Indigenous Legal Traditions in Transitional Justice Processes: Examining the Gacaca in Rwanda & the Bashingantahe in Burundi

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This thesis titled
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ABSTRACT

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Indigenous Legal Traditions in Transitional Justice Processes: Examining the Gacaca in Rwanda & the Bashingantahe in Burundi

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In the efforts to address the aftermath of the 1990s conflicts, the Rwandan and the Burundian post-conflict states incorporated the indigenous legal traditions of gacaca and bashingantahe in their transitional justice processes. Although scholarly literature has become more critical of post-conflict states’ efforts to include local mechanisms of justice in transitional justice processes, in the cases of Rwanda and Burundi, most analyses focus on the effectiveness of the gacaca and bashingantahe as individual phenomena. This thesis asks questions that have not yet been given sufficient considerations. It focuses on jurisdictional differences between the gacaca and the bashingantahe. For instance, the gacaca’s decisions are legally binding while bashingantahe’s decisions only serve as advises, the gacaca are strictly controlled but the bashingantahe have some autonomy (Longman, 2009, Nindorera, 2007). How can we account for these differences? Historical and contemporaneous similarities and interconnections between Rwanda and Burundi compel us to study the gacaca and the bashingantahe comparatively. Olsen, Payne, and Reiter (2010) explain that the adoption of specific transitional justice methods dependent on economic, cultural, political, and military constraints of particular post-conflict societies. Without neglecting the pertinence of international factors, this thesis examines how domestic factors might have influenced
the incorporation of the *gacaca* and the *bashingantahe* in the transitional justice processes. Hence, this thesis wishes to argue that jurisdictional differences between the *gacaca* and the *bashingantahe* can be explained by differences in the 1990s conflict dynamics, the method of conflict termination, shifts in the composition of the ruling political coalitions, and the way ethnicity is addressed by the post-conflict state.

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ABBREVIATIONS

AFDL: The Democratic Alliances Forces for the Liberation of Congo


CNTB: The National Commission for Land and other Properties

DRC: The Democratic Republic of Congo

FDLR: The Democratic Forces for the Liberation of Rwanda

FNL: The National Liberation Forces (a former Burundian rebel groups)

GLR: The Great Lakes Region (of Africa)

IDP(s): Internally Displaced Person/ People

ILTs: Indigenous Legal Traditions

LRA: The Lord’s Resistance Army

RPF: The Rwandan Patriotic Front

TRC: Truths and Reconciliation Commissions

UN: The United Nations
CHAPTER 1: INTRODUCTION

Following the devastating 1990s conflicts in Rwanda and in Burundi, the post-conflict Rwandan and Burundian states incorporated the traditional justice mechanisms of gacaca and bashingantahe in their transitional justice processes. Although transitional justice attempts to solve past injustice through mechanisms such as trials, truth and reconciliation commissions, as well as local and traditional mechanisms of justice (Olsen, Payne, and Reiter, 2010), it is uncertain whether incorporating the gacaca and the bashingantahe in the Rwandan and the Burundian post-conflict justice processes encourages local participation. Could it be that by incorporating the gacaca and the bashingantahe in the transitional justice processes, Rwanda and Burundi are extending state control over these participatory mechanisms of justice? This is the broader question that the present study attempts to address. A more specific question pertains to differences in the incorporation of the gacaca and the bashingantahe in the transitional justice. While the gacaca are strictly controlled and their decisions have legal force, the bashingantahe have some autonomy, but their decisions are not legally binding. These differences could be explained by differences in the 1990s conflicts in Rwanda and Burundi, the method of conflict termination, the type of change in the ruling political coalition, and how the post-conflict state addresses questions of ethnicity.

Statement of the Problem

The incorporation of the gacaca in the post-genocide justice in Rwanda was initially considered as the state’s innovative attempts to encourage local participations in
post-conflict justice (Ntahombahe, 1999). And the inclusion of *bashingantahe* in the Burundian post-conflict justice was seen as a vital component of national reconciliation (Nindorera, 2003). But these early analyses did not fully take into account the fact that Rwanda and Burundi are legally pluralist societies, where multiple legal regimes not only operate concomitantly but also compete. The scholarly literature is becoming more critical toward state efforts to incorporate local justice mechanisms in transitional justice processes. Even for the sake of transitional justice, state efforts to co-opt the *gacaca* and the *bashingantahe* could result in some form of resistance from the people. The potential fault line of incorporating the *gacaca* and the *bashingantahe* in Rwanda and Burundi’s transitional justice processes was the fact that, as local mechanisms of justice, the *gacaca* and the *bashingantahe*’s legitimacy is socially constructed. State efforts to incorporate the *gacaca* and the *bashingantahe* in the transitional justice processes could be interpreted as state efforts to distance the people from their justice of proximity. Considering that the *gacaca* and the *bashingantahe* have been historically marginalized by the postcolonial Rwandan and the Burundian states (Chretien, 2006), it is fair to question whether the incorporation of the *gacaca* and the *bashingantahe* in the transitional justice processes empowers or disempowers Rwandans and Burundians. Bearing in mind that transnational ideas of justice have influenced transitional justice processes in post-conflict countries of the Global South (Schneider, 2009), this study admits that changes in domestic politics in Rwanda and Burundi may explain why it was in interest of the post-conflict Rwanda and Burundi to include the *gacaca* and the *bashingantahe* in the transitional justice processes. Without neglecting the role of
international influence, this study centers on domestic politics’ role in the way the *gacaca* and the *bashingantahe* were included in the transitional justice processes in Rwanda and Burundi. In Rwanda the *gacaca* were specifically revived as a way of addressing the post-genocide justice (Baker, 2007), and in Burundi the state attempted to centralize the *bashingantahe* with the goal of fostering national reconciliation (Kohlhagen, 2010).

If the incorporation of the *gacaca* and the *bashingantahe* in the Rwandan and the Burundian transitional justice is meant to encourage local participation, Rwandans and Burundians should have more latitude to take part in the *gacaca* and the *bashingantahe* sessions. In addition, meaningful local issues, such as land access, that have contributed to the 1990s Rwandan and the Burundian conflicts (Uvin, 1999), and continue to affect ordinary Rwandans and Burundians (Baregu, 2011) should be part of the *gacaca* and the *bashingantahe* hearings. Although Longman (2009) recognizes the pertinence of the *gacaca* for the reconciliation of Rwandans, he deplores the Rwandan state interference with the *gacaca* processes; Deslaurier (2003) argues that the politicization of the *bashingantahe* has weakened their popular legitimacy; and Kohlhagen (2009) laments that the *bashingantahe* were not included in Burundi’s land code. Certainly these three previous researches, and many others, have raised pertinent questions with respect to state co-opting of the *gacaca* and the *bashingantahe*. However, they studied the incorporation of the *gacaca* and the *bashingantahe* in the transitional justice separately. The present study wishes to argue that conducting a comparative analysis of state’s co-opting of the *gacaca* and the *bashingantahe* could provide us with new ways of
understanding why sometimes local mechanisms of justice are included in post-conflict justice processes.

Research Questions

The incorporation of the *gacaca* and the *bashingantahe* in transitional justice processes is not only happening in the context of post-conflict justice; it is also happening in the context of legal pluralism, where different legal systems compete in the same spatial and temporal space. It is pertinent to investigate how the interplay between societal dynamics and states’ actions could affect the *gacaca* and the *bashingantahe*, and the overall transitional justice process. The present study grapples with three main questions:

- Why did the Rwandan and the Burundian governments incorporate the *gacaca* and the *bashingantahe* in their transitional justice processes?
- What are possible social effects of the co-opting of the *gacaca* and the *bashingantahe* by the state?
- If there are remarkable differences in state’s incorporation of the *gacaca* and the *bashingantahe* how can we account for them?

Methodology

Since the study is exclusively based on secondary materials, my methodology is primarily reflexive. I conducted an extensive literature review on the *gacaca* the *bashingantahe*, Rwanda, Burundi, the African Great Lakes Region (GLR), and on
transitional justice. Then I reflected on the way the literature addresses the question of the 
*gacaca* and the *bashingantahe* in the Rwandan and the Burundian transitional justice 
processes. From major arguments on scholarly debates about the *gacaca* and the 
*bashingantahe*, I attempted to formulate different questions and arguments based on 
assumptions of legal pluralism and social constructivism. The next chapter explains why 
I adopted legal pluralism and social constructivism as the main theoretical frameworks of 
this study.

**Significance of the Study**

Considering the magnitude of the 1990s conflicts in Rwanda, in Burundi, and the 
subsequent spread of violence in the GLR, it is imperative to study not only factors that 
contributed to the emergence of conflict but also mechanisms that are attempting to 
prevent potential conflicts by addressing past and present social injustices. In including 
the *gacaca* courts and the *bashingantahe* (respectively in Rwanda and in Burundi) in the 
process of national reconstruction, the post-conflict Rwandan and Burundian states 
acknowledged, at least in principle, the pertinence of including bottom-up processes in 
their transitional justice. Since the traditional *gacaca* and the council of *bashingantahe* 
are mainly institutions that provide a justice of proximity (Huyse and Salter, 2008), they 
provide potential avenues for resolving, or at least alleviating, social conflicts, especially 
those related to land and property rights. Given that issues of property rights were crucial 
in the Rwandan and the Burundian 1990s conflicts (Marysse and Reyntjens, 2005), the
*gacaca* and the *bashingantahe* systems of justice should have a legitimate place in the debate over property rights and land conflicts in Rwanda and Burundi.

If the *gacaca* courts and the *bashingantahe* are no longer operating as “local justice mechanisms” due to state control and interferences, they will probably not be able to effectively contribute to post-conflict justice and to the resolution of pertinent social issues, such as property rights and land conflicts. Because Rwanda, Burundi, and other countries of the GLR operate plural legal systems, it is not sufficient for the statutory justice system to exclusively address post-conflict justice and current pertinent issues that might have contributed to recent conflicts in the region. Since the colonial period, the histories of Rwanda and Burundi have been so intertwined that sometimes the best way to understand social, political, and economic occurrences in one country is to study both simultaneously.

Looking at the way the *gacaca* courts and the *bashingantahe* are included in the transitional justice processes in Rwandan and in Burundi might provide new insights on how state involvements in local mechanisms of justice might affect the transitional justice processes, not only in Rwanda and Burundi but also in the entire GLR. Since traditional justice systems have been advocated and included in transitional justice processes in Uganda, Rwanda, Burundi, and in the DRC (Corey and Joireman, 2004; Bangura, 2008; and Huyse and Salter, 2008), the results of the present study might be useful in explaining whether the legitimacy of traditional justice systems such as the *gacaca* courts and the *bashingantahe* is still derived from the people or from the post-conflict state. And in the case that the *gacaca* and the *bashingantahe* are being transformed into top-down
processes, or simply politicized for the benefit of specific groups, not only the effectiveness of these local mechanisms of justice is threatened, but also changes imposed from the top could become potential sources of conflict in the long run.

If it is the case that post-conflict governments in Rwanda and Burundi are using the *gacaca* and the *bashingantahe* as ways of legitimizing and consolidating power instead of addressing pertinent social questions, such as issues related to land and women’s participation in the political processes, then the transitional justice in Rwandan and in Burundi fails to address some fundamental social injustices that led to the 1990s conflicts. In order to comparatively study how the post-conflict Rwandan and Burundian states have included the *gacaca* and the *bashingantahe* in their transitional justice processes, the study focuses on some pre-independence and post-independence developments that have transformed the relationship between state and local mechanisms of justice. The study also looks at the ways in which post-conflict Rwanda and Burundi deal with issues related to land and whether or not the *gacaca* and the *bashingantahe* continue to be involved in adjudicating conflicts surrounding land access. The study pays particular attention to how domestic changes that resulted from the 1990s Rwandan and Burundian conflicts might have affected the modern *gacaca* and the *bashingantahe*.

Defining Terminologies

Although throughout this study important concepts and terminologies are defined, here is how I understand the principal terminologies of the present study:
Transitional justice:

In this study I understand transitional justice as an ensemble of mechanisms and strategies that post-conflict states adopt in their efforts to address past violence and injustice, and launch national reconciliation. Some of those mechanisms are: trials, amnesties, lustrations, truth and reconciliations commissions, and local and traditional justice mechanisms.

Forum shopping:

The study employs *forum shopping* exclusively in the context of legal pluralism, where at least two legal regimes regulate the behaviors and the interactions of individuals. And in that context of legal pluralism, I define *forum shopping* as individuals’ ability to select, according to their opportunities and expectations, the legal regime of their choice for specific legal matters.

Gacaca:

Originally the *gacaca* were a type of traditional participatory mechanisms of conflict resolution in Rwanda. The word *gacaca* derives from the Kinyarwanda word *umucaca*, which refers to the grass or lawn where public hearings on different legal matters took place (Ingelaere, 2008). The *gacaca* were presided by elders called *Inyangamugayo*. But the modern *gacaca* courts are a hybrid legal structure, based on the traditional *gacaca*, and reinvented by the post conflict Rwandan government in the early 2000s to help prosecute the suspects of the 1994 Rwandan genocide (Haile, 2008).
**Inyangamugayo:**

In the traditional *gacaca inyangamugayo* were respected elders who presided over the *gacaca* (Corey and Joireman, 2004). Although traditional *inyangamugayo* were selected and trained by elders, they had to be approved by the community (Verpoorten, 2010). But for the modern *gacaca* the government controls the training and determines the criteria for selecting *inyangamugayo*.

**Bashingantahe (or mushingantahe in singular)**

Traditionally the terms *bashingantahe* refers to Burundian elders who had the authority to conduct private mediations and public hearings on different local legal matters. Their selection and training was supervised by senior *bashingantahe* but their approval depended on the community (Deslaurier, 2003). However, the government appoints some of the modern *bashingantahe*, while others *bashingantahe* continue to be selected by elders at the local levels (Kaburahe in Huyse and Salter, 2008).

**Génocidaire(s):**

*Génocidaire* is a French word that refers to a person who has committed a crime of genocide. But in the present study the term *génocidaires* is exclusively used with reference to Rwandans who were convicted or suspected of the 1994 Rwandan genocide.
Jurisdiction:

In general the term jurisdiction refers to the legal authority to speak on specific matters and/or the geographical area in which a certain administrative authority has legal responsibility. In this thesis the term jurisdiction is exclusively used with reference to the power to make authoritative claims on definite legal issues.

Organization of the Study

The study is divided in five chapters, including the introduction and the conclusion. Chapter two explains the theoretical frameworks of the study and provides a review of literature on transitional justice, and an overview of transitional justice in Africa and in the Great Lakes region of Africa. This chapter attempts to explain how local mechanisms of justice, such as the gacaca court and the bashingantahe, are linked to land rights in the context of legal pluralism.

Chapter three addresses the contexts in which the modern gacaca and the bashingantahe were incorporated in the transitional justice processes in Rwanda and in Burundi. This chapter attempts to explain why the gacaca and the bashingantahe became integral part of the post-conflict justice in Rwanda and Burundi. Chapter three also attempts to establish connections between the gacaca, the bashingantahe and local land issues in Rwandan and in Burundi. Finally, this chapter tries to examine possible social effects of state interferences with the gacaca and the bashingantahe.

In chapter four the study argues that jurisdictional differences observed between the incorporation of the gacaca and the bashingantahe in the transitional justice
processes in Rwanda and Burundi could be explained by differences in the conflict dynamics, the methods of conflict termination, the type of shift in the post-conflict ruling political coalition, and the way the post-conflict state attempts to redefine ethnic relations.

Finally, chapter five provides a summary of the study, and attempts to establish inferences based on evidence observed. In addition, as a concluding remark, this chapter reflects on possible areas of future research on transitional justice and traditional justice (or local justice mechanisms) in Rwanda, Burundi, in the African GLR, and in other legal pluralist contexts where post-conflict states could co-opts local mechanisms of justice.
CHAPTER 2: THEORETICAL FRAMEWORK AND REVIEW OF LITERATURE

This chapter explains the study’s theoretical framework and reviews pertinent literature on the study of transitional justice, indigenous mechanisms of justice, the African region of the great lakes, Rwanda, and Burundi. In addition, this chapter attempts to demonstrate how local mechanisms of justice such as the *gacaca* and the *bashingantahe* are connected to critical social issues, such as land rights, in legally pluralist societies such as Rwanda and Burundi.

