Rwanda Crisis. History of a Genocide (2010) , p. 54 ; Uganda became independent from the United Kingdom on 9 October 1962 (see <https://www.cia.gov/library/publications/the-world-factbook/geos/ug.html>, 17/12/2011). For all dates of admission to the United Nations, see <http://www.un.org/en/members/>, 20/12/2011

²³⁸ While the UDHR is not a legally binding instrument of public international law, the Vienna Convention on Succession of States in respect to Treaties of 1978 (see http://untreaty.un.org/ilc/texts/instruments/english/conventions/3_2_1978.pdf) deals with the options a newly independent state has with regard to treaties to which the predecessor state was bound in articles 16 to 19. See also Fischer, Peter, and Köck, Heribert Franz : Völkerrecht (2004) , p. 121.

²³⁹ <http://www.un.org/en/documents/udhr/>, 17/12/2011

effectiveness is something very few of those states might be in a position to guarantee. However, while the judiciary needs to keep striving to achieve a certain degree of effectiveness, this provision also offers a starting point for donors in rebuilding a state in a post-conflict situation, as assistance to the judiciary could enable post-conflict states to abide by this provision faster and with better results than if they would be left on their own to re-establish a judicial system.

Article 9.

*No one shall be subjected to arbitrary arrest, detention or exile.*²⁴⁰

While article 9 is inter alia aimed at law enforcement agencies, in most legal systems, it is the task of the judiciary to determine whether someone is held in custody arbitrarily and to take measures against such arbitrary detention or arrest.

Article 10.

*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*²⁴¹

Article 10 sets forth the obligation for the judiciary as well as for any other tribunals (such as e.g. administrative tribunals) to be independent and impartial and to uphold the standards of fair trials. It obliges the judicial system to treat everyone with full equality and determines that hearings should be public. The judiciary is therefore bound to try suspects under the observation of the general public; however, certain exceptions can be made, in particular where required to protect the privacy or interests of the victim or witness.²⁴²

²⁴⁰ <http://www.un.org/en/documents/udhr/>, 17/12/2011

²⁴¹ *ibid*, 17/12/2011

²⁴² See e.g. §229 StPO (Austrian Criminal Procedure Code), which foresees the exclusion of the public only in restricted cases such as cases requiring the protection of victims, witnesses or third persons (§229 paras 2 and 3). The German version of the Criminal Procedure Code is available under: <http://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40092959/NOR40092959.pdf>, 20/12/2011

Article 11.

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

*(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.*²⁴³

Article 11 may require amendments in the criminal code to establish the presumption of innocence foreseen in para. 1. This paragraph is vital to the judiciary, which is the keeper of the presumption of innocence and needs to bear this principle in mind throughout the entire process. It furthermore establishes the right to a fair trial and the right to defence, which includes the right to consult a lawyer or to be informed of procedural questions by the judge or other competent authorities. The wider scope of this provision means that, in order for it to be effective, an independent bar association or similar organization needs to be in place in the country in question to certify the qualification of lawyers to represent defendants at court.

Article 11, para. 2, establishes the principle of “nullum crimen sine lege” and “nulla poena sine lege”, which states that no one can be punished for an act that was not criminalized at the time of its commission. First established in article XV of the constitution of Maryland in 1776²⁴⁴, this principle went on to being an integral part (article 7) of the French Declaration of the Rights of Man and the Citizen²⁴⁵ of 1789, it quickly became one of the guiding principles of the rule of law.²⁴⁶ By determining that

²⁴³ <http://www.un.org/en/documents/udhr/>, 17/12/2011

²⁴⁴ See <http://www.nhinet.org/ccs/docs/md-1776.htm>, 21/12/2011. This constitution also upholds the importance of an independent judiciary, see e.g. article XXX.

²⁴⁵ See http://www.constitution.org/fr/fr_drm.htm, 21/12/2011

²⁴⁶ See Kienapfel, Diethelm, and Höpfel, Frank : *Grundriss des Strafrechts. Allgemeiner Teil* (2009) , p. 17, in which the development and the importance of the principle of nullum crimen sine lege is discussed.

no one can be punished for an act or an omission that was not criminalized at the time of its commission, it is conceived to prevent arbitrary jurisdiction and to promote legal certainty by helping citizens predict legal decisions.