Theoretical Framework

I combine theoretical perspectives of legal pluralism and social constructivism in an attempt to explain how social implications of the 1990s conflicts and political rearrangements are affecting the *bashingantahe* in Burundi and the *gacaca* in Rwanda. In the post-conflict Rwanda, for instance, the *gacaca* courts are only permitted to try the 1994 genocides related crimes (Ingelaere, 2007). And in Burundi, the government’s interferences in the selection of *bashingantahe* have resulted in the reduction of popular legitimacy of *bashingantahe* (Nindorera, 2003). These changes to the *bashingantahe* and the *gacaca* can be explained through the theoretical lenses of legal pluralism and social constructivism.

*Legal Pluralism*

A key factor in the effort to understand how political rearrangements caused by the 1990s conflicts might have affected the *bashingantahe* in Burundi and the *gacaca* in
Rwanda is the fact that Rwanda and Burundi are essentially legally pluralist countries (Chretiens, 2006). As a result of pre-colonial social arrangements and colonization, Rwanda, Burundi, and other countries of the GLR of Africa have maintained multiple legal regimes in such a way that statutory laws, customary laws, and other forms of legal norms operate simultaneously. Sometimes the multiplicity of legal regimes causes conflict. For example, on issues of property rights there is almost always a tension between customary land tenure systems and statutory land tenure systems (Joireman, 2008). This study pays a particular attention on how recent shifts in politics in Rwanda and Burundi might have influenced the interplay between the statutory law and the gacaca and the bashingantahe. Rwanda and Burundi are post-colonial countries where customary laws have been interacting with statutory laws since colonial times (Doom and Gorus, 2000), and this history of legal pluralism helps to explain the relationship between ILTs and land rights in the discourse of transitional justice in Rwanda and Burundi.

John Griffiths (1986) defines legal pluralism as “the presence in a social field of more than one legal order” (p.1). The behaviors of people living in a legally pluralist environment are regulated by multiple sets of norms. Contrary to legal centralism, in which justice is a function of a unified legal system, under conditions of legal pluralism, multiple legal traditions operate concurrently. Post-colonial states are certainly legally pluralist. Soyinka (1981) depicts the plurality of the post-colonial Nigeria in terms of the duality of religious practices, legal systems, and political norms. The societal compartmentalization of postcolonial societies does not necessarily mean that there is a clear separation between different normative systems. Instead, it implies that there are
interactions between different sets of political, religious, economic, and legal norms. As ILTs were forced to cohabitate with statutory laws in the colonial and postcolonial states, there had been mutual influence between ILTs and statutory laws.

Legal pluralism does not only refer to multiple “systems of norms and regulations,” it also entails diverse systems of authority and legitimation (Griffiths, 1986). Arguably, this is where tensions between statutory and customary laws occur. While the state oversees statutory laws, traditional leaders oversee ILTs, and potential tensions develop over the control of jurisdictions. For example, as a consequence of modernization, statutory land tenure and customary land tenure constantly compete over legitimacy. The tension between ILTs and statutory laws is due to the fact that multiple legal systems regulate similar matters such as property rights, crimes, successions, etc. And where ILTs and statutory laws overlap, individuals have the latitude to choose the legal system of their preference For instance, when a Ugandan chooses to present a property right complaint in front of an ILT rather than before a statutory legal court, the individual in question recognizes the authority and the legitimacy of ILTs. This implies that one will choose the legal system that appears somewhat more favorable to one’s case (Ties, 1999).

Under legal pluralism, individuals’ choices to present their cases to one legal system over another are called forum shopping (Meinzen-Dick and Pradhan, 2002). Even though forum shopping provides choices and flexibility in the legal system, it is also a potential source of tensions and conflicts, because it provides an arena for citizens to articulate competing claims on matters such as property rights and on other legal issues,
adopting different legal reasonings. Not only could *forum shopping* be a source of tension, but in the context of post conflict reconstruction a legally pluralist environment could exacerbate uncertainty as the transitional government attempts to navigate and consolidate different legal frameworks in order to address past injustice. In addition, *forum shopping* could also be a way of resisting state interference in local matters. This study considers particularly whether Rwandans and Burundians are using *forum shopping* as a form of resisting state interferences in the *gacaca* and the *bashingantahe*.

In legally pluralist systems, multiple cultural identities interact in the same social and political setting. The multiplicity of cultural identities and legal systems constantly create struggles for the redefinition and the reconstruction of identities and interests (Membe, 2001). It is therefore pertinent to study recent transformations of the *gacaca* and the *bashingantahe* through the lenses of social constructivism. Customary laws and property rights, for instance, are inextricably associated with how a person or a group of people understand their identities, relate to their environment, and interact with one another (Newbury, 1998). This is why Ties (1999) suggests that when aborigines of New Zealand present themselves in the modern courts of law, but plead to be tried in their traditional legal settings, it is not necessarily because they do not recognize the authority of the national court system. It could also be because they identify more with their customary legal system, or because sometimes it is strategically beneficial for indigenous groups to resolve conflicts through ILTs.

In involving political, affectionate, and strategic interests, *forum shopping* is decided within the intersection of power relations and social dynamics (Joireman, 2008).
In general, people abide by the legal regime that seems more legitimate, but in post-colonial states the presence of a traditional authority challenges the authority and the legitimacy of the state. This is why in the colonial and the post-colonial state the incorporation of traditional structures and the power of coercion have strongly been used as means of enforcing the authority and the legitimacy of the state (Mbembe, 2001). In the effort to understand how the gacaca and the bashingantahe might have been affected in the post-conflict Rwanda and Burundi, it is relevant to examine how state power has been centralized, and how the gacaca and the bashingantahe have been incorporated in the transitional justice. I am assuming here that the stronger the integration, the more power and control the state has over the gacaca and the bashingantahe. And since local mechanisms of justice, such as the gacaca and the bashingantahe, are based on social relations (Deslaurier, 2003), this study considers how social relations, group identity, and legitimacy have been socially constructed/or reconstructed in the post-conflict Rwanda and Burundi.

*Social Constructivism*

The central claim that social constructivism makes is that social phenomena are outcomes of social interactions (Kukla, 2000). In order to better understand a given social phenomena, we ought to examine ideational factors and social interactions that contributed to the development of the phenomena in question. John Ruggie (1998) explains that social constructivism “rests on an irreducible intersubjective dimension of human actions” (p. 869). The types of land tenure or customary laws that a community
chooses to implement are the result of social negotiations between different members of that community over a period of time. After periods of instability, efforts to craft the social and political rearrangements might affect ILTs and property rights systems. Considering that between the 1990s and the early 2000s Rwanda and Burundi experienced tremendous periods of instability resulting in political changes, the present study takes into account how political rearrangements in post conflict Rwanda and Burundi have affected the Gacaca and the Bashingantahe.

Perhaps the question of identity formation is the most important notion that social constructivism brings in the discussion of social phenomena. Identity and interests are interconnected and mutually influence one another. Marc Lynch (1999) explains, “[social] constructivism employs social ontology in which deeply constitutive networks of relations and discourse shape actors’ identity and interest” (p. 28). Probably one of the most extreme cases of state reshaping identity and interests is the case of the DRC. In 1971, president Mobutu imposed his philosophy of authenticité and changed the name of the country to Zaire. Not only Congolese became Zaïrians by the will of the state, but they began referring to themselves as citoyens, and even their public and formal attire were determined by the state (Nzongola-Ntalaja, 2002). In 1997 when Laurent Desire Kabila and the Democratic Alliances Forces for the Liberation of Congo (AFDL) dethroned Mobutu, Zaïre was renamed the Democratic Republic of Congo, and the language of the army was changed from Lingala to Kiswahili (Stearns, 2011). Consequently, even the national perception of Congolese Kiswahili speakers changed, as they became the leaders of the army and the country. These two examples, although
extreme, show how the authority of the state can be used to reshape identity, interests, and affect social relations. In this study I also consider how the Rwandan and the Burundian post-conflict states might have affected groups’ identity, interests, social relations, and their probable implications in the modern gacaca and the bashingantahe.

In attempting to understand why some individuals choose to take a land conflict to a customary court instead of a statutory court, the identity of the parties in conflict needs to be taken into consideration. This is why the study considers different ideas and events that have contributed in the reformulation of Burundian and Rwandan identities since the 1990s. And since individual and collective identities are influenced by collective intentionality (Copeland, 2000), the present study also considers how conflicts that began in the 1990s have contributed in the reshaping of the Rwandan and Burundian identities.

Review of Literature

*Transitional Justice*

In recent history, the pertinence of transitional justice was revived as various oppressive states in Latin America, in the former Soviet Union, in East Europe, and in Africa were toppled by a new class of political leaders (Teitel, 2000). For countries that were emerging from decades of dictatorial regimes the crucial question was how to deal with the painful past in order to forge a better future.

Lundy and McGovern (2008) explain that transitional justice asks whether societies emerging from long periods of conflict and injustice should prioritize justice
over reconciliation, or whether they should simultaneously implement measures of justice and reconciliation in their efforts toward reconstruction. Transitional justice encompasses different strategies, such as trials, truth and reconciliation commissions, amnesties, and reparations, that different countries employ in order to come to term with a violent and unjust past (Olsen, Payne, and Reiter, 2010). Arehovel (2008) provides a comprehensive definitions, he defines transitional justice as:

“...a range of approaches that societies undertake to reckon with legacies of widespread or systematic human rights abuse as they move from a period of violent conflict or oppression towards peace, democracy, the rule of law, and respect for individual and collective rights” (p.8).

Depending on the intensity, the lengths, and the nature of the conflict, post conflict societies adopt transitional justice approaches that suit their social, political, and economic environment. Since the 1940s there have been two major trends in transitional justice: massive amnesties and prosecutions. Huyse (in Huyse and Salter, 2008) explains that by the 1940s some post conflict societies chose not to address past injustice; he refers to this strategy as a “self-imposed silence,” whereby the transitional government and the successor elites decide not to address past injustice, hoping that, with time, the past will somewhat become a distant memory.

Yet, at the same time when some transitional governments chose self-imposed silence in dealing with their violent and unjust past, the 1948 Tokyo and Nuremberg trials condemned Japanese and German war criminals (Turley, 200). Huyse (in Huyse and Salter, 2008) believes that, in culminating to the 1949 Geneva Convention on genocide, the 1948 Tokyo and Nuremberg trials had set a legal precedent for transitional justice. But at the same time Huyse (ibid.) acknowledges that the Tokyo and the Nuremberg trials
were the beginning of the internationalization of transitional Justice. Arenhovel (2008), Minow (2010), and Marysse and Reyntjens (2005) recognize that since the 1980s the spread of international norms about human rights and justice began influencing transitional justice processes in Latin America, the Hague tribunal for the former Yugoslavia, the Arusha tribunal for Rwanda, and ultimately the establishment of the International Criminal Court. International norms on human rights have been spreading through “norm cascade.” Keck and Sikkink (1998) demonstrate how views of justice take on a global character through the process of *boomerang*, involving states, NGOs and IGOs. Even with the internationalization of norms about transitional justice, the two major trends of transitional justice have remained. On one side a group of academics and professionals continue to advocate for amnesty (or a general forgiveness for those who were responsible of violent mass crimes), and on the other side some academics and professionals continue to argue in favor of prosecuting the responsible of the violent past (Robinson, 2003).

In addition to massive prosecutions and massive amnesties as ways of addressing transitional justice, Olsen, Payne, and Reiter (2010) admit that there is a third approach, a *moderate approach* that recognizes the importance of prosecutions but warns that trying hundreds of thousands of perpetrators, such as in the case of Rwanda, might be logistically problematic. This is why the *moderate* approach of transitional justice proposes a combination of trials and amnesties. Arguably, this is what happened in the case of Uganda, when the Ugandan government offered amnesties to lower rank combatants of the Lord’s Resistance Army (LRA) while prosecuting top ranks officials.
The moderate approach to transitional justice is not solely limited to combining prosecutions and amnesties, it also advocates the localization and the specification of transitional justice practices. One of the proponents of the localization of transitional justice is Martha Minow (2008) who argues that since the objectives of transitional justice are reconciliation, accountability, truth, and reparation, it is imperative to contextualize the process of transitional justice. Agreeing with Minow (2008), Arhenovel (2008) advances that:

“...transitional Justice is not only about human rights violations; it is a process to shape citizens’ understanding of justice and a re-foundation of democracy... for this reason a participatory approach is needed” (p.11).

It was precisely in the context of taking into account the conditions and opportunities of each post-conflict situation that mechanisms such as Truth and Reconciliation Commissions (TRCs), and indigenous mechanisms of justice became integral part of the discourse of transitional justice in Africa, especially in the early 1990s when some countries were emerging from long periods of political turbulence.

Transitional Justice in Africa

Perhaps the 1990s South African TRCs’ hearings are the most publicized African transitional justice cases. They had a massive international traction, and were specially geared toward reconciliation (Zyl, 1999). Following the end of the South African Apartheid regime in 1990, the emerging new South Africa entrusted its TRCs with the task of bearing witness, recording testimonies, granting rehabilitation, reparation, and in some instances granting amnesty to perpetrators of violations of human rights during the
Apartheid era. South Africans did not unanimously accept the adoption of TRCs for their transitional justice. Some South Africans argued that the TRCs failed to expose the ruthlessness of apartheid justice (Ross, 2002), and other warned that revisiting the past could be detrimental for racial relations in the post-apartheid South Africa (Wilson, 2001).

No matter what side one takes about the South African TRCs, the crucial point is that transitional leaders have to balance rebuilding social trust and doing justice for the violent past (Olsen, Payne, and Reiter, 2010). In this equation, political, social, economic, and juridical opportunities become crucial, they determine how transitional justice could be implemented. TRCs were a concerted strategy by the new South African regime to strike this balance. Blanket amnesties or massive prosecutions might not have worked. Generalized amnesties could have strained race relations, and massive prosecutions could have drained resources away (Wilson, 2001). Another option for South Africa could have been traditional justice mechanisms. Unfortunately this type of local justice could not have been efficient in an environment where people were forced to live separately under the apartheid regime. This is why TRCs seemed politically and socially more plausible for South Africa.

For other post-conflict African countries such as Liberia, Mozambique, and Uganda, where ILTs had been in use since pre-colonial times, it made sense to incorporate local justice systems in the transitional justice (Arenhovel, 2008). For such countries, the presence of widespread local justice systems, such as the *barza communautaires* in DRC (Clark, 2010), provided political and legal opportunities for
reconciliation. On the case of northern Uganda, Angucia (2009) argues that involving the Acholi mechanism of justice *mato oput* in the reintegration of former child soldiers played a role in reconciliation processes in northern Uganda. Boothby, Crawford, and Halperin (2006) explains that in Mozambique local traditional healing ceremonies, such as visiting the *ndumba* (the house of spirits) were crucial for the reintegration of ex-child soldiers. They argue that because Mozambican communities where ex-child soldiers were reintegrated have particular customs, structures, and expectations, traditional healers and leaders were pertinent for the healing of ex-child soldier and the reconciliation of local communities. Some argue that the inclusion of ILTs in transitional processes was also fostered by a conformism to international norms of human rights (Corbin, 2008). In accordance with the *boomerang*, the idea that international norms on human rights can circulate through networks of States, NGOs and IGOs (Keck and Sikkink, 1998), Western governments have the ability to pressure African post-conflict states to include participatory mechanisms in processes such as the demobilization disarmament and reintegration of ex-combatants (Herman and Peterson, 2010), the reintegration of internally displaced peoples (Harrison, 2002), and in the overall transitional justice process (Leebaw, 2008). ILTs, at least from their formal and procedural viewpoint, include participatory characteristics (Salter in Huyse and Salter, 2008). Therefore, including ILTs in transitional justice processes provides transitional government with some leverage for national and international legitimacy.

The resurgence of ILTs in Africa was encouraged by the necessity to deal with past atrocities and injustice at the local level (Mamdani, 2000). In many instances, such
as in Sierra Leone, where long periods of conflict destroyed social fabrics with considerable implications for local justice systems, ILTs had maintained some structural capability and legitimacy to address some questions related to post-conflict justice (Lahiri, 2009). This is why Leebaw (2008) argues that traditional methods of conflict resolution provided African post-conflict governments options for a quick reestablishment of order and national reconstruction. For instance, by including the *mato oput* (an ensemble of public rituals for purification and reconciliation practiced in northern Uganda) in the reintegration processes of former LRA combatants in northern Uganda, the Ugandan government seemed to promote local participation, saved on resources, and looked good to international donors. This is, at least partly, why traditional mechanisms of conflict mediation were formally incorporated in peace agreements and in transitional justice processes of some post-conflict African countries. And customary process such as the *mato oput*, the *gacaca*, and the *bashingantahe* became part of transitional justice, respectively in post conflict Uganda (Murithi, 2002), Rwanda (Longman, 2009), and Burundi (Deslaurier, 2003). As mentioned earlier, the inclusion of ILTs in transitional justice processes in some African post-conflict states was an outcome of international pressure, the incapacity of formal justice systems to adequately address past injustice, and the effort of transitional governments to seek or to establish popular legitimacy.

Although Huyse and Salter (2008) maintain that for the most part ILTs are bottom up process, others argue, that even in the pre-colonial era ILTs were subject to the political power (Joireman, 2008). Local mechanisms of conflict mediation are neither
immune to political influence nor are they immutable to political and temporal shifts. Political and social changes introduced by colonization and by the postcolonial state in Africa have considerably affected the nature of ILTs. ILTs are often described in local terms as restorative, not retributive justice systems. Deslaurier (2003) argues that the primary purpose of traditional methods of conflict mediations in Africa was reconciliation and the reestablishment of societal harmony. Understandably, it is conceivable that traditional societies that depend on agriculture and man power as their primary means of production would promote amicable resolution of conflicts than retributive justice. For example, in small communities a retributive justice system might weaken the productivity of the community.

Thus, Eichstaedt (2009) explains that in traditional societies the notion of collective peace and societal harmony had primacy over individual justice or rights. It is for this reason, for instance, that Corbin (2008) and Dunson (2007) explain that in the Acholi ethnic group of northern Uganda, murder was not necessarily punished by death, or exclusion. Instead, a panoply of traditional ceremonies of reconciliation, such as the mato oput, engaged the perpetrator and the victim’s family in public ceremonies for the recovery of social harmony. It could be that the importance of such practices was largely symbolic. But the fact that in the Acholi ethnic group of northern Uganda the mato oput was widely practiced and continued to be practiced even after colonization (Bangura, 2008) might be an indication that in Acholi land mato oput had a popular legitimacy.

In many instances the pre-colonial ILTs were neither uniform nor harmonious. Often, agriculturalists and pastoralists living in the same geographic area competed over
lands and other natural resources because they abided by different customary land tenures, or different ILTs (Gahama, 2006). Even within the same ILT sometimes pre-colonial power struggle between different political leaders and different groups caused conflicts. Autesserre (2008) explains that the current trend of conflicts in Bunia, in northeastern Congo, between the agriculturalists Lendu and the pastoralist Hema, are manifestations of grievances and unresolved pre-colonial conflicts that continued to incubate and develop in the post-colonial Congo.

With colonization, African ILTs were severely affected by the imposition of legal systems based on individual rights and the centralization of justice. Chretien (2006) argues that the centralization of the colonial administration reduced the autonomy and ultimately the effectiveness of African indigenous mechanism of justice. As African indigenous systems of authority lost most of their power and legitimacy, traditional systems of justice were pushed to the fringe of society (Deslaurier, 2003), operating mainly as informal systems of justice. Not only did colonial legal systems emphasize justice and individual rights over social peace, they also came with legal fees and a legal language that was not always translatable into the native languages (Davidson, 1992). In this way, colonization entrenched cultural limitations and differentiation in the legal systems. This is how the forces of history imposed a new form of legal pluralism on African societies.

With time societal changes introduced by colonization became consolidated, and the traditional elite class became subordinate to the colonial administration while a new class of African elites was emerging (Mbembe, 2001). Still, in spite of the blow of
colonization, African ILTs were never completely eradicated, and traditional chieftaincies maintained some degree of authority. In northern Nigeria, for instance, the British indirect ruling sanctioned ILTs to facilitate the establishment of the colonial administration (Falola and Heaton, 2008). In some instances the traditional elites collaborated with the colonial administration to preserve their legitimacy. They sold or gave away customary lands to missionaries, and in some instances they forced their people to convert to Christianity. For example, Kasongo (1998) argues that in the aftermath of World War II some Congolese Atetela traditional chiefs of the Kassaï region supported the enforcement of statutory labor (or forced labor), which resulted in a massive rural exodus. Chretien (2006) explains that the colonial administration maintained the legitimacy of traditional authority in some limited capacity, especially in rural areas. Following the decolonization period, many African postcolonial leaders revived aspects of traditional leadership, especially during the nationalism waves of the 1960s, as a means of appealing to nascent national pride and as an alternative to colonial institutions (Mamdani, 2001). However, Mbembe (2000) insists that many postcolonial African political leaders revived political traditionalism and ILTs in an attempt to justify their authoritarian regimes.

In 1971, in proclaiming his murky doctrine of *authenticity*, the president of Zaïre, Mobutu Seseko, banned all European names and introduced a specific dress code, while nationalizing at the same time all major companies and business through the infamous process of *Zaïrianization* (Renaissance Congo-2000, 2000). In recognizing traditional chieftaincies, Mobutu considered himself as a “traditional leader” of the Ngbandi people
(his ethnic group). In this way Mobutu was able to claim legitimacy from the *Ngbandi* people (Nzongola-Ntalaja, 2002). Ekeh (1975) would probably argue that in order to consolidate his legitimacy, Mobutu was able to navigate between the *primordial public* sphere (when the public behavior is determined and influenced by “primordial groupings, ties, and sentiments”) and the *civil public* sphere (when the public behavior is based on civic structures as a legacy of the colonial administration). Agreeing with Mbembe (2000), Salter (in Huyse and Salter, 2008) contends that for most African postcolonial leaders, recognizing the authority of traditional chieftaincies was a strategy to legitimize their authority, not necessarily a way of governing from the bottom up.

_Land Rights and ILTs_

The shrinking authority of traditional chieftaincy came with changes in property rights and land tenure systems. As the administrative authority became centralized around the postcolonial state, customary systems of land tenure began to lose relevance to the benefit of statutory land tenures, especially in public matters. For the purpose of the present study it is pertinent to consider how the relationship between ILTs and land rights were transformed as a result of the colonial and the postcolonial state.

Perhaps one of the most immediate effects of colonization on African societies was a dramatic change in the nature of relationship between ILTs and land rights. Traditionally, kinship or conquest determined access to land (Huggins and Clover, 2005). But colonization introduced a new form of accessing land, in which traditional leaders could sell portions of customary lands to colonizers and missionaries who were perfect
strangers, not part of the community or kinship, and not traditionally entitled to the land. In this way, unused land or common properties were commoditized. In addition to land privatization, colonization introduced land commercialization in the GLR (Chretien, 2006). In many instances under the customary land tenure systems, the land belonged to the community and community members had the rights of occupation and usufruct (Davidson, 1992). For instance, for many pastoralist communities, grazing lands were a common property, individuals could only use land without owning it (Migot-Adhalla, Hazel, Blarel, and Place, 1991). The pre-colonial customary land tenure systems were not idealistic by any stretch of imagination. In many instances political power controlled and determined accessed to land. Huggins (in Huggins and Clover, 2005) argues that in indigenous societies those who had political power had the highest right to the land, since land was a public good. It is for this reason that Joireman (2008) claims, “customary law is explicitly and is best viewed as a battle ground in the struggle for power within” (p.1235).

In supplanting customary tenure systems, the statutory land tenure shifted the struggle for the control of public good from the local setting to the state, in this way those who controlled the state had more access to pubic goods. This is why Mbembe (2001) explains that the centralization of power in post-colonies resulted in the centralization of public goods in such a way that redistribution depended on post-colonial leaders’ arbitrary rules. The point that Mbembe is suggesting here is that the logic of redistributions espoused by post-colonial leaders was less legitimate, as opposed to the rationale of customary system of redistribution. As Joireman (2008) mentions, customary
legal systems are arenas where different traditional leaders struggle for the control of public resources. Perhaps the difference is that the authority of traditional chieftaincies was more legitimate and accepted as opposed to the authority of post-colonial leaders.

In the post-colony, some traditional leaders were successfully co-opted by the state. As a result their popular legitimacy became contested. Ingelaere (in Huyse and Salter, 2008) informs that in rural Rwanda some citizens were wary of traditional leaders who appeared to collaborate closely with the regime. The centralization of power under the post-colonial state and the progressive erosion of the legitimacy of customary authority have had some negative impact on customary systems of property rights. Huggins and Pottier (in Huggins and Clover, 2005) claim that continued interactions between customary and statutory legal systems created an overlap of authority and legitimacy, with contentious implications for property rights. When customary and statutory land claims compete, in many instances the customary claim is disadvantaged due to poor records, the absence of land registration, and the lack of enforceability.

One of the biggest challenges in addressing indigenous legal systems and property rights in Sub Saharan Africa is the absence of substantial written records of customary law. Fremont (2009) explains that the lack of written records in pre-colonial legal systems problematizes their precise content. Often customary legal knowledge is entrusted with elders or specific groups of people who oversaw matters of property rights (Harlacher, Okot, Omboyo, Balthazar, and Atkinson, 2006). The absence of land registrations and records in ILTs become problematic in the context of political conflicts in which massive number of people are internally displaced or exiled. Massive population
displacement creates demographic pressure on land, and forces a reinterpretation and renegotiation of land access and land rights, especially in the context of customary land tenure (USAID, 2005). Huggins and Pottier (in Huggins and Clover, 2005) remark that since customary knowledge is bestowed in the collective memory, “remembered land tenure could be used to forge a social difference today” (p.386). Thus, those who are more convincing in their recollections and reinterpretation of traditional land tenure systems could manipulate other community members for political gain. This is partly why the reinterpretation of the past has been pertinent in the political instability of the African GLR since the 1990s. Nyankanzi (1998) argues that the reinterpretation of the Rwandan history played a critical role in the events that led to the 1994 Rwandan genocide.

The recent unstable history of the African GLR, especially that of Uganda, Rwanda, Burundi, and the DRC, is marked by a political will to deconstruct and reconstruct the past. And this reinterpretation of the past has some implications on ILTs and property rights. When colonization introduced statutory legal systems in in the African GLR, ILTs began to lose significance, and property rights systems changed drastically. Mbembe (2001) explains that one of the implications of the colonial and postcolonial states was that ILTs lost their effectiveness as the central administration took the monopoly of coercion. Firmin-Sellers (1995) and Joireman (2008) explain that the most important attribute in a land tenure system is the ability to enforce land regulations. Once ILTs lost their coercive power, their ability to enforce customary land tenures also was reduced. The current situation of the African GLR is an interesting showcase for how
ILTs have been transformed from the colonial to the post-colonial state. For example, in causing massive human displacements in Kivu, in eastern Congo, the 1990s conflicts increased demographic pressure on land and stretched the capacity of an already weak statutory justice system. Consequently, local justice mechanisms such the *barza communautaires* have resurfaced as valuable alternatives for addressing land conflicts in the Kivu province and in other parts of eastern Congo (Clark, 2010).

**The African Great Lakes Region and ILTs**

For many African nations, the 1990s are considered as the years of *democratization*. The dynamic of political alignment lost its importance after the end of the Cold War era. Proxy wars and the conflicts between the West and the East in Africa came to an end. In South Africa, the Apartheid regime ended, and many African countries went from single party-state systems to *multipartism*. In Zaïre, president Mobutu’s *Mouvement Populaire de la Révolution* (MPR) was no longer the party-state and Zairians were finally allowed to organize themselves in political parties (Haskin, 2005), and of course, choose their own public attire and keep European first names if they wished.

One of the few successful examples of democratization in the 1990s is probably the case of Ghana. Between 1992 and 2005 Ghana had multiple democratic elections during which power peacefully shifted at least twice between the two major political parties NPP and NDC. Although the end of the Apartheid regime in South Africa was inspiring and encouraging to Africans, Africa continued to face tremendous challenges.
The Angolan conflict was still going on, the Somali rebellion was gaining momentum, Liberia and Sierra Leone were facing brutal civil wars, and hunger and HIV/AIDS continued to decimate African populations.

Amidst of the optimism of the post-Cold War era, the GLR was facing tremendous political instabilities. Uganda was confronting a brutal and gruesome rebellion in its northern territory; Burundi was in a political crisis; Zaire (DRC) was plunging into an interminable quagmire of armed conflicts; and Rwanda was entangled, arguably, in the bloodiest “ethnic conflict” of the decade. In the 1990s, in the GLR the only country that was not going through an armed conflict was Tanzania (Khadiagala, 2006). But, as inter and intra conflicts continued to develop in the region, Tanzania became a refugees hosting country. Many Congolese, Rwandans, and Burundians found refuge in Tanzanian villages and cities. Even though there were no armed confrontations in Tanzania, conflicts in Rwanda, Uganda, Burundi, DRC and, even Sudan affected Tanzania.

In the last two decades, four countries in the African GLR (DRC, Uganda, Rwanda, and Burundi) have developed a peculiar dynamic of collaboration, conflicts, and interventionism (Renton, Sedon, and Zeilig, 2007). All of these four countries have had civil wars in the last 17 years. The 23 years long Ugandan civil war ended in 2006, as a result of the Juba Peace Talk between the Ugandan Government and the LRA (Dunson, 2007). The DRC is still unstable, especially in the northern and eastern parts where warlords and militias control different portions of the country (Baregu, 2011). Since the 1994 genocide, Rwanda has made a lot of economic progress but a growing number of academics, such as Longman (2009), lament the over-centralization of Paul Kagame’s
government. And finally, in Burundi the observation of the 2000 Arusha agreement have helped stabilize the country; however, the regime is becoming more and more authoritarian, although Pierre Nkurunziza, the actual President, is Hutu the Burundian army is largely comprised of Tutsis, and educational and business opportunities are largely favoring Tutsis (Soderbaum & Taylor, 2008)

The surge of conflicts in the GLR in the 1990s did not happen spontaneously. Reyntjens (2001) shows that since the 1960s there have been a pattern of internal conflicts with regional implications. Following the decolonization era, former colonizers struggled to maintain political and economic influence over former colonies, while on the other side African emerging nations were learning to deal with national and international issues (Marysse, and Reyntjens, 2005). Chretien (2006) insists that in the GLR refugee hosting countries, wittingly or unwittingly, provided training opportunities to rebels that would later attack and destabilize neighboring countries. This is why in many occasions instability in a country has prompted instability in another, such as the case of Burundi, Rwanda, and the DRC.

Hence, since the 1960s economic and political instabilities in the GLR have encouraged complex interactions between Uganda, Rwanda, the DRC, and Burundi. Paul Collier (2007) explains that the slow and negative economic growth in the region has fostered the expansion of informal trades and activities both within and between countries. Environmental and political instabilities have also forced people to move from one country to the other (Renton, Sedon, and Zeilig, 2007). In 2002 when the volcanic Mountain Nyiragongo erupted in the city of Goma, in eastern Congo, thousands of Congolese had no option but to seek refuge in Rwanda and Burundi. Davidson (1992)
explains that during the Hutu revolution in Rwanda in 1959 hundreds of thousands of Rwandan Tutsi sought refuge in Uganda, Burundi, and the DRC. And when Idi Amin Dada’s government was overthrown in 1979 in Uganda with the help of Tanzania (Eichstaedt, 2009), thousands of Ugandan who had ties with Amin fled to DRC (then Zaire) (Bangura, 2008).

Often, political instabilities in the GLR have forced people to move from one country to another, causing spontaneous changes in social structures and imposing new challenges to statutory legal systems and ILTs. For example, the presence of approximately one million of Rwandan refugees in eastern Congo following the Rwandan 1994 genocide (Autesserre, 2010) put a lot of stress on land, and exacerbated border security issues between Rwanda and the DRC. Although border security is a national and a regional issue in the GLR (Khadiagala, 2006), in the case of the DRC and Rwanda border security is also an issue of citizenship, especially in North and South Kivu regions of the DRC (Mamdani, 2001). Though Kinyarwanda-speaking people had been settling in eastern Congo before 1885, they are still not recognized as Congolese citizens (Stearns, 2011). The massive presence of Rwandan refugees in eastern Congo in the mid-1990s complicated even more the questions of citizenship, land access, and other local issues. Inversely, when Rwandan refugees returned to Rwanda by 1996 they increased demographic pressure on land and complicated other local social concerns (Musahara, 2006).