While the judiciary can uphold this principle for the national legislation through relatively simple research on the legal framework governing criminal justice at the time of commission of the offence, the reference to criminalization in international law can be of particular interest in post-conflict situations: As the criminal justice framework might not criminalize certain acts or omissions during the conflict, the judiciary has to refer to international standards, such as the Convention on the Prevention and the Punishment of the Crime of Genocide²⁴⁷ or the Convention against Torture to determine whether a certain conduct was criminalized at an international level at the time of its commission. If so, the perpetrators have to be prosecuted and tried even though there was no national legislation criminalizing their conduct at the time of commission.

5.2.2 The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The General Assembly to the United Nations adopted the United Nations Convention against Torture in its resolution A/RES/39/46 on 10 December 1984, exactly on the 36th anniversary of the Universal Declaration of Human Rights (or Human Rights Day 1984).²⁴⁸ The Convention entered into force on 26 June 1987, 30 days after the twentieth States party had deposited its instrument of ratification, as stated in article 27 (1) of the Convention.²⁴⁹ While there are also other legal instruments against torture available, such as the Organization of American States' Inter-American Convention to Prevent and Punish Torture²⁵⁰, they will not be discussed here as the United Nations Convention against Torture is the most encompassing instrument open

²⁴⁷ See <http://www2.ohchr.org/english/law/genocide.htm>, 20/12/2011

²⁴⁸ See [http://daccess-dds-](http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/460/23/IMG/NR046023.pdf?OpenElement)

[ny.un.org/doc/RESOLUTION/GEN/NR0/460/23/IMG/NR046023.pdf?OpenElement](http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/460/23/IMG/NR046023.pdf?OpenElement), 18/12/2011

²⁴⁹ See <http://www2.ohchr.org/english/law/pdf/cat.pdf>, 18/12/2011

²⁵⁰ See <http://www.oas.org/juridico/english/treaties/a-51.html>, 18/12/2011

for accession to all states world-wide and not only to a certain, regionally restrained group of states, as it is the case for the Inter-American Convention²⁵¹.

Austria, the DRC, Rwanda and Uganda are all States parties to the UN Convention against Torture. Austria signed the Convention on 14 March 1985 and ratified it on 29 July 1987, while Rwanda acceded²⁵² to the Convention on 15 December 2008, very recently compared to Uganda and the DRC, which acceded on 3 November 1986 and on 18 March 1996 respectively.²⁵³ To date, the Convention has 149 States parties (out of 193 UN Member States²⁵⁴) and 78 signatories.²⁵⁵

Similar to the Universal Declaration of Human Rights, the UN Convention against Torture contains several provisions that are of vital importance to the legal system. While most provisions would need to be contained in either the criminal code of the country in question or its constitution and would therefore require legislative work, they are equally important to the judicial system as it needs to bear these general principles in mind before, during and after trial and in the potential subsequent imprisonment of an offender. The most pertinent provisions of the UN Convention against Torture as regards the judicial system are included below:

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or

²⁵¹ See articles 18 to 20 of the Inter-American Convention to Prevent and Punish Torture, which state that the Convention is subject to ratification and open for signature by members of the Organization of American States and open for accession to other American States. See <http://www.oas.org/juridico/english/treaties/a-51.html>, 18/12/2011

²⁵² "Accession" is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force. The Secretary-General of the United Nations, in his function as depositary, has also accepted accessions to some conventions before their entry into force. The conditions under which accession may occur and the procedure involved depend on the provisions of the treaty. A treaty might provide for the accession of all other states or for a limited and defined number of states. In the absence of such a provision, accession can only occur where the negotiating states were agreed or subsequently agree on it in the case of the state in question. [Arts.2 (1) (b) and 15, Vienna Convention on the Law of Treaties 1969], http://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml#accession, 18/12/2011

²⁵³ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en, 18/12/2011

²⁵⁴ See <http://www.un.org/en/members/pomembership.shtml>, 19/12/2011

²⁵⁵ See http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en, 18/12/2011

mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

[...]