The absence of effective central legal systems following the conflicts in the GLR forced ILTs and other local mechanisms of justice, such as the barza communautaires (in eastern Congo), to address local grievances and to attempt to solve the crisis of
legitimacy at the local level (Clark, 2010). This is partly why the post-conflict Rwanda, Burundi, the DRC, and Uganda opted to include ILTs in their processes of transitional justice (Lahiri, 2009, Deslaurier, 2003, Clark, 2010, and Bangura, 2008). Although customary legal systems in the GLR were profoundly affected by colonization and the postcolonial state, traditional leadership and traditional mechanisms of conflict mediation had maintained some authority and legitimacy in the region, especially in rural areas. For instance, Kaburahe (in Huyse and Salter, 2008) explains that during the Burundian conflict in 1993, some bashingantahe members formed human shields in parts of Burundi in order to prevent conflict escalation between warring parties.

In the DRC, Uganda, Burundi, and Rwanda customary laws and constitutional provisions dually regulate issues such as marriage, property rights, and other legal matters. In Uganda, for instance, there are four different land tenure systems, the mailo, the freehold, the leasehold, and the customary tenures system (the Ugandan Constitution, 1995). In many instances these four Ugandan tenure systems require a simultaneous participation of traditional authorities and the administrative authorities. Such a pluralist environment could facilitate tensions and conflicts, not only between ILTs and the statutory legal systems, but also within ILTs as traditional leaders compete for the control of public resources (Joireman, 2008). In post-conflict contexts the disruption of societal structures, and possible ruptures in the traditional leadership, could become sources of land conflicts as multiple interpretations of customary laws attempt to address multiple land claims (Theron, 2009). In spite of these limitations, when statutory legal systems are weakened by years of conflicts, ILTs could provide alternative ways to address the post-conflict justice.
In the aftermath of the 1990s conflicts in the GLR, ILTs and other local mechanisms of justice had maintained some capacity to address past injustice at the local level (Huyse and Salter, 2008; and Vandeginste, S. 2009). This is partly why the practice of *mato oput* has been included in the process of reintegrating ex-combatants of the LRA in northern Ugandan (Bangura, 2008); the DRC has employed the local justice mechanism of *barza communautaires* in land disputes in eastern Congo (Clark, 2010); the institution of *bashingantahe* has been revived in Burundi (Dexter and Ntahombaye, 2005), and the *gacaca* have been actively used in trying genocide suspects in Rwanda (Longman, 2009). While other ILTs in the GLR are equally pertinent for the study of transitional justice, the present study focuses on the *gacaca* and the *bashingantahe* in transitional justice processes in Rwanda and Burundi.

Scholars of the African GLR agree that the resurgence of the *gacaca* and the *bashingantahe* following the cycle of conflicts of the 1990s and 2000s in Rwanda and Burundi was fostered by the necessity to address past atrocities and injustice at the local level. The post-conflict Rwandan and Burundian states found an outlet in ILTs in their efforts to reestablish order and launch national reconstruction. This is partly why the *gacaca* and the *bashingantahe* became part of transitional justice, respectively in the post-conflict Rwanda and Burundi. The next chapter addresses the context of the resurgence of the *bashingantahe* and the *gacaca*, in the post-conflict Rwanda and Burundi and their role in the transitional justice processes.
CHAPTER 3: THE RESURGENCE OF THE GACACA AND THE BASHINGANTAHE IN RWANDA AND BURUNDI

In this chapter I wish to argue that the decisions to include the gacaca and the bashingantahe in transitional justice processes in Rwanda and Burundi were politically motivated. They were not necessarily post-conflict states’ efforts to encourage local participation in the transitional justice processes. The attempt to centralize the gacaca and the council of bashingantahe has affected popular participation, and has rendered forum shopping even more complex, as Rwandans and Burundians seek alternative justice processes outside of the statutory justice system, and the gacaca and the bashingantahe. Arguably, the gacaca and the council of bashingantahe are traditionally based on social capital (Ingelaere, 2007, and Nindorera, 2003). Their legitimacy derives from horizontal social relations. Infusing a semi-official character to the gacaca and the bashingantahe attempts to shift the legitimation process from horizontal to vertical. Some implications of these changes could be the delocalization of the gacaca and the bashingantahe as mechanisms of justice of proximity. In order to make this argument this chapter examines the background of the gacaca and the bashingantahe, the 1990s Rwandan and Burundian conflicts in Rwanda, and the post-conflict contexts in which the gacaca and the bashingantahe resurfaced.

Origins and Background of the Gacaca

In an attempt to rebuild Rwanda and to account for the crimes of the 1994 genocide, the post-conflict Rwandan state reinvented the gacaca court (Rettig, 2008).
The *gacaca* is Rwanda’s traditional mechanism of dispute resolution. According to Bert Ingelaere (in Huyse and Salter, 2008), the precolonial *gacaca* had a political, a cosmological, a social, and a juridical function. This is why the people who presided over the *gacaca* were elderly males with social, political, and religious legitimacy to render verdicts on issues such as property rights, murder, and marriage (Verpoorten, 2010). The *gacaca* were traditional gatherings aimed at restoring peace and harmony (Longman, 2009). The primary aim of *gacaca* was reconciliation of the conflicting parties and societal harmony (Ingelaere, in Huyse and Salter, 2008). For this reason, justice, the punishment of the perpetrator, or reparation of the victim, as such, was not the primary purpose of the *gacaca* (Golooba-Mutebi, 2008). Admittedly, the *gacaca* as many other pre-colonial Rwandan social structures might have been at the mercy of the most powerful. Still, Corey and Joireman, (2004) insist that the *gacaca* were not by essence a retributive legal system. In introducing the indirect ruling system, and a new legal system, colonization had profoundly impacted the Rwandan society and substantially affected the nature and the purpose of the *gacaca* (Chretien, 2006).

In the postcolonial Rwanda the *gacaca* continued to lose relevance. The postcolonial political Rwandan elites copied the Belgian type of government, education, and the legal system. The *gacaca* were relegated to an inferior status, although they continued to function as a system of customary dispute resolution at the local level, especially in rural areas (Ingelaere, 2007). Following the 1994 genocide, the new Rwandan government had to deal with the post-genocide justice. Thousands of Rwandan Hutu suspects of the genocide were indicted and jailed (Haile, 2008). Since the Rwandan
sociopolitical and economic structures were shuttered by four years of conflicts, the transitional government had no viable legal system to try genocide suspects (Golooba-Mutebi, 2008).

Origins and Background of the Bashingantahe

Similar to the Rwandan gacaca, the counsel of bashingantahe (mushingantahe in singular) is Burundi’s traditional justice systems, comprised traditionally of elderly men, vested with legal authority to conduct private mediations, public hearings, and to render justice on diverse issues (Nindorera, 2003). In the pre-colonial Burundi, the justice system was encapsulated in the persona of bashingantahe, who were considered as “men of integrity […] responsible for settling conflicts at all levels” (Kabrahe in Huyse and Salter, 2008, p. 154). Chretien (2006) reports that the institution of the bashingantahe developed and expended in the seventeenth century, when a Burundian sage Ngoma ya Sacega became famous by his insight in rendering justice during the reign of King Ntare Rushatsi I.

Although developed in a juridical context, the bashingantahe played a political role as well. Vandeginste (2007) argues that the bashingantahe were relatively independent and had a countervailing power to the King and chiefs. Due to their importance in the Burundian monarchy, the selection of the bashingantahe was meticulous and democratic in the sense that candidates to become umushingantahe had to be known and approved by their local communities (Deslaurier, 2003). Criteria for the selection of bashingantahe included fairness, a sense of humor, discretion, intelligence,
temperance, and eloquence (Ndikumasabo and Vandeginste, 2007). Like the gacaca, the primary purpose of the bashingantahe was social cohesion and harmony through mediation, reconciliation, and arbitration. Kaburahe (in Huyse and Salter, 2008) explains that the primary responsibility of the bashingantahe was to mediate between the conflicting parties in private. It was only after efforts of mediation had failed that public hearings were held.

The function and the role of the bashingantahe changed radically with colonization. First Germany, then the Kingdom of Belgium imposed its indirect administration rule, suppressing and co-opting Burundian indigenous leaders (Chretien, 2006). Similar to other colonized parts of Africa, the colonial administration crippled Burundian local institutions and socio-political structures. In the 1920s in introducing the individualized system of law into the Burundian judicial system, the Belgians reduced the power of the bashingantahe. Dexter and Tahombaye (2005) explains that:

“In the early 1920s, the Belgian colonizers brought their legal system, based on a more individual orientation to the organization of society... The Belgian authorities began to diminish the bashingantahe institution by controlling their judgments, modifying their verdicts and withdrawing their right to impose certain sanctions...The institution was weakened during the colonial era, beginning in the 1920s. First, the justice rendered by the bashingantahe became ‘informal’ justice with the establishment of the Belgian system of positive law. At the same time, many bashingantahe were co-opted by the colonial and then the post-colonial regimes,” (p. 14).

Thus, during colonization the bashingantahe were pushed to the margin of the Burundian society where they continue to operate in informality. In addition, postcolonial constraints brought more restrictions to the bashingantahe. Between 1962 and 1993 the authoritarian political system in Burundi forced the bashingantahe to side with the
regime and restricted their scope of influence (Nindorera, 2003). Dexter and Ntahombaye (2005) argue that the Burundian government took over the institution of the *bashingantaha* they write, “the government would confer the title and function of *mushingantahe* on its own territorial administrators and local party bosses who were invested en masse” (p. 15).

In spite of a history of state control and repression, in the mid-2000s as the post-conflict Rwandan and Burundian states were addressing the outcomes of the 1990s political conflict, the *bashingantaha* and the *gacaca* took the national stage.

Conflict in the GLR, Genocide, and the Post-conflict Context

The 1990s conflicts in Rwanda and Burundi demonstrate the political complexity of the GLR. Often, when conflict breaks out in Rwanda, Burundi’s political stability is threatened (Uvin, 1999). The historical interlocking of Rwanda and Burundi is not only due to their similar colonial experience under the Kingdom of Belgium, but also because they have similar demographic compositions (Nyankanzi, 1998). In Burundi and in Rwanda, Hutu represent about 84% of the population and Tutsi represent about 14% (Marysse and Reyntjens, 2005). And in both countries ethnic conflicts have severely marked the postcolonial state (Mamdani, 2001). However, when Belgians left in 1962 Hutu were in power in Rwanda, and the Tutsi were in power in Burundi. Because of historical interconnections and the fact that ethnicity has long been used as a critical social, economic, and political identifier in Rwanda and in Burundi, political and ethnic conflicts in one country have had spillover effects in the other country (Khadiagala,
2006). Such were the political circumstances of Rwanda and Burundi when a civil war broke out in northern Rwanda in October 1990.

As a civil war was developing in Rwanda in 1990, Burundi embarked in a political upheaval. In 1993 Melchior Ndadaye, the first Hutu to be elected president in Burundi, was assassinated three months after his election by extremist Tutsis (Dallaire, 2004). In April 1994 Ndadaye’s successor, Cyprien Ntaryamira and the Rwandan president, Juvenal Habyarimana, both Hutu, were assassinated as their plan was shot down by an unknown militia around Kigali airport (Uvin, 2001). This double assassination marked the genesis of the 1994 Rwandan genocide, with appalling implications in Burundi, and later in the DRC.

Four years prior to the 1994 genocide, the RPF attacked Rwanda from its basis in southern Uganda. Comprised mainly of Tutsis who had been refugees in Uganda since the 1960s, RPF fighters were trained in Uganda by the army of Yoweri Museveni (Marysse & Reyntjen 2005). When the RPF attacked Rwanda, Paul Kagame, then a major in the Ugandan Army, was in training at Fort Leavenworth, in Kansas, (Waugh 2004). The Rwandan rebellion went on from 1990 to 1993 when peace negotiations began in Arusha, in Tanzania. In the same period internecine conflicts were escalating in Burundi. Following Ndadaye’s assassination in 1993, thousands of Hutu and Tutsis Burundian were slain. About 200,000 Burundian Hutu fled to Rwanda where different Hutu militias targeted Tutsi and moderate Hutu as a repercussion of Hutu massacres in Burundi (Nyankanzi1998).
The assassination of Habyarimana in 1994 interrupted peace negotiations and plunged Rwandan in genocide. About a month after the Arusha agreement was signed 300 Tutsi civilians were massacred in a single prefecture in Rwanda (Cohen 2007). Dallaire (2004) explains that in the period preceding the genocide the Rwandan army increased in size from 5,000 to about 35,000 men strong, and a paramilitary organization, called the *interahamwe*, was formed. From Kinyarwanda, *interahamwe* is usually translated as: “Let us strike together, those who aim at the same target, or those who aim repeatedly at the same target.” Kapuscinski (1998) argues that the primary task of the *interahamwe* was to kill Tutsi male or female of all ages, as well as Hutu politicians who opposed Hutu hegemony in Rwanda.

On April 9 France and Belgium troops evacuated the international community that was in Kigali, and on April 21 the UN Security Council reduced the UN peacekeepers from 2700 to 250 (Meisler, 2007). On May 17, 1994, the UN voted to increase the number of the UN peacekeeper, and on June 23 the French launched the Operation Turquoise, forcing their way into Rwanda. Finally, on July 4 the RPF took control of the whole Rwanda, and on August 28 the Operation Turquoise ended. By then between 800,000 and 1000,000 Rwandese were killed, countless were displaced within Rwanda, and about two million sought refuge in the DRC, Burundi, Tanzania, and Uganda.

Like the Rwandan case, the assassination of Ntaryamira in 1994 thrust Burundi in a fierce civil war that lasted ten years. From 1993 to 2003 Burundi was ungovernable: Hutu and Tutsi rebel factions fought to established strongholds in different parts of
Burundi, while the central government administrative capabilities continued to shrink. During that time, approximately 300,000 Burundian Hutu and Tutsi were killed, thousands others were internally displaced or forced to exile in neighboring countries (Alusala, 2005).

Upon the assassination of Ntaryamira in 1994, Sylvestre Ntibantunganya became the interim president. But in 1996 another bloodless coup d’état took place, and Pierre Buyoya became the interim president of Burundi (Kalron, 2010). From 1996 different negotiations between the Burundian government and rebel groups took place, and in November 2003 the largest Burundian rebel faction the *Conseil National pour la Defense de la Democratie –Forces pour la Defense de la Democratie* (CNDD-FDD) under Pierre Nkurunziza, signed a Comprehensive Peace Agreement with the government (Harbom and Wallensteen, 2010). Later on, other rebel groups, except the Palipehutu – Front National Pour la Libération (FNL), signed a cease-fire with the government (El Abdellaoui, 2009). In 2005 Burundi held its first presidential elections since 1993, and Nkurunziza won the presidency.

The 1990s conflicts considerably affected social and judiciary structures in Rwandan and Burundi. In the effort to reconstruct their countries ad attempt to address the repercussions the conflicts, Rwanda and Burundi incorporated the *gacaca* and the *bashingantahe* in their transitional justice processes.
The Resurgence of the *Gacaca*

The resurgence of the *gacaca* happened in a politically and ethnically tense context, following a brutal ethnic conflict that disrupted almost all fabrics of the Rwandan society. The judicial apparatus was destroyed, and the transitional government was forced to speedily rebuild the justice system. President Paul Kagame (Goureевич and Kagame, 1996) admits that the Rwandan government needed to implement a series of socially engineered programs in order to accelerate the processes of reconciliation. The incapacity of the statutory justice system to address the post-genocide justice compelled the Rwandan state to incorporate the *gacaca* in the transitional justice. It was in that orientation that the *gacaca* took a semi-official character. However, as Ingelaere (2007) argues, constitutive ideas behind the resurgence of *gacaca* were closely tied to the way the Rwandan government and the international community portrayed the 1994 Rwandan genocide.

In addition to the simplistic explanation that the 1994 Rwandan genocide was primarily the outcome of Hutu and Tutsi animosities, the Rwandan government successfully presented the 1994 Rwandan genocide solely as an outcome of Belgian ethnic differentiation between Hutu and Tutsis. For example, in an effort to redefine ethnic relations the Rwandan government launched the concept of “one Rwanda” (Kagame, in Gourevitch and Kagame, 1996). Ingelaere (2007) refers to “one Rwanda” as *Rwandanicity*, he explains:

“On the one hand there is the idea, [the] ideology of ‘Rwandanicity’ or ‘Rwandanness’, meaning that Rwandans were one before the arrival of colonialism… People can be consulted on general issues in society, but in the end [they] need some guidance from above and from within the liberation movement
of the RPF to fully embrace the new regained order of ‘Rwandanicity’, free from the perils of ethnicity and bad governance…This framework is widely propagated in the countryside during awareness campaigns, meetings with authorities and military commanders, and has installed a far reaching degree of self-censorship in the population with regard to elements not fitting in the official “public transcript” (p. 29).