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law

*which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.*²⁵⁶

Article 1 of the UN Convention against Torture defines torture for the first time in an international treaty and has to be read in conjunction with article 16, also reproduced above.²⁵⁷ Article 1 sets out the main elements defining torture. Nowak and McArthur describe them as the involvement of a public official, the infliction of severe pain or suffering, intention and specific purpose.²⁵⁸ Members of the judicial system as well as members of the police and other investigating bodies are likely to be classified as public officials in most countries; therefore, this provision is of direct importance to them as they are themselves prohibited from torturing as well as from instigating another person to torture someone or to consent to such conduct²⁵⁹.

This provision should serve directly as a guarantee to anyone in custody or being tried that he or she will not be tortured; however, this is not clearly spelt out as the Convention “lacks a general provision prohibiting torture or granting an individual human right not to be subjected to torture and other forms of ill-treatment [...]”²⁶⁰. The so-called “lawful sanctions clause” set forth in the last sentence of article 1, para. 1, has been subject of much debate with regard to whether corporal punishment foreseen in particular by some Islamic states is in accordance with or against the Convention.²⁶¹

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

²⁵⁶ <http://www2.ohchr.org/english/law/pdf/cat.pdf>, 18/12/2011

²⁵⁷ See Nowak, Manfred, and McArthur, Elizabeth : The United Nations Convention against Torture. A Commentary (2008) , p. 28

²⁵⁸ Ibid, p.28

²⁵⁹ Ibid, p. 77

²⁶⁰ Ibid, p. 61

²⁶¹ Ibid, p. 79ff

*2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.*²⁶²

This obligation is crucial for states, as it may require legislative work to ensure that torture is included as an offence in their criminal code. Nowak and McArthur explain that, while there is no obligation to establish torture as a separate offence, practice has shown that this is the most suitable way to proceed.²⁶³ As with any other new offence, it is vital for the judicial system that this potentially new amendment to the criminal code is disseminated and that background documents (such as travaux préparatoires or other drafts circulated and potential comments made during the establishment of the offence) are made available to judges for them to be able to correctly interpret the offence and try suspects on the basis of the legal framework available.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

- (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;*
- (b) When the alleged offender is a national of that State;*
- (c) When the victim is a national of that State if that State considers it appropriate.*

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

²⁶² <http://www2.ohchr.org/english/law/pdf/cat.pdf>, 18/12/2011

²⁶³ See Nowak, Manfred, and McArthur, Elizabeth : *The United Nations Convention against Torture* (2008) , p. 248f

*3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.*²⁶⁴

Similar to article 4, article 5 may require legislative amendments to ensure that all forms of jurisdiction required by the Convention are included in a country's criminal code. This is particularly true for the universal jurisdiction set forth in article 5, para. 2, as it might be a new element for some countries.²⁶⁵ The principle of universal jurisdiction is revolutionary as it does not require any additional conditions apart from the authorities believing on reasonable grounds that a person present in a territory under its jurisdiction has committed an act of torture.²⁶⁶ As such, it is important for the judicial system to be aware of this possibility, as universal jurisdiction is usually foreseen only for crimes of similar gravity, if at all.

Furthermore, the establishment of universal jurisdiction has a particular importance in military occupation of another state's territory, which might become pertinent also in state-building exercises: If a foreign power *de jure* or *de facto* controls another state's territory, it is obliged to exercise universal jurisdiction over that territory (Nowak and McArthur bring the example of the United States' obligation to establish universal jurisdiction over alleged torturers present in Afghanistan, Iraq or Guantánamo Bay).²⁶⁷

Article 5, para. 2, establishes the principle of "aut dedere aut judicare", try or extradite, for any cases in which another state has jurisdiction over an alleged offender and is requesting his or her extradition.²⁶⁸ In this case, it is important for the judiciary to note that, if it decides to prosecute and try the alleged offender itself, the trial is supposed to be held within a certain reasonable amount of time. However, the definition of a reasonable amount of time within which a trial is supposed to be held is flexible and needs to be interpreted on a case-by-case basis.

²⁶⁴ <http://www2.ohchr.org/english/law/pdf/cat.pdf>, 18/12/2011

²⁶⁵ See Nowak, Manfred, and McArthur, Elizabeth : The United Nations Convention against Torture (2008) , p.254f

²⁶⁶ See *ibid*, p.255f

²⁶⁷ See *ibid*, p.318

²⁶⁸ See *ibid*, p.256

Article 11

*Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.*²⁶⁹

This provision calls for a systematic review of practices to determine whether they do or do not constitute torture. While this systematic review will not be done within the judicial system but rather by specialized commissions or bodies, article 11 calls also for an active role of the judiciary: It reminds the judiciary that, in particular in dealing with torture cases, case law and established practices need to be re-examined in light of the most recent developments: A practice that was not deemed to constitute torture might 50 years ago might nowadays be classified as such, and it is the judiciary in the trial of the individual case who needs to establish whether this is the case or not. Nowak and McArthur point to the importance of the Standard Minimum Rules for the Treatment of Prisoners (discussed further below) for guidance on whether a certain practice constitutes torture or not.²⁷⁰

Article 12

*Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.*²⁷¹

Article 12 foresees the ex-officio investigation of potential cases of torture.²⁷² In most countries, investigations will be started by law enforcement officials with an involvement of the judiciary at a later stage, e.g. when it comes to taking suspects into custody. This provision is of importance to the judiciary as it includes its obligation to

²⁶⁹ <http://www2.ohchr.org/english/law/pdf/cat.pdf>, 18/12/2011

²⁷⁰ See Nowak, Manfred, and McArthur, Elizabeth: *The United Nations Convention against Torture* (2008), p. 411

²⁷¹ <http://www2.ohchr.org/english/law/pdf/cat.pdf>, 18/12/2011

²⁷² See Nowak, Manfred, and McArthur, Elizabeth: *The United Nations Convention against Torture* (2008), p. 413

take necessary action in the actions for which it is responsible during an investigation. In addition, it also sets forth an obligation for the judiciary to jump-start investigations in cases in which it has reasonable grounds to believe that an act of torture or ill-treatment has been committed.

Article 13

*Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.*²⁷³

Article 13 mirrors the right to ex-officio investigations established in article 12 and requires that an investigation is carried out as response to a complaint by a potential victim of torture.²⁷⁴ Nowak and McArthur point out that, as article 13 constitutes the basic remedy of torture victims; it is also the basis for any potential reparation they might receive under article 14.²⁷⁵ The implications for the judiciary are almost the same as in article 12; however, the initiative for the investigation under article 14 is taken by the victim. As a victim might not be aware of how to make a formal submission of a complaint of torture or might be too afraid to do this, an allegation by the victim is sufficient to trigger the obligation of investigating the case.²⁷⁶ The judiciary needs to be aware of this, particularly in cases in which the allegation is made directly to it or is unearthed during a trial for another offence.

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to

²⁷³ <http://www2.ohchr.org/english/law/pdf/cat.pdf>, 18/12/2011

²⁷⁴ See Nowak, Manfred, and McArthur, Elizabeth : *The United Nations Convention against Torture* (2008) , p. 439f

²⁷⁵ *Ibid*, p.440

²⁷⁶ *Ibid*, p.444, decided on the occasion of *Parot v Spain*

fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

*2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.*²⁷⁷

The right to redress and compensation as set forth in article 14 concerns the judiciary in so far as it is, in many countries, likely to be the institution that will decide on the scope of reparations that a victim will receive. The “fair and adequate compensation” the victim is to receive will in most states depend on the gravity of the torture, potential aggravating circumstances etc. The judiciary needs also to bear in mind the “full rehabilitation” a victim should receive, and has to take adequate measures that this full rehabilitation is achieved.

Article 15

*Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.*²⁷⁸

Nowak and McArthur explain that, in accordance with the right to a fair trial, article 15 constitutes the absolute prohibition of torture and is intended to remove the incentive for torture to obtain evidence or a confession.²⁷⁹ This provision directly concerns the judiciary as it has to refuse evidence obtained through torture categorically, should it come across such evidence at any stage during a trial.

To conclude, it can be stated that the United Nations Convention against Torture contains several provisions of great direct importance to the judiciary, which need to be

²⁷⁷ <http://www2.ohchr.org/english/law/pdf/cat.pdf>, 18/12/2011

²⁷⁸ *ibid*, 18/12/2011

²⁷⁹ See Nowak, Manfred, and McArthur, Elizabeth : *The United Nations Convention against Torture* (2008) , p. 503f

kept in mind at all stages of a trial. The Convention also demands higher levels of alert and judgement of the judiciary concerning evidence, allegations or formerly accepted practices that might have come to be regarded as torture, as it is its task to determine the presence of such evidence, allegations or practices and take a decision on how to proceed in the individual case.