The concept of “one Rwanda” attempts to reinterpret the Rwandan past by explaining that the Belgian administration artificially created ethnic differences between Hutu and Tutsi for political reasons. This is why the Rwandan government has launched a campaign against any form of public discourse that distinguishes ethnic groups in Rwanda (Gourevitch and Kagame, 1996). The Rwandan state explanation for ethnic divide between Hutu and Tutsi misrepresents historical facts. Nyankanzi (1998), Chretien (2006), Newbury (1999) and other scholars of Rwanda admit that there were ethnic tensions between Hutu and Tutsis prior to Germans and Belgians occupation. From this perspective, colonization did not create ethnic tensions in Rwanda but exacerbated them instead. The one-sided Rwandan government’s explanation of the 1994 genocide played a central role in the way the gacaca were integrated in the transitional justice.

**Jurisdiction of the New Gacaca**

In addition to ideas of Rwandanicity, the Rwandan government restricted the gacaca to cases related the 1994 genocide crimes (Longman, 2009). Haile (2008) argues that, “…the government pursues a discriminatory application of the law. Accordingly, the authorities have restricted the scope of gacaca to ‘genocide’ crimes” (p. 28). Considering that the gacaca try only genocide related crimes, and that in most cases only Hutu suspects are tried (Corey, and Joireman, 2004), it is hard to expect that a Hutu suspect
will have a fair trial or will have good faith in truth telling, especially since the *gacaca* is premised on “truth” telling (Lahiri, 2009). In a case study of two Rwandan communities of Ntambona and Rukoma, Ingelaere (2009) found that in Rukoma all the *Inyangamugayo* (those who preside over the *gacaca*) were Tutsis victims of the 1994 genocide.

The Rwandan state’s restrictions and control of the *gacaca* have led some Rwandans and a considerable number of professionals and scholars of Rwanda to consider the *gacaca* as an apparatus of the *victorious justice* (Longman, 2009). Ingelaere (2007) found that a good number of Rwandans, Hutu and Tutsis, consider the new *gacaca* as a *state instrument*. Since the participatory nature of traditional justice systems is premised on social capital (Leebaw, 2008), changes in the perception of the *gacaca* could be translated to changes in popular legitimacy and in the level of local participation. Certainly, this argument could go on both ways, since shifts in the social relations could also affect *gacaca* proceedings. Still, structural changes that the Rwandan government introduced while resurrecting the *gacaca* were top-down (Rettig, 2008), they attempted to change the legitimation of the *gacaca* from the local level to the national level. And these vertically induced changes could have adverse effects on Rwandans’ participation to *gacaca* hearings. Haile (2008) makes a compelling logical argument, explaining that the *gacaca* cannot increase participation and speed trials at the same time. The more people participate in democratic debates over competing claims, the longer hearings will be. The reduction of popular participation to *gacaca’s* hearing could be a manifestation of the contestation of its legitimacy.
The popular legitimacy of the modern gacaca was problematic from their inception. The Rwandan government molded the new gacaca after the traditional Rwandan justice system that was largely based on guilt admission and geared toward restoration rather than retribution (Longman, 2009). But the new gacaca is geared toward retributive justice (Corey and Joireman, 2004) in which most victims are Tutsi while most suspects are Hutu (Gready, 2009). Following this logic it appears that the new gacaca is designed to try Hutus, not Tutsi. As such the reinvented gacaca put in question the notion of “one Rwanda” or Rwandanicity. It is clearly problematic to assume that Hutu who are the majority would massively participate in a justice system in which they are presumed guilty until proven innocent.

Moreover, in focusing almost exclusively on crimes related to the 1994 Genocide, the new gacaca has an exclusively retrospective character. Though the new gacaca attempts to address past injustice, it does not fully meet the objective of reconciliation. Reconciliation does not only imply addressing the past, it also necessitates a prospective orientation. Unfortunately, by dealing solely with the past the new gacaca fails to contribute to the normative restructuring of the Rwandan society. There is a consensus that concerns related to land access and property rights played a crucial role in the 1994 Rwandan genocide (Young, 2006). Therefore, meaningful measures that aim at reconciling the Rwandan people should include retrospective and prospective approaches on property rights and land conflict resolution. So far the gacaca are not trying current property rights cases because, “the jurisdiction of the gacaca courts is limited to crimes committed between 1 October and 1990 and 31 December 1994…” (Corey and Joireman,
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2004, p. 86). Since customary previsions continue to be pertinent in land tenure in Rwanda, excluding the *gacaca* from current land issues could be counterproductive.

*Land Rights and the new Gacaca*

Unequivocally the three most pressing challenges of the modern Rwanda are issues of land, post-genocide justice, and ethnic reconciliation (Gready, 2009). But the literature on Rwanda suggests that the Rwandan government is tackling these issues as separate entities. Keeping current land disputes away from the *gacaca* while hoping that the statutory justice system alone suffices to respond to land issues might not be the adequate way of addressing land issues in the post-conflict Rwanda. Many current land disputes could easily be traced back to the 1994 genocide, or to events that led to the 1994 genocide (Young, 2006). It is not efficient to limit the *gacaca* to crimes that took place between October 1990 and December 1994 while those very same crimes could have bearing in current land conflicts. In 2005 a land reform was adopted in response to challenges over land rights and ownership in Rwanda, while the concept of *Rwandanicity* was used as a way of forging ethnic reconciliation between Rwandans (Ingelaere, 2007). Not only questions of land disputes, post-genocide justice, and ethnic reconciliation are interconnected, they require an integrated approach for the national reconciliation in Rwanda.

The Rwandan government treats ethnic differentiation between Hutu and Tutsi as a superficial colonial legacy (Gourevitch, and Kagame, 1996) that could be addressed by the promotion of *Rwandanicity* or the concept of “one Rwanda.” The *gacaca* are used for
post-genocide justice, and questions of land access are addressed by land legislations. It is doubtful whether the land reform law passed in 2005 suffices to transition the legally pluralist Rwandan land tenure system into a centralized land tenure system. I argue that in the case of Rwanda any land reform will require sufficient time for consolidation, and until then some lands will continue to be regulated by legal pluralism.

Following the establishment of the RPF in Rwanda after the 1994 genocide, there was a large flow of Rwandans (known as the old caseload), mostly Tutsis who left the country during the repression of 1959, 1963, 1973, and throughout the Habyarimana regime (Mamdani, 2001). And when Rwandan refugee camps were dismantled in DRC in 1996 by the RPF, thousands of Rwandan Hutu refugees returned to Rwanda, they are known as the new caseload (Khadiagala, 2006). The return of the old caseload and the new caseload posed a serious pressure on land. Every time when people were displaced within Rwanda or were forced to exile, other people occupied their lands. It was problematic for the post-conflict Rwandan state to efficiently assess competing land claims, especially because most lands were not registered, and credible witness to land claims might have been killed, displaced or exiled. And in sometime instances witness to land claims are intimidated by the state regime (Longman, 2009). Subsequent to two waves of Rwandan returnees, not only land conflicts have become more prevalent in Rwanda (Musahara and Huggins, 2005), but also addressing them has become more complex. This is why the Rwandan government passed a land law in 2005 in an attempt to help address land issues.
It appears as though the Rwandan government treats land issues as a matter of technicality rather than an issue of practicality. One of the priorities of the 2005 land law was registration, which the law has not been able to achieve. Musahara (2006) argues that the 2005 land law did not clearly elaborate on the process of land registration, he insists that “…for poor families, [land] registration may be too expensive an undertaking and with more than 1.5 million plots to survey, it will be a long time before the process reaches an ordinary peasant” (p. 16). In addition, the land law does not clearly distinguish between landholding, land use, and landowning, this lack of clarity could further complicate land registration and the enforcement of the law, Des Forges (2006) claims that:

“The 2004 policy document, like the 2005 law, and like earlier drafts treat «ownership» in a very ambiguous way, talking of landholders and landlords and even using the term landowners, apparently always in reference to the same category of people. They talk both of the right to use the land and of the right to own the land. Rights of ownership are presented sometimes as virtually absolute, at other times as subject to a variety of conditions set by the government” (p. 365).

Other complications of the 2005 land law derive from the fact that the law empowers some Rwandan officials with the authority to dispossess landholders of lands in different ways, sometime without proper compensations (Uvin, 1997). This situation could result in similar unlawful land deprivations that extended from the Kayibanda regime in the 1960s to Habyarimana, and ultimately contributed to the 1994 genocide (Corey and Joireman, 2004). Until all Rwandan lands are registered, land tenure and land disputes will continue to be regulated by statutory laws and customary laws. It is pointless to restrict the gacaca, or to exclude local communities from fully participating
in the debate about land while in practice lands continue to be regulated by legal pluralism.

Musahara (2006) identifies three specific problems related to land access in Rwanda, he explains that land has long been a property of the state for this reasons many people do not hold land titles; second, land scarcity is exacerbated by environmental degradation; and finally, land distribution has usually favored urban-based elites. In 2004 and 2005 the Rwandan government passed two land laws as ways of addressing land issues. (Gready, 2009). The central point of these two pieces of legislation was to improve land ownership and land transfer by preventing land fragmentation, encouraging efficient use of land, and improving land registration processes (Mugabe, 2007). In sum, the recent Rwandan land laws were oriented toward land commercialization so that Rwandans could efficiently trade land. Yet, land commercialization cannot be effective if a large number of lands are not registered. Historically Rwandans have traded lands through customary land tenure (Lahiri, 2009), under that system land registration was not relevant. This explains why most lands in Rwanda are not registered; they do not belong to particular individuals but to communities. For this reason a successful land reform in Rwanda should include local communities such as the gacaca, or other local structures. There is no indication that the gacaca, or other local structures took active part in the 2005 land reform (Haile, 2008). However, as most Rwandan lands continue to be regulated by customary laws, the statutory land tenure alone does not suffice to address land issues. This could explain why Rwandans are developing alternative ways to address current land issues. For example, in the year following the 1994 genocide Rwandans
started a spontaneous movement of land sharing whereby neighbors informally agreed to share land spots for subsistence agriculture (Haile, 2008).

The new forms of *gacaca* were socially engendered as a tool to speed up the prosecution of thousands of the 1994 genocide suspects (Corey and Joireman, 2004). It is questionable whether the *gacaca* provide everyday Rwandans the opportunity to participate in the national reconciliation. It is equally questionable whether the *gacaca* continue to provide a justice of proximity for Rwandans. Olsen, Payne, and Reiter, (2010) argue that the effectiveness of any mechanism of transitional justice system depends on the way that mechanism has been conceived. In designing the *gacaca* solely for crimes related to the 1994 genocide, the Rwandan government has limited Rwandans’ participation to *gacaca*.

The Resurgence of the *Bashingantahe*

The debate over the pertinence of *bashingantahe* resurfaced at the national level in early 1990s when the Burundian government organized national conversations about democratization. Nindorera (2003) argues that at that time the big majority of Burundians expressed that the council of *bashingantahe* was a valuable model for governance and it should be included in Burundi’s democratization processes. In the effort to rehabilitate the institution of *bashingantahe* the Burundian government began appointing *bashingantahe* by presidential decrees instead of following traditional processes of local participation (Vandeginste, 2007). And in 1996 a presidential decree appointed the
National Council of *bashingantahe* for the National Unity and Reconciliation (Dexter and Ntahombaye, 2005).

In supporting Burundi’s efforts to restore the counsel of *bashingantahe*, the international community recognized the institution of *bashingantahe*. In 1998 in appreciating some Burundians for assisting their countrymen during the 1993 conflict, UNESCO gave awards and titles of *bashingantahe* (Nindorera, 2003). This is a clear case of international organizations contributing to the erosion of local capacity. In bypassing traditional norms and processes pertaining to the training and the investiture of *bashingantahe*, UNESCO played a role in the progressive devaluation of the counsel of *bashingantahe*. Vertical changes imposed since the colonial time, continued under the post-colonial state, had now received some support from the international community. These top-down changes contributed in distancing Burundians from the *bashingantahe*. The reduction of local participation in the selection of *bashingantahe* questions the effectiveness of *bashingantahe* in Burundi’s national reconciliation. Under the Burundian Tutsi regime some *bashingantahe* were co-opted by the state. This closeness with the political power considerably tarnished the *bashingantahe*’s reputation. In the post-conflict Burundi, not only the government has attempted to centralized *bashingantahe*’s activities through the National Council of *Bashingantahe* for the National Unity and Reconciliation, but also the government has created other local structures and national structures that compete, and sometimes overshadow, the *bashingantahe*. This is how Vandeginste (2007) represents the situation of *bashingantahe*:

“In summary, we may state that as much as the Bashingantahe were increasingly instrumentalised under the one party-regime by the Uprona party, they are now
politically sidelined and disliked by the regime dominated by the CNDD-FDD. In addition, the traditional authority of the Bashingantahe may well, at the local level, be increasingly contested by the community level authorities that were elected during the local elections in September 2005” (p. 26).

It is more likely that presidential appointments in the post-conflict Burundi will continue to force the bashingantahe away from the people, eroding furthermore their legitimacy. In the attempt to centralize the council of bashingantahe, allegations of corruption amongst bashingantahe have increased (Deslaurier, 2003). Nindorerea, (2003) explains that sometime members of bashingantahe request a bribe in order to rule in favor of one party. And Theron (2009) reports that in 2008 about 500 bashingantahe were removed from serving in the institution due to allegations of negative behavior, including corruption.

*Jurisdiction of the New Bashingantahe*

In spite of allegations of corruption, impartiality, and vertically imposed changes in the council of bashingantahe, horizontal legitimation has endured at some extent, especially in rural areas (Deslaurier, 2003). The bashingantahe who were neither co-opted under the Burundian Tutsi dominated regime, nor appointed by the current regime have managed to maintain some popular legitimacy. They continued to operate in accordance with Burundian traditional ways. Contrary to the gacaca in Rwanda, the bashingantahe in Burundi are not limited to particular jurisdictions, they continue to hear different cases, ranging from domestic affairs to land conflicts. However bashingantahe’s decisions are not legally binding. And government’s appointments of some bashingantahe have created differences in the popular perception of bashingantahe.
members, in terms of the “true”, the “old”, the “new”, and the “false” (Nindorera, 2003). This categorical distinction could be a sign of the erosion of bashingantahe’s legitimacy and a demonstration of Burundians’s resistance against the centralization of bashingantahe. Kohlhagen (2008) explains that Burundians are developing alternative ways of settling their disputes. Sometimes, conflicting parties select a trustworthy coworker, or a wise family member, or even a respected neighbor to whom they take their disputes (Ndikumasabo and Vandeginste, 2007).

Perhaps, the social capital on which the idea of bashingantahe has been based is still present in Burundian communities. The fact that Burundians can select impromptu mediators for their disputes could be an indication that the council of bashingantahe has the potential to reconcile Burundians. Regrettably, state interferences are affecting bashingantahe’s effectiveness. In spite of the political control and the lack of legal force (Kohlhagen, 2010), the bashingantahe continue to have some relevance on issues pertaining to land rights and land disputes.

Land Rights and the New Bashingantahe

By all accounts the popular legitimacy of bashingantahe has been shrinking since the colonial and the postcolonial time, and this is not different for the post conflict Burundi. The current party in power, the CNDD-FDD, has put additional restrictions on the bashingantahe. The Burundian government has established the Conseil des Collines (Hill Councils) whose scope of responsibility competes with that of bashingantahe (Deslaurier, 2003). In 1997 president Pierre Buyoya instituted the National Council of
**bashingantahe**, with the pretention of helping **bashingantahe** coordinate their activities (Nindorerea, 2003). In spite of legitimacy and procedural constraints, for the most part Burundi has remained a legally pluralist country (Lemarchand, 2006). For this particular reason some legal matters pertaining to marriage, domestic disputes, and land disputes continue to be simultaneously regulated by statutory laws and customary laws (Ndikumasabo, and Vandeginste, 2007). Land issues continue to be regulated by customary laws for three particular reasons: most lands in Burundi are not registered (Theron, 2009); a large number of legal records were lost during the civil war (Ntampaka, 2008); and finally, the Burundian justice system is not yet logistically capable of handling all land dispute cases (Kohlhagen, 2010), especially after a long fought civil war. These reasons explain why the council of **bashingantahe** continues to be relevant, and should fully be included in issues related to land.

Despite their relative pertinence on land issues, the **bashingantahe** and customary law are not fully integrated in Burundi’s land laws. Kohlhagen (2008) reports that in Burundi’s land code only seven articles out of 433 pertain to customary law, and the **bashingantahe** were not included in the development of that legislation. Most of the law is directed to state owned lands and registered lands, little attention is given to lands that are under the customary land tenure system. A more recent Burundian law, the law number 1/02 of January 2010 revising the law number 1/06 of April 2005 about “**l’administration Communale**” has completely banished the council of **bashingantahe** from the Burundian legislation (Kohlhagen, 2010). There seems to be a logical inconsistency here, part of the causes of land disputes in Burundi is the fact that most
lands are not registered; they are regulated by customary laws (Ntampaka, 2008). Consequently, any land reform that aims to address and improve land registration in Burundi should include customary land tenure. Yet, the Burundian land laws, and the recent communal law have excluded the *bashingantahe* in the legal conversation about property rights. Although, the Burundian government attempts, or pretends, to revive the counsel of *bashingantahe*, state’s restrictions prevent the *bashingantahe* from legally participating in land issues, an area in which they have maintained some relevance.

Dexter and Tahombaye (2005) inform that:

> “Today, the bashingantahe are still consulted, particularly on the collines. They are active in resolving the crucial problems of the day such as disputes over land and the resettlement of refugees and displaced persons” (p. 6).

Ntampaka (2005) insists, “Burundi has recognized the importance of the institution of *bashingantahe* in customary land disputes but it [the government] regulates land access…” (p. 52). In countless instances the Burundian government has redistributed lands to returning refugees and former IDPs without involving the *bashingantahe* and local communities (Theron, 2009). Furthermore, the Burundian state has established a multiplicity of governmental institutions that intervene in land issues, creating complex overlaps and confusions, which exacerbate the process of resolving land disputes.

These are some institutions that have jurisdiction over land in Burundi: the Ministries of Environment, National Solidarity, Repatriation, National Reconstruction, Human Rights and Gender, Interior and Communal Development, Agriculture and Livestock, Justice, Water, Energy, and Mines (Tampaka, 2008). In this confusing list of institutions the *bashingantahe* and local communities continue to be marginalized
(Kohlhagen, 2010). In 2006 in an effort to address land disputes the government of Burundi established the National Commission for Land and other Properties (CNTB), with the mission of solving land disputes and assisting vulnerable people to reclaim their lands (Theron, 2009). Although the CNTB provides additional free legal options for land disputes mediation, similar to other previously mentioned institutions, it presents a challenge to the bashingantahe. In addition the possibility of legal enforceability, the CNTB has the authority to make recommendations to the government to recompense individuals who have been illegally dispossessed of their lands (Deslaurier, 2003), but the bashingantahe’s decisions have no legal force.

In issues of land disputes, Burundians have a plethora of options. Amongst other options, Burundians can take their land dispute cases to the council of bashingantahe, the CNTB, or the court. Nevertheless, amongst these options, the bashingantahe decisions are not legally binding; they simply serve as advices that Burundians take to their own discretion. Yet, in spite of a dwindling popular legitimacy, some Burundians continue to bring land dispute cases to the bashingantahe. Theron (2009) explains that the majority of cases that were submitted to the bashingantahe concerned land. Forum shopping could explain why some Burundians continue to bring their land dispute cases to the counsel of bashingantahe in spite of all other governmental institutions. Of course, in interfering with bashingantahe’s proceedings, the Burundian state has generated different perceptions of the bashingantahe (Kohlhagen, 2009). However, some Burundians still trust the council of bashingantahe (Nindorera, 2003), which is possibly why they continue to bring land dispute cases to the council of bashingantahe.
Arguably, the resurgence of *bashingantahe* in Burundi came at the cost of their popular legitimacy. Government’s appointments, and sometime international organizations’ involvement, in *bashingantahe*’s proceedings have restricted local participation (Kohlhagen, 2010). The Burundian government and the international community efforts to promote the rehabilitation of the council of *bashingantahe* have produced negative unintended consequences.

The top-down push to insert the council of *bashingantahe* and the *gacaca* in the transitional justice process further fragmented the legitimacy of these institutions, and put in question the process by which they mediate conflicts at the local level. Comparable to restrictions imposed on the Rwandan *gacaca*, it appears that state control on the *bashingantahe* has affected local participation. As a result, Burundians as well as Rwandans are finding ways to resist state institutionalization of the *gacaca* and the *bashingantahe*.

**Resisting the Reinvention of the Gacaca and the Bashingantahe**

Perhaps the most obvious form of resistance that Rwandans and Burundians are demonstrating against the reinvented *gacaca* and *bashingantahe* is a reduced level of participation to public hearings. Both Rwandans and Burundians participate less in the new forms of *bashingantahe* and *gacaca* hearings (Deslaurier, 2003; Ingelaere, 2008; Theron, 2009, and Kohlhagen, 2010). Rwandans and Burundians’ participation to the *bashingantahe* and *gacaca* sessions have been affected, at least in part, by the politicization and the centralization of these mechanisms of justices by the state. As
implication, some Burundians and Rwandans associate the gacaca and the bashingantahe with the state (Haile, 2008; and Dexter and Ntahombaye, 2005). It is possible that the gacaca and the bashingantahe do no longer represent a justice of proximity. Ingelaere, (2009) reports that in many instances Rwandans are refusing to abide by the decisions adopted by the Inyagamugayo in the gacaca courts. And as a mark of resistance, Burundians’ participation to bashingantahe hearings is decreasing (Nindorera, 2008).

Although Burundians and Rwandans are not using confrontational resistance against state co-opting of the bashingantahe and the gacaca, they are employing what James Scott (1985) terms “every day forms of resistance” (p. 32). Instead of openly challenging the state, Rwandans and Burundians have reduced their participation to the gacaca and the bashingantahe hearings, they have categorized the inyagamugayo and the bashingantahe as arms of the state, and they continue to find alternative networks through which to address some of their legal disputes, (Ingelaere, 2007; Deslaurier 2003; and Kohlhagen, 2008). It is pertinent to investigate different “informal” networks that Rwandans and Burundians may be using as responses to state integration of the gacaca and the bashingantahe, that question could be addressed in future studies.

Increasing evidence suggest that Rwandans and Burundians do not necessarily own gacaca and bashingantahe’s processes. It is therefore not completely accurate to term the new form of gacaca and the bashingantahe as “traditional justice systems”, or “justice of proximity.” Besides the fact that Rwandans and Burundian may be employing “everyday resistance,” against state co-optation of the gacaca and the bashingantahe, a careful reading of the literature on the gacaca and the bashingantahe shows that there are
clear differences in the way the new *gacaca* and the new *ubushingantahe* have been integrated in transitional justice processes. Although in both cases the Rwandan and the Burundian states sought to institutionalize these traditional mechanisms of justice as part of their transitional justice, there are clear differences in the way the *gacaca* and the *bashingantahe* were co-opted by the state. In Rwanda the training of *Inyagamugayo* is controlled by the state, the scope of *gacaca* is limited to crime related to the 1994 genocide (Longman, 2009), and decisions taken by the *gacaca* are legally binding (Corey and Joireman, 2004, and Gready, 2009).

While the *gacaca*’s decisions have legal implications, *bashingantahe*’s decisions have no legal force; they only serve as courts testimonies or advices to conflicting parties (Ndikumasabo and Vandeginste, 2007). Although the legitimation of *bashingantahe* has taken a top-down character through presidential appointments (Haile, 2008), some traditionally recognized *bashingantahe* continue to operate in informality (Kohlhagen, 2008). The differential categorization of *bashingantahe* in terms of the “old”, the “new”, the “true” and the “false” (Nindorera, 2008) has rendered legal forum shopping even more complex because Burundians are not only shopping for alternative justice systems, they are also shopping for credible arbiters. Due to state control and interference the horizontal legitimation of *bashingantahe* is no longer a given, it is now a function of the perception of that specific members of the community have on a given *umushingantahe* or on a group of *bashingantahe*. This is why some Burundians are appointing impromptu arbiter to settle their disputes than consulting traditional or government appointed *bashingantahe* (Kohlhagen, 2010). It is worth mentioning here that in contrast with the
gacaca that are confined to the 1994 genocide related crimes, the bashingantahe continues to hear a wide range of cases, even though their decisions have no legal force.

It is clear that there are differences between the institutionalization of the gacaca and the bashingantahe, how can we account for these differences? What are the factors that might explain why the gacaca are tightly controlled while the bashingantahe have some autonomy? The next chapter attempts to address these questions.
CHAPTER 4: JURISDICTIONAL DIFFERENCES BETWEEN THE GACACA AND THE BASHINGANTAHE

This chapter grapples with a question that has not yet been given sufficient considerations in the literature on the gacaca and the bashingantahe. It is pertinent, in the context of Rwanda and Burundi, to question why the gacaca courts seem to be more jurisdictionally restricted than the council of bashingantahe. For instance, why are gacaca’s decisions legally binding while bashingantahe’s decisions only serve as recommendations Yet, in both cases the Rwandan and the Burundian states are attempting to co-opt these two ILTs for the purpose of post-conflict reconstruction and national reconciliation. It has been sufficiently demonstrated that sometimes post-conflict governments interfere with traditional mechanisms of justice by controlling the recruitment of traditional judges, limiting local participation, and restraining the scope of local justice systems (Minow, 2008). Olsen, Payne, and Reiter (2010) argue that the implementation of transitional justice systems are dependent on economic, cultural, political, and even military imperatives of specific post-conflict societies. Thus, we cannot simply claim that the differences in the formalization of the gacaca and the bashingantahe are an outcome of political will. I will offer a more nuanced explanation as to why the Rwandan post-conflict state limited the gacaca to genocide related crimes, while in Burundi the bashingantahe continue to have some latitude, although without legal implications.

Jurisdictional differences in the incorporation of the gacaca and the bashingantahe in transitional justice processes can be explained by a number of factors,
including differences in conflict dynamics (such as the length, and the intensity of the conflict), the method of conflict termination, shifts in the nature of the political coalitions, and the way ethnicity is addressed by the post-conflict state. As any other societal structure, local mechanisms of justice are not immune to social, economic, and political shifts. Just as historical and political shifts have affected the gacaca and the bashingantahe, recent conflicts in Rwanda and Burundi have markedly affected the structural and the procedural norms of the gacaca and the bashingantahe (Baker, 2007, and Deslaurier, 2003).

Other factors such as international actors’ involvements and resources endowment have implications for the way post-conflict states choose to include ILTs in transitional justice processes. Certainly, international mediations, for example, prevented further escalation of conflict in Burundi than in Rwanda (Khadiagala, 2006, and Cohen, 2007), and post-conflict international intervention in Rwanda was far more intensive that in Burundi (Golooba-Mutebi, 2008; and Soderbaum and Taylor, 2008). Without dismissing the pertinence of international factors, this study focuses particularly on domestic factors.

Differences in Conflicts Dynamics

The objectives of transitional justice mechanisms are to provide post-conflict states tools and strategies to address past violence and launch national reconciliation. The adoption of specific transitional justice mechanisms is dependent on shifts and opportunities that a conflict creates (Olsen, Payne, and Reiter, 2010). A conflict may result in changes in the nature of political coalition, a redefinition of national identity, and
a change in the composition and the structure of the army. In the Rwandan and the Burundian conflicts, I see two key domestic differences that might have played a significant role in the way the gacaca and the bashingantahe were incorporated in the transitional justice. The Rwandan and the Burundian conflicts differ remarkably on their intensity (Mamdani, 2001; and El Abdellaoui, 2009), and on the demarcation between victims and perpetrators. I believe that these differences played a crucial role in the strategies chosen by the Rwandan and the Burundian government in the resurgence of the gacaca and the bashingantahe.

Intensity of Conflicts

Perhaps the fact that captivated the world the most about the 1994 Rwandan genocide is not the death toll, but the manner and the speed with which mass killings were committed. In a period of one hundred days approximately 800,000 Rwandans were brutally killed, mostly with the use of hoes, machetes, and stones (Dallaire, 2004). The Congolese conflict, for instance, has caused about six million deaths (Clark, 2010), approximately seven times more deaths than the Rwandan genocide did. But the world has not yet fully paid attention to the human disaster in the DRC, in part because Congolese deaths occurred in a longer period of time (about five years) and they were not so spectacular as were Rwandans’ (Stearns, 2011). Similarly, the Burundian conflict was not as dramatic as the Rwandan genocide (Young, 2006). Although approximately 300,000 Burundians lost their lives between 1993 and 2003 as a result of the conflict, the atrocities of the 1994 Rwandan genocide continue to overshadow Burundian mass
killings. In Burundi the world did not see a sea of dead bodies floating on rivers, or lying on streets, as was the case in Rwanda.

It is probable that the massive civilian participation in the 1994 Rwandan genocide and the gruesomeness of killings prevented the Rwandan post-conflict government to trust Rwandan pre-genocide internal structures, including the *gacaca*. In the aftermath of the 1994 genocide some RPF officials vehemently claimed that for decades the pre-genocide Rwandan political leaders had turned one group against the other for political gains. In so claiming, RPF officials also implied that Rwandan social structures were so politicized that they failed to prevent or stop the genocide. President Paul Kagame (in Gourevitch and Kagame, 1996) explains:

“...the whole thing here has a relationship to the past. In Rwanda at one time we had a society whose leaders directed one group against the other for political reasons. After thirty years of doing this kind of things [ethnic division], of course, we have this kind of situation [genocide]. The confusion, the conflict explanation of what happened and what is happening now, will always rightly or wrongly be considered through the past” (p. 184).

In the effort to address ethnic divide of the past, the post-genocide Rwandan government invested in reforming Rwanda’s socio-political structures, including the *gacaca* (Newbury and Newbury, 1999). Initially, for Rwandan civilians who experienced the genocide, changes introduced by the RPF were applauded as signs of improvement (Longman, 2010). Furthermore, any initial opposition to the RPF government was interpreted a resistance to progress and reconciliation (Newbury, 1998). This is probably why there was no dramatic resistance when the Rwandan government introduced substantial changes in the *gacaca* courts.
In Burundi on the other hand, not only the death toll was low but also the intensity was lower and the time frame of killings spanned through a period of ten years (Kalron, 2010). This suggests that there were internal structures and dynamics that prevented a full-blown rampage of mass killings in Burundi, as opposed to the 1994 Rwandan genocide. It is well documented that one of the Burundian structures that prevented a full-blown escalation of killing was the council of *bash ingantahe* (Ndikumasabo and Vandeginste, 2007). In some cases groups of *bash ingantahe* prevented massacres, sometimes endangering their own lives (Huyse, in Huyse and Salter, 2008). Of course, in many instances some *bash ingantahe* members took part in the killings of Burundian Hutu or Tutsi (Deslaurier, 2003). Although the council of *bash ingantahe* had a mixed role in the Burundian conflict, this ambivalence set them apart as an institution that was not totally one-sided. In addition, not only Burundian civilians but also different Burundian armed factions recognized the pertinence of *bash ingantahe* during peace negotiations (Theron, 2009). The role of *bash ingantahe* during the conflict earned them the esteem of civilians, politicians, and even armed groups. Hence, the post-conflict Burundian state did not have enough reason to substantially reform the council of *bash ingantahe* as the Rwandan transitional government “reformed” the gacaca.

**Victims and Perpetrators**

There is a consensus that the large majority of the victims of the 1994 Rwandan genocide were Tutsi (Waugh, 2004). Some observers go as far as arguing that the Rwandan genocide was meticulously prepared by the Hutu regime (Dallaire, 2004 and
Cohen, 2007). But there is no evidence suggesting that ethnic violence in Burundi was sponsored by the state (Chretien, 2006), or that there was a clear-cut demarcation between victims and perpetrators in terms of ethnic groups. In Burundi both Hutu and Tutsi conducted and participated in massive interethnic killings (Marysse and Reyntjens, 2005). Arguably, the lack of demarcated ethnic responsibility in the Burundian conflict influenced peace negotiations, and ultimately helped preserve some degree of autonomy of the bashingantahe. In contrast, in Rwanda Hutu were considered as the perpetrators while Tutsis were the victims (Mamdani, 2001). The victorious Tutsi-led RPF had no incentives for compromising in a peace agreement, especially as Hutu political and military structures were destroyed, and the bulk of Hutu military and political leaders went to exile in Europe and in neighboring countries (Fujii, 2009). Toward the end of the genocide, the RPF had no countervailing power with whom to negotiate (Stearns, 2011). It is probable that the perception that Hutu were the perpetrators of the 1994 genocide contributed in the way the Rwandan state has restricted the gacaca courts in their proceedings.