5.2.3 The United Nations Standard Minimum Rules for the Treatment of Prisoners

The First UN Congress on the Prevention of Crime and the Treatment of Offenders (Crime Congress) adopted a set of Standard Minimum Rules for the Treatment of Prisoners in 1955, which were subsequently approved by the Economic and Social Council (ECOSOC) by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.²⁸⁰ While Rwanda, Uganda and the DRC were not independent neither at the time of the first Crime Congress nor at the time of the first approval of the rules in the ECOSOC, Austria, Belgium and the United Kingdom were all represented at the Congress and thus participated²⁸¹ in the adoption of the Standard Minimum Rules.²⁸²

The Standard Minimum Rules set forth very practical rules for the organization of prison systems. In particular, they insist on the separation of convicted from untried prisoners (rule 8 b²⁸³) and the separation of young prisoners from adults (rule 8d²⁸⁴). States in post-conflict situations can turn directly to the Standard Minimum Rules to determine whether and how to reform their prison system in order to be compliant with international standards.

²⁸⁰ See <http://www2.ohchr.org/english/law/treatmentprisoners.htm>, 18/12/2011

²⁸¹ The rules of procedure for the First Crime Congress foresee a voting system with one vote per government delegation. See

http://www.asc41.com/UN_Congress/1st%20UN%20Congress%20on%20the%20Prevention%20of%20Crime/008%20ACONF.6.L.1%20Rules%20of%20Procedure.pdf, p.5, rules 18ff, 18/12/2011

²⁸² See

http://www.asc41.com/UN_Congress/1st%20UN%20Congress%20on%20the%20Prevention%20of%20Crime/006%20ACONF.6.INF.3%20List%20of%20Participants.pdf, pages 2f and 21f, 18/12/2011

²⁸³ See <http://www2.ohchr.org/english/law/treatmentprisoners.htm>, 18/12/2011, p.2

²⁸⁴ See <http://www2.ohchr.org/english/law/treatmentprisoners.htm>, 18/12/2011, p.2

6 Recommendations for the practical implementation of the findings

Subsequent to the theoretical analysis above, it is important to draw practical recommendations for the implementation of any projects aiming at the re-establishment of judicial systems in post-conflict situations.

Following the same scheme developed in chapter four, in which three levels of re-establishing a judicial system have been developed, the practical recommendations also start on the legal level:

Recommendations for the legal level:

- External experts should be brought in to carry out a desk review and a practical review of the judicial system in place and the laws implemented together with national experts. This will guarantee both the external point of view, in particular with regards to international instruments to be included or legislation to be adapted to conform with such instruments as well as the inside knowledge of the practical application of national laws, any potential role the judicial system played within the conflict and potential political influences on the judicial system.
- External experts should, wherever possible, be from similar legal systems to the one in place in the post-conflict state, as this will enable them to become effective faster and more efficient than other experts.

Recommendations for the personnel level:

- A vetting exercise for all currently serving staff should take place. Assessors should be both international and national experts to guarantee a fair assessment to the needs of the post-conflict state. The vetting exercise can also be used to identify needs for capacity-building among the judicial personnel.

- Application processes and appointment procedures should be reviewed by external and internal experts together in order to avoid personnel management susceptible to nepotism.
- Staff serving the judicial system, from administrative staff to judges and prosecutors, should receive their salary on a regular basis to avoid incentives for corruption.
- Staff should be paid competitively or at least at a level which ensures their and their families' survival to reduce the risk of corruption.
- Appropriate capacity-building exercises should be organized for the judiciary personnel at all levels, from legal training to case management and general administration.
- Sufficient staff to serve the potentially increased need for justice after a conflict should be trained and made available for the judicial system.
- Curricula of law faculties and judicial training centers should be reviewed to be adapted to the new legal basis and the reviewed judicial system.
- Potential threats against the judicial personnel need to be examined and evaluated and strategies to address such threats and offer sufficient protection to judicial personnel need to be elaborated.
- Victim and witness protection strategies, if necessary, need to be developed and implemented to ensure their participation in trials without fear of reprisals.