The binary victims and perpetrators, génocidaires Hutu and defenseless Tutsi, might have placed a political and a moral responsibility on the Rwandan post-conflict state to control the gacaca courts. Without restraining the gacaca, the logic of victims and perpetrators might not have made sense. Considering that Hutu represent approximately 84% of the Rwandan population (Vandeginste and Huyse, 1999), and the fact that Rwanda was strongly divided along ethnic lines (Rafti, 2005), democratizing the gacaca courts would have meant that approximately eight out ten Inyagamogayo could
have been Hutu. The implication of this reasoning is that “perpetrators” or génocidaires would have been prospective judges of genocide suspects. This is the dilemma of democracy in deeply divided society in which a group constitutes the larger majority. Burundi was also strongly divided along ethnic lines with similar demographic proportion as Rwanda. But because there was not a clear determination between victims and perpetrators in terms of ethnicity (Ndikumasabo and Vandeginste, 2007), there was no reason for the post-conflict Burundian government to limit the bashingantahe to issues related to the conflict; or to determine who could be judged by the bashingantahe. Bearing the atrocities of the 1994 genocide in mind, or using the genocide as a pretext for a strong centralization of power (Newbury and Newbury, 1999), the post-conflict Rwandan state restricted the scope of the gacaca and made sure that Tutsis were not tried in the gacaca (Rafti, 2005). In the logic of victims and perpetrators, it simply makes sense for the “victorious” victims to judge the perpetrators. I believe that is what the Rwandan government has attempted to achieve with the gacaca.

The Method of Conflict Termination

In many instances the method of conflict termination has been used as a reliable predictor of how long post-conflict peace might last (Reisman, 1998), and how centralized or decentralized, exclusive or inclusive a post-conflict government might be (Khadiagala, 2006). This logic, that the method of conflict termination methods might affect a post-conflict state, could help shed light on how a post-conflict government deals with local mechanisms of justice. This is especially true in the context of Rwanda and the
Burundi where some types of local mechanisms of justice are widely practiced. As Joireman (2008) argues, a legally pluralist political space is not only a space in which people engage in *forum shopping* in function of their opportunities and expectations, it is also a space of tension between different legal systems, vying for more legitimacy. Since the method of conflict termination could affect how political power is centralized, it also has the potential to affect the way a post-conflict government includes local mechanisms of justice in the transitional justice.

*Losers and Winners*

The way the 1994 Rwandan genocide ended is among factors that could help explain why the post-conflict Rwanda placed more restrictions on the *gacaca* courts. One of the most notable outcomes of the Rwandan conflict is the fact that the conflict produced clear winners and losers (Stearns, 2010). After a hundred days of nationwide government’s sponsored massacres of about 800,000 Tutsi and moderate Hutu (Nyankanzi, 1998), the RPF took over the control of Rwanda. Meanwhile suspected Hutu *génocidaires* (those who committed the genocide) and Hutu civilians fled the country, seeking for asylum in the neighboring countries (Mamdani, 2001). Taking into account the fact that the RPF was essentially comprised of English speaking Tutsi who had no viable internal political structures in Rwanda (Waugh, 2004), the RPF had to build political structures in Rwanda. And in a context of strong ethnic divide between Tutsi and Hutu (Newbury and Newbury, 1999), the RPF could simply not have trusted existing
social and legal structures such as the gacaca courts, especially because democratizing the gacaca could have given Hutu some political leverage.

Imposing itself as the winner party (Waugh, 2004), the RPF had no strong incentives, and no considerable internal pressure to bring Hutu in the government. The Tutsi RPF victory over the Hutu became an excuse for the post-conflict Rwandan government to control the gacaca courts. Probably the strongest way to control the gacaca courts was to ban them. But banning the gacaca might not have been effective. Since the colonial time Rwandans have found ways to settle disputes on the margin on the statutory legal system (Chretien, 2006), circumventing in the process the colonial and the post-colonial state restrictions. In addition, genocide suspects were jailed in miserable conditions without trial for months and sometimes years (Cohen, 2007). The Rwandan government was not financially and logistically fit to try all the 1994 genocide suspects, about 130,000 by some estimate (Uvin, 2001). This could explain why the Rwandan administration chose to try Hutu genocide suspects through a modified version of the gacaca (Longman, 2010), a convenient and more affordable option for the state. Consequently, the modern gacaca took on a retributive aspect (Corey and Joirema, 2004), introducing in the process substantial differences between the current gacaca and the traditional gacaca (Ingelaere, 2007). Instead of banning the gacaca the Rwandan government shifted the legitimation of the gacaca from horizontal to vertical. Controlling who can be an inyagamugayo and who can be tried in the gacaca made the government the guarantor of the gacaca legitimacy as opposed to a popular legitimacy.
Traditionally gacaca courts were oriented toward reconciliation and societal harmony (Golooba-Mutebi, 2008). In the postcolonial Rwandan state, although marginalized, the gacaca took on a symbolical role (Baker, 2007). But the current gacaca are heavily retributive and legally binding (Corey and Joirema, 2004). The Rwandan government did not reinvent the gacaca courts as a mechanism of participatory justice, but as a modified version of the statutory and punitive justice system.

A Peace Agreement

The dynamics of the Burundian conflict played a significant role in the peace negotiations that ultimately led to the cease-fire and a UN peacekeeping mission in 2002 (Bowd and Chikwanha, 2010). Since there was not a clear side for losers and winners at the end of the Burundian conflict, neither Hutu nor Tutsis had strong incentives to limit the bashingantahe to crimes related to the civil war, or to strictly control the process of recruiting and training the bashingantahe. Furthermore, not only the Burundian conflict ended by a Comprehensive Peace Accords (El Abdellaoui, 2009), but also the bashingantahe had some representation in the negotiation processes (Deslaurier, 2003). Of course, it is debatable whether Burundian political and armed factions were pressured by international actors to include the bashingantahe in the negotiation tables (Theron, 2009). Still, the bashingantahe’s presence in the Burundian peace accord processes might have influenced the way the Burundian post-conflict state deals with Burundi local justice mechanisms.
Although *bashingantahe’s* decisions are not “legally” binding (Vandeginste, 2007) and the state has sought to restructure the council of *bashingantahe* by presidential appointments (Haile, 2008), the *bashingantahe* continue to have some relative autonomy as compared to the Rwandan *gacaca* courts. This is in part why in Burundi there are multiple perceptions of the *bashingantahe* in terms of the “new,” the “old,” the “true,” and the “false” (Nindorerea, 2003). Although the Burundian state has attempted to shift *bashingantahe’s* legitimation from horizontal to vertical, there is still a popular legitimacy bases for the *bashingantahe*, or else how can we account for Burundians who continue to bring their cases to *bashingantahe* knowing that their decision have no legal force (Kohlhagen, 2009)? Had the Burundian conflict ended by clear winners and losers in terms of Tutsis or Hutus, chances are that the winners might have sought more political and administrative control, and this could have included a stronger control or restrictions of the *bashingantahe*.

The *bashingantahe*, as most other aspects of Burundian life, have been transformed by ten years of armed conflict. The lack of a clear ethnic winning side in the Burundian conflict contributed to the peace agreement that resulted in power sharing between Hutus and Tutsis. But in the case of Rwanda there was no power sharing between Hutu and Tutsi.

Changes in the Ruling Political Coalition

The logic of winner takes all centralized power around the RPF, and drastically transformed the Rwandan political landscape. The radical change in the Rwandan ruling
political coalition provides some explanation as to why there are stronger restrictions on the *gacaca* courts than on the *bashingantahe*. While the post-conflict Burundian government and political coalitions were comprised of a rearrangement of the Burundian pre-conflict political class, the Rwandan conflict resulted in a completely new political ruling coalition.

*Winner Takes All*

Perhaps, in the case of Rwanda the single most important factor that influenced government’s control of the *gacaca* was a complete shift in the composition of the political ruling coalition. The political coalition that took control of Rwanda in the wake of the genocide was made up of English speakers and foreign trained military and professional elites (Fujii, 2009). When a rebellion started in Rwanda in October 1990, the RPF was essentially comprised of Tutsis who were refugees in Uganda since the 1960s. Most and probably all of RPF leaders grew up and were born abroad (Barnett, 2002). Once the RPF took control of Rwanda, thousands of Tutsi diaspora returned or migrated to Rwanda since for most of them it was the first time to come and settle in Rwanda (Waugh, 2004). This explains why the current Rwandan political and military elite is essentially comprised of Tutsi Rwandans who grew up abroad, speaking English instead of Kinyarwanda or French. Consequently, the current political coalition in power in Rwanda is comprised of foreign-trained military men, scholars, and professionals who may not have a cultural appreciation of the *gacaca* courts. It is probable that in attempting to demarcate themselves from the genocide and the pre-1994 genocide
Rwandan state, the new Rwandan political class restructured the *gacaca* not only in order to control it, but also in order to make it resemble statutory judicial systems that they are more acquainted with.

In his conversation with Gourevitch, President Kagame, constantly argues that change was desperately needed in Rwanda. He also insists that the rule of law had to be applied to everybody in the same way (Gourevitch and Kagame, 1996). It could be that Kagame was referring to a unified justice system in which even the *gacaca* would function as an appendage of the statutory justice system.

*Power-Sharing*

In addition to a negotiated termination of conflict in Burundi, the relative sameness of the Burundian political class contributed in maintaining some degree of autonomy for the *bashingantahe*. The Arusha Comprehensive Peace Agreement forced Burundians into a process of power sharing between Hutu, Tutsi, and other minority ethnic groups (Kohlhagen, 2009). For example, the Arusha accord and the Burundian 2005 constitutions stipulate that the president of the Republic of Burundi will be assisted by two vice-presidents from two different ethnic groups and two different political parties (El Abdellaoui, 2009). In contrast to Rwanda, the post-conflict Burundian political leadership is mainly comprised of political and military actors who were born, grew up, and lived in Burundi (Ould-Abdallah, 2000). It is highly probable that most of Burundians who fought in the civil war were acquainted with Burundian traditions; they might not have had strong incentives to restrict the *bashingantahe*. Moreover, as the
had maintained some level of popular legitimacy (Nindorerea, 2007), including them in the peace negotiation and in the transitional processes might have given political leaders and different armed factions credibility for national reconciliation.

Furthermore, since the Burundian power-sharing is based on grand coalitions, proportionality, and elite cooperation (El Abdellaoui, 2009), Burundian pre-conflict political coalitions have maintained some political leverage at the national and the local level. Not only Burundian pre-conflict political coalitions have had political structures prior to the conflict, but also the post-conflict political rearrangements protect their participation. Citing the Burundian constitution, Vandeginste (2009) explains:

“Regarding the composition of the government, the Constitution requires that a maximum of 60% of the ministers are Hutu and a maximum of 40% of the ministers Tutsi. At least 30% must be women (art. 129). The Minister of National Defense and the Minister in charge of the National Police must belong to different ethnic groups (art. 130). Furthermore, political parties that obtain 5% of the votes cast at the parliamentary elections are entitled to participate in a coalition government, with the number of ministerial posts that is proportionate to their seats at the National Assembly. In practice, these provisions have been more or less respected, though not without difficulties” (p. 76).

This explains in part why in Burundi the political class has not changed much. Perhaps what has changed is the proportion of ethnic representation in the political process, the administration, and the army (Fujii, 2009). Whether power-sharing will increase and protect political participation in Burundi is debatable. However, as of now, Hutu participation in the army and the government has increased (Vandeginste, 2009), Tutsi and other ethnic minorities political participation is protected by the law (Kaburahe, in Huyse and Salter, 2008). Whether this state of affairs will continue in the future is not determined, however the Burundian consociationalism did not give a specific ethnic
group or a specific political organization political or judiciary power to control Burundian traditional justice mechanisms such as the *bashingantahe*. Another pertinent factor that might help explain the differences between the incorporation of the *gacaca* and the *bashingatahe* in the transitional processes is the way the Rwandan and the Burundian post-conflict state address the question of ethnicity.

**Addressing Ethnic Relations**

The socio-political and economic conditions that led to civil wars in Burundi and Rwanda in the 1990s was the culmination of multiple historical and contemporaneous, exogenous and indigenous factors. When attempting to account for the causes of civil war in a given country scholars and professionals adopt different theoretical approaches. In the case of the Congolese conflict, Reno (2006) looks at the role of economic and political structural shifts at the national, regional, and international level. And in explaining the cause of the Somali and the Afghan civil wars, Enlgehart (2002) focuses on the actions of despotic rulers and patronage politics. Other scholars, such as Collier (2007) and Fearon (2005), analyze the pertinence of primary commodity dependency on civil wars. No matter what theory of civil war one subscribes to, insurgent groups require visions and opportunities in order to sell and launch successful rebellions (Bob, 2005). Once in power the vision that sustained an insurgency might play a critical role in the redefinition of national identity and cause shifts in intergroup and intragroup relations. Differences in the national identity project and efforts to redefine ethnic relations could
help explain why the Rwandan gacaca courts are more restricted than the Burundian council of bashingantahe.

\[\text{No Tutsi, Hutu, or Twa, but “One Rwanda,” “Rwandanicity”}\]

Another point to consider in the effort to understand why the gacaca courts are heavily restricted is the rupture that the current Rwandan government has sought to establish between the post-conflict and the pre-conflict Rwanda. By the end of the 1950s the socio-political space in Rwanda was heavily ethnicized and dominated by the Hutus (Nyankanzi, 1998). Perhaps with the exception of the business sector where Tutsis maintained some level of participation (Hintjens, 1999), Hutus controlled every sector of life in the pre-1994 genocide Rwanda (Barnett, 2002). Tutsi’s participation in the administration and the army was restricted (Hintjens, 1999). In education the government had imposed a quota for Tutsis’ enrollment in primary, secondary, and tertiary education (Semunjanga, 2003). In this way, Tutsi social mobility was limited to the business sector where the government failed to limit Tutsis’ access (Mamdani, 2001). When Tutsi political elites took power in 1994, they sought to deal with ethnic disparities by ostensibly attempting to eliminate the salience of ethnicity in the Rwandan identity (Gourevitch and Kagame, 1996), hopping that this would level the field of opportunity for Tutsi. As mentioned earlier, Ingelaere (in Huyse and Salter, 2008) refers to this project as Rwandanicity, and President Kagame (Gourevitch and Kagame, 1996) calls it One Rwanda. The idea here is to ignore, if possible to eradicate the notion of Tutsi, Hutu, and Twa ethnicities in order to reduce ethnic tensions, at least in public discourse. Only
time will tell whether this reimagined Rwandan community would persist without a re-
imagination of ethnic or intergroup differentiations. Nevertheless, in today’s Rwanda
questions of ethnicity are no longer addressed in public and extremely discouraged in
private (Gourevitch and Kagame, 1996). This is why ethnic groups Hutu, Tutsi, and Twa
no longer appear on official documents. I believe that the notion of One Rwanda might
have played a role in the centralization and the formalization the gacaca.

The rationale of One Rwanda implies that the Rwandan identity has more salience
than the Hutu, Twa, or Tutsi identities. Hence, the ethnicity of the inyagamugayo or that
of 1994 genocide suspects is not “relevant.” In this logic the only thing that matters is the
fact that “regular” Rwandans, whether they are all Tutsi or not, are judging the 1994
genocide suspects. Under the logic of One Rwanda the reinvented gacaca courts pretend
to act as a justice of proximity with respect to the 1994 genocide. Although the
reinvented gacaca give the impression that everyday Rwandans have the latitude to judge
the 1994 genocide suspects, it obscures the fact that the government controls the
appointments of the inyagamugayo, and hearing procedures in the gacaca (Longman,
2010). And in establishing distinctions, for instance, between murders committed by
Hutu and Tutsi during the genocide period (Newbury and Newbury, 1999), the gacaca
courts are acting as a differentiating structure. With respect to the post-genocide justice,
the One Rwandan project fails to blur ethnic differentiation because it is far too easy to
convict a Hutu for a genocide crime than a Tutsi for a similar crime committed between
1990 and 1994 (Haile, 2008). The simple fact that Tutsi are not tried in the gacaca is
evidence that ethnicity has morphed into a “silent salient” component of the Rwandan identity.