Recommendations for the infrastructure level:

- Basic working material such as paper, files etc. should be made available to the judicial system.
- Court houses and prisons should be part of projects aiming at the reconstruction of the infrastructure missing or destroyed during the conflict.
- Access to the judicial system, both in terms of placement of courts and their accessibility by road as well as the accessibility of prisons should be included in the decision on how to re-establish the judicial system.
- International organizations with the appropriate mandates, such as the ICRC, should be given the possibility to visit prisons and detention centers and

make recommendations on how they can be rendered conform to international standards.

7 Conclusio (English)

Judicial systems are of utmost importance to establishing and keeping peace and security as they deter criminal actions and ensure stability within a society. However, in many post-conflict situations, the judicial system is not functional or still suffering from the events that took place before or during the conflict.

In order to help a state emerge from a post-conflict situation, re-establishing an independent, functional and efficient judicial system needs to be one of the priorities in any state-building exercise. On an international level, several legal instruments, such as the Universal Declaration of Human Rights and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, are available to offer guidance and indications as to which elements have to be included in a judicial system for it to be independent and functional.

As shown throughout the study, re-establishing a judicial system in a post-conflict situation is a task that poses significant challenges. While many of these challenges are unique to a particular post-conflict situation or a specific country, some are found in most post-conflict situations, such as a legal framework that might be outdated or not in accordance with international instruments protecting human rights or civil liberties, judicial and administrative staff that is not sufficiently trained to perform their jobs to a high level of professionalism, understaffed courts and non-existent infrastructure or infrastructure that is in a deplorable state.

To address the challenge of re-establishing a judicial system, the present study suggests following a three-pronged approach: On the legal level, the laws and constitutional provisions establishing the judiciary should be reviewed to guarantee its independence. Furthermore, the general legislative framework in place should be reviewed and updated in order to be fully compliant with international standards, in particular with regards to the protection of human rights and the guarantees to a fair trial. On a personnel level, courts and prisons must be staffed sufficiently and with well-trained personnel. In addition, on a structural level, the infrastructure required to ensure the functioning of the judicial system, such as courts and offices, but also prisons, which

tend to be overcrowded following conflicts and are often not compliant with international standards, should be renovated or built wherever they have been destroyed or have never existed prior to the conflict.

When re-establishing a judicial system in a post-conflict situation, special attention needs to be given to transitional justice mechanisms that have been or are being put in place in the state concerned, as the cooperation between the judicial system and any additional transitional justice mechanisms is crucial. This holds particularly true if the judicial system and the transitional justice mechanism have concurrent jurisdictions. Out of the two countries used as case studies throughout this paper, the issue of cooperation between the judicial system and transitional justice mechanisms was especially important in the case of Rwanda, in which, next to the judicial system, an International Criminal Tribunal was set up to try the highest-level suspects and a series of community-based Gacaca courts was established to try the lowest-level suspects, leaving the western-style national judicial system to try suspects in the middle of the range of responsibilities.

To conclude, while there is no one-size-fits-all solution to re-establishing judicial systems, it is clear that by drawing on lessons from the past and adapting them to any new post-conflict situations, the chances for success in re-establishing a judicial system rise.

8 Conclusio (German)

Aufgrund ihrer präventiven Wirkung sind Justizsysteme von größter Wichtigkeit, um Frieden und Sicherheit in einer Gesellschaft herzustellen und zu gewährleisten. In vielen post-conflict-Situationen funktionieren Justizsysteme allerdings nicht, weil sie durch die Geschehnisse vor oder während des Konflikts zu sehr beschädigt wurden.

Um einen Staat erfolgreich aus einer post-conflict-Situation zu führen, muss die Reetablierung eines unabhängigen, funktionierenden und effizienten Justizsystems eine der obersten Prioritäten im staatlichen Wiederaufbau sein. Internationale Rechtsinstrumente, wie beispielsweise die Universelle Deklaration der Menschenrechte oder das Übereinkommen der Vereinten Nationen gegen Folter und andere grausame, unmenschliche oder erniedrigende Behandlung und Strafe, bieten Anleitungen, wie ein Justizsystem unabhängig und funktionell gestaltet werden kann.

Wie in der vorliegenden Arbeit gezeigt wird, stellt der Wiederaufbau von Justizsystemen eine besondere Herausforderung dar. Viele dieser Herausforderungen hängen speziell mit der jeweiligen Situation oder dem betroffenen Staat zusammenhängen. Einige jedoch, wie zum Beispiel ein veraltetes oder nicht menschenrechtskonformes gesetzliches Regelwerk, zu wenig und schlecht ausgebildetes juristisches und administratives Personal und fehlende oder desolate Infrastruktur, finden sich in den meisten post-conflict-Situationen.

Die vorliegende Arbeit verwendet einen dreigeteilten Ansatz, um den Herausforderungen des Wiederaufbaus gerecht zu werden: Auf juristischer Ebene müssen die gesetzlichen und verfassungsmäßigen Grundlagen der Etablierung des Justizsystems überprüft werden, um dessen erforderliche Unabhängigkeit zu gewährleisten. Darüber hinaus müssen weitere Normen geprüft und auf den neuesten Stand gebracht werden, um völlig den internationalen Standards - wie dem Schutz der Menschenrechte und der Garantie eines fairen Prozesses - zu entsprechen. Auf personeller Ebene müssen Gerichte und Gefängnisse mit ausreichendem und gut

qualifiziertem Personal ausgestattet werden. Auf struktureller Ebene muss die erforderliche Infrastruktur, wie Gerichtsgebäude und Büros, aber auch Gefängnisse, die nach Konflikten häufig stark überbelegt und nicht menschenrechtskonform sind, renoviert oder neu errichtet werden.

Während des Wiederaufbaus des Justizsystems muss besonderes Augenmerk auf Mechanismen der transitional justice gelegt werden, die im betroffenen Staat eingeführt worden sind oder werden, weil die Kooperation des nationalen Justizsystems mit diesen entscheidend ist. Dies ist ganz besonders dann der Fall, wenn Zuständigkeiten konkurrieren. Von den beiden Staaten, die als Fallbeispiele im Rahmen der vorliegenden Arbeit untersucht werden, betrifft diese Kooperation ganz besonders Ruanda. Dort wurden neben dem nationalen Justizsystem sowohl ein Internationales Tribunal, das die Speerspitze der Verdächtigen des Völkermordes vor Gericht bringt, als auch eine Reihe von Gemeinschaftsgerichten, sogenannten Gacaca Gerichten, etabliert, vor denen die Prozesse gegen Verdächtige ohne besonders starke zusätzliche Schuld stattfinden. Prozesse gegen Verdächtige mit mittelschwerer Schuld verbleiben bei den nationalen Gerichten nach westlichem Muster.

Zum Abschluss lässt sich feststellen, dass keine einheitliche Lösung für den Wiederaufbau eines Justizsystems für alle post-conflict-Situationen existiert. Durch die Analyse von bereits stattgefundenen Initiativen und Projekten und deren Adaptation an neue post-conflict-Situationen steigen jedoch die Treffsicherheit und der Erfolg von Maßnahmen zum Wiederaufbau von Justizsystemen.

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Abstract (English)

Judicial systems are of utmost importance to ensuring peace and stability in a society. However, in post-conflict situations, they are often not functional and incapable of carrying out their duties. The present study aims at suggesting solutions to this dilemma by proposing a viable, structured approach to how a judicial system can be re-established, taking into particular consideration the special challenges posed by the post-conflict situation. Furthermore, the present study examines the links between transitional justice mechanisms and the re-establishment of a judicial system and focuses on such re-establishments as part of a successful state-building exercise.

Abstract (German)

Justizsysteme sind von größter Wichtigkeit, um Frieden und Stabilität in einer Gesellschaft zu gewährleisten. In vielen post-conflict-Situationen funktionieren Justizsysteme allerdings nicht und können daher den an sie gestellten Anforderungen nicht gerecht werden. Die vorliegende Arbeit zielt darauf ab, Wege aus diesem Dilemma aufzuzeigen. Sie zeichnet einen gangbaren, strukturierten Plan vor, wie ein Justizsystem unter Berücksichtigung der speziellen Herausforderungen von post-conflict-Situationen wiederaufgebaut werden kann. Darüber hinaus werden die Interdependenzen zwischen den Mechanismen der transitional justice und dem Wiederaufbau eines Justizsystems untersucht, wobei dem Wiederaufbau als Teil eines erfolgreichen State-building besondere Bedeutung zukommt.

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