Another possible flaw of the *One Rwanda* project is the fact that identity is relational (Doom and Gorus, 2000). Within Rwanda the Rwandan identity, as such, has little relevance, it becomes expressly relevant when it is related to the Ugandan, the South African, or the Tanzanian identities. In Rwanda Rwandans cannot simply be “Rwandans.” Intragroup and intergroup Rwandan identities will continue to be shaped by the nature of group relations. Similar to the way Tutsi and Hutu identities were outcomes of the way two groups related with each other in the pre-1994 Rwandan genocide (Rafti, 2005), group relations will continue to inform group identities in the post-conflict Rwanda.

Among other tangible changes, the post-conflict Rwandan state introduced a shift in the official language of Rwanda. The administration adopted English to the expense of French (Golooba-Mutebi, 2008). As of today primary, secondary, and tertiary education in Rwanda are taught in English instead of French. In addition, Rwanda refused to strengthen ties with La *Francophonie* (the international organization of French speaking nation headed by France) (McNulty, 2000). Instead, Rwanda joined the Commonwealth of Nations (The Commonwealth Secretariat, 2010) and the East African Community; two essentially English speaking international organizations. Why exactly Rwanda joined the Commonwealth is unclear. Nonetheless, this shows, at least partially, a deliberate move of the Rwandan administration to break away from the pre-1994 genocide Rwandan administration. Whether the new reimagined Rwandan community would be cemented
around the English language will be answer in the future. However, in addition to French, Kinyarwanda, and Kiswahili, English has become a salient part of the national and groups’ identity in Rwanda (Chretien, 2006). The current Rwandan political coalition is Tutsi, English speaking, and is closely associated to the RPF (Kalron, 2010), while the previous Rwandan political class and the majority of political oppositions are Hutu, French speaking, and associated to president Habyarimana (Rafti, 2005). It appears as though linguistic identity is becoming a determinant identifier in today’s Rwandan politics. The One Rwanda project might have silenced the public conversation on ethnicity, but it might be creating a political ethnico-linguistic identities. Likewise, in centralizing and limiting the gacaca courts to genocide related crimes, the Rwandan government might have strengthened some differences between Tutsi and Hutu.

A Multiethnic Government?

As opposed to Rwanda, where the government is attempting to silence ideas of ethnicity through the propagation of the concept of Rwandanicity or the idea of one Rwanda, Burundi is trying to deal with the question of ethnicity through power-sharing (Vandeginste, 2009). As a virtue of power-sharing the Burundian national orientation continues to be influenced by the pre-conflict political class, even the former “two times” president Buyoya continue to be relevant in the Burundian politics today. There was not a radical rupture between the pre-conflict and the post-conflict Burundi in terms of national orientation. A direct implication here is that controlling or limiting the autonomy of the bashingantahe was not necessary for the Burundian government. Efficient governmental
control of the *bashingantahe* would necessitate either the takeover of the Burundian government by an ethnic group, or a strong agreement between the Hutu and the Tutsis political elites. But the current Burundian political landscape is such that even the dominantly Hutu ruling party, the CNDD-FDD, faces serious internal divisions (Theron, 2009).

A decade of civil war in Burundi has resulted in the emergence of political parties that seem to be more driven by ideology than ethnicity. For example, even though the current Burundian ruling party, the CNDD-FDD is predominantly Hutu, its fierce rival is the Palipehutu-FNL, another predominantly Hutu party and the very last insurgent group to sign a peace accord (El Abdellaoui, 2009). This may be an indication that Burundian political parties are now articulating their grievances around other avenues than ethnicity. Certainly, the lack of a strong cohesion in the Burundian political space and the awareness that any political groups might successfully mount an insurgency renders the Burundian state fragile. However, as different political actors have a voice in the Burundian politics it has become challenging for a specific ethnic group or even the ruling party to unilaterally impose itself. This may explain why the Burundian government has not been able to centralize or to place heavy restrictions on the council of *bashingantahe*, as compared to the *gacaca* courts in Rwanda. Furthermore, the fact that Burundian (predominantly Hutu) insurgent groups have successfully fought a Hutu government could be an indication that ethnic relations are beginning to change in Burundi.
Historical differences between Rwanda and Burundi can explain why the Rwandan RPF Rebellion was more unified than was the Burundian Hutu resistance against the Tutsi led army and government at the beginning of the 1990s. Upon their independence Rwanda was under the Control of the majority Hutu (Uvin, 2001), but Burundi was under the control of the minority Tutsi (Vandeginste, 2007). From a strategic viewpoint it was more beneficial for Rwandan Tutsi to be united under the banner of the RPF than for Burundian Hutu to join a single insurgent group. Due to their superior number and diverging regional and political interests, Burundian Hutu political leaders created different, and sometimes competing, political groups (Meisler, 2007). And the ruling Burundian Tutsi (although in charge of the government and the army up until 1993) had to make some strategic concessions in order to create alliances with powerful Hutu political elites (Khadiagala, 2006). With time this dynamic created strong political divergences between different Burundian Hutu political elites in such way that Burundian Hutu could not unite even after the assassination of Melchior Ndadaye, the first Hutu president of Burundi, in 1993. Ten years of civil war and political strife that followed reinforced political divergences between Burundian Hutu political elites, and between Tutsi political elites (El Abdellaoui, 2009). Adding to the list the experience of power-sharing, the post-conflict Burundian political arena has become such that ethnic politics alone is no longer enough to mobilize people. Now Burundian Hutu are forced to compete with Hutu, and Tutsis are forced to compete with Tutsi (Vandeginste, 2009). In such competitive political environment traditional leaders such and the *bashingantahe* could represent both a political asset and a liability, but due the nature of the political
environment and power-sharing, the government is not able to place strong unilateral restrictions on the *bashingantahe*.

Factors that help explain differences in the way Rwanda and Burundi incorporated the *gacaca* and the *bashingantahe* in their transitional justice processes include differences in conflicts’ dynamics, whether the conflict ended by a clear victorious side or peace negotiations, the type of shift in the ruling political coalition, and whether or not the post-conflict state is attempting to centralize ethnic relations. Of course, this list of factors that might influence how and why a post-conflict state includes local mechanisms of justice in the transitional justice processes is not exhaustive. Other considerations such as the relative importance of a given ILT, the strength of the statutory justice system, the relative importance of other ILTs, and the degree of international intervention before, during, and after the conflict could also explain why and how a post-conflict state includes ILTs in its transitional processes. For the Rwandan and the Burundian cases, differences in conflict dynamics, the method of conflict termination, shifts in the ruling political coalition, and state sponsored changes in post-conflict ethnic relations provide a compelling explanation of jurisdictional differences between the *gacaca* the *bashingantahe*.

These four factors capture pertinent changes in the domestic political dynamics of Rwanda and Burundi; they may not be the primary explanations of why the *gacaca* and the *bashingantahe* have been incorporated differently in transitional justice processes, but they are the expression of other complex factors that affected the Burundian and the Rwandan political realities before and after the conflicts. International interventions
affected the intensity of the conflict in Rwanda and in Burundi, as well as the method of conflict termination (Barnett, 2002; Dellaire, 2004; Chretien, 2006; and Vandeginste, 2009). Although in some instances international involvements have had a direct influence on the way Rwanda and Burundi dealt with local justice mechanisms, as was the case of UNESCO in *bashingantahe* (Nindorera, 2007), the most pertinent implication of the international community in Rwanda and Burundi was expressed through internal political rearrangements. I contend that changes in internal political dynamics in the post-conflict Rwanda and Burundi had more direct effects on the way the *bashingantahe* and the *gacaca* were incorporated in the transitional justice processes. If we want to study how Rwandan and Burundian politics are directly affecting the *gacaca* and the *bashingantahe* we should primarily focus on shifts in the domestic politics.
CHAPTER 5: CONCLUSION

The larger question that the present thesis attempted to address is whether the incorporation of local mechanisms of justice in transitional justice processes encourages or discourages local participation, and when participation is discouraged how can we account for it, and what could be its implications? Is state involvement in the gacaca and the bashingantahe conducive to a justice of proximity, or are the Rwandan and the Burundian post-conflict states attempting to use the gacaca and the bashingantahe as arms of the state? This chapter presents a summary of the study and pertinent conclusions drawn from the literature reviewed. It also provides some recommendations for further research.

Historically the legitimacy and the effectiveness of the gacaca and the bashingantahe had been undermined by the colonial state and by the postcolonial state. The Rwandan and Burundian state’s attempt to revive the gacaca and the bashingantahe in the 2000s raises some questions. For instance, how can post-conflict states effectively incorporate traditional institutions that have been historically undermined by the state? Although Burundi and Rwanda incorporated the gacaca and the bashingantahe in the transitional justice processes, they took different approaches. Rwanda fully co-opted the gacaca, and in so doing the Rwandan state controlled and limited its scope. The Rwandan government restricted the gacaca to crimes related to the 1994 genocide (Verpoorten, 2010). Since the Rwandan government defined the genocide almost exclusively in terms of Tutsi’s massacres by Hutu between October 1990 and December 1994 (Newbury and Newbury, 1999), the large majority of Rwandans that are tried by the gacaca are Hutu.
Burundi, on the other side, did not fully integrate the *bashingantahe* in its transitional justice. The *bashingantahe*’s decisions have no legal force, although they continue to advise Burundians on different local matters (Kohlhagen, 2009). State’s interferences in the *bashingantahe*’s procedures by the end of the 1990s affected the legitimacy of this traditional institution (Nindorera, 2003).

Summary of the Study

In the aftermath of their brutal internecine conflicts of the 1990s the post-conflict Rwandan and Burundian states incorporated the traditional justice mechanisms of *gacaca* and *bashingantahe* in their transitional justice processes. Initially the willingness of the post-conflict Rwandan and Burundian states to include the *gacaca* and the *bashingantahe* in the transitional justice was saluted as innovative ways for post-conflict states to encourage participation in post-conflict justice (Lahiri, 2009, and Ntahombahe, 1999). Later on, observers of Rwanda and Burundi became critical of state’s motives in reviving the *gacaca* and the *bashingantahe* (Deslaurier, 2003 and Longman, 2009). Other scholars vehemently raised questions related to the effectiveness of the *gacaca* and *bashingantahe* as mechanisms of justice.

Research Questions

In the context of debating the pertinence of incorporating the *gacaca* and the *bashingantahe* in transitional processes in Rwandan and in Burundi, this study brought another dimension; it attempted to understand the incorporation of the *gacaca* and the
bashingantahe in the transitional justice from a comparative viewpoint. The study posited that because the gacaca and the bashingantahe are local mechanisms of justice, their legitimacy depend on social relations. And considering that Rwanda and Burundi are legally pluralist societies, state’s attempt to centralize the gacaca and the bashingantahe could result in some form of popular resistance. The study argued that due to Rwanda and Burundi’s historical and contemporaneous interconnections, a comparatively study could bring new insights in the efforts to understand why the post-conflict Rwandan and Burundian states incorporated the gacaca and the bashingantahe in their transitional justice. Thus, the primary purpose of this study was to examine whether there are substantial differences in state’s incorporation of the gacaca and the bashingantahe, and how to explain those differences. This is why the study dealt with three principal questions:

- Why did the Rwandan and Burundian governments incorporate the gacaca and the bashingantahe in their transitional justice processes?
- What are possible social effects of state co-opting of the gacaca and the bashingantahe?
- If there are remarkable differences in state’s incorporation of the gacaca and the bashingantahe how can we account for them?

**Findings**

The study found that the modern gacaca and bashingantahe resurged in the post-conflict Rwanda in early 2000 and in Burundi in the mid-2000s as strategic choices.
adopted by the post-conflict Rwandan and Burundian states to address crimes related to the 1990s conflicts. The 1994 Rwandan genocide caused the death of approximately 800,000 Rwandans, and countless others were internally displaced, dispossessed of their lands, or went to exile in neighboring countries. Following four years of civil war, and the devastation of the 1994 genocide, the RPF had no viable legal system or a coherent bureaucratic machinery to try genocide suspects (Newbury, 1998). Approximately 130,000 of genocide suspects filled Rwandan jails for months, and sometimes years, without trial, living in deplorable conditions (Longman, 2009). Facing such humanitarian crisis the Rwandan government needed an annex justice system to help alleviate the situation. This is why the Rwandan government reinvented the *gacaca* to fill in the gap of the statutory justice system. The *gacaca* were primarily incorporated in the transitional justice as a *justice of opportunity*, not necessarily as a *justice of proximity*. It was convenient for the Rwandan government to transform the *gacaca* into a hybrid justice system in which the government controls the selection of the *inyangamugayo*, hearings procedures, and determined who could be tried in the *gacaca* (Baker, 2007). The new *gacaca* cannot be considered as a *justice of proximity* since their legitimacy depends primarily on the government.

The local and the participatory nature of the traditional *gacaca* have been usurped by the post-conflict Rwandan state. The new *gacaca* functions as statutory courts, but without impartiality (Haile, 2008 and Ingelaere, 2007). The *gacaca* try only crimes related to the 1994 genocide, and the term “genocide” may cover any crime committed by Hutus against the Tutsis during the period of the genocide (Newbury and Newbury,
1999). By contrast, crimes allegedly committed by RPF members during the same period are excluded from the jurisdiction of the gacaca, because they do not fall within the Rwandan state’s definition of the 1994 genocide (Baker, 2007).

The Burundian case is slightly different. Although the post-conflict Burundian government included the bashingantahe in the transitional justice processes, the bashingantahe are not completely annexed to the Burundian statutory justice system. Their decisions are not legally binding; they only serve as advices to the court or to conflicting parties (Dexter and Ntahombaye, 2005). Even though the Burundian state has attempted to centralize the council of bashingantahe, some bashingantahe continue to be selected and trained through traditional processes (Kohlhagen, 2009). Consequently, the bashingantahe have preserved some popular legitimacy. In spite of some legitimacy, participation to bashingantahe’s hearings is decreasing (Nindorerea, 2003). However, through presidential appointments of some bashingantahe, the Burundian government has affected the popular perception of bashingantahe, and the level of participation in bashingantahe sessions. Similar to the gacaca, the bashingantahe might no longer be representing a justice of proximity.

To evidence that the gacaca and the bashingantahe are losing popular legitimacy and might not be representing a justice of proximity, the study found that not only participation is decreasing but also Rwandans and Burundians are developing alternative dispute resolution mechanisms, outside of the gacaca, the bashingantahe, and the statutory legal system. Ingelaere (2008) argues that some Rwandans are living on the margin of the gacaca, since they cannot address their issues either in the gacaca or in the
statutory legal system. And Burundians are developing “informal ways” of solving disputes by appointing impromptu arbiters, who could be a respected co-worker, a neighbor, a friend, or a family member trusted by the conflicting parties (Deslaurier, 2003, and Nindorera, 2003). When it comes to meaningful local matters such as land disputes, the study found that the *gacaca* and the *bashingantahe* have been sidelined by the state. Although most privately “owned” lands are not registered in Rwanda and in Burundi (Theron, 2009 and Ntampaka, 2008), neither the *gacaca* nor the *bashingantahe* have played a pertinent role in the current land reforms in Rwanda and in Burundi (Gready, 2009 and Kohlhagen, 2010). In attempting to centralize their land tenure systems, the Rwandan and Burundian states neglected to include the *gacaca* and the *bashingantahe* in the process. Since most owned lands in Rwanda and Burundi continue to be regulated by customary law (Musahara, 2006 and Lahiri, 2009), bypassing the *bashingantahe* and the *gacaca* could be counterproductive. Since Rwanda and Burundi continue to be legally pluralist societies (Chretien, 2006), it will take a long time to register all private lands and to transit, if ever possible, from the customary land tenure to the statutory land tenure. Until then, some level of local participation in land issues is still needed in Rwanda and Burundi.

Perhaps the most important finding of this study are jurisdictional differences observed in the incorporation of the *gacaca* and the *bashingantahe* in the transitional justice. The study found that the *gacaca* are strongly integrated into the transitional justice in Rwanda, but the *bashingantahe* are only partially included in the Burundian transitional justice. While the *gacaca* are tightly controlled by the state, the
bashingantahe have some level of autonomy. The study argued these differences could be explained by differences in the dynamics of the 1990s conflicts in Rwanda and in Burundi, the method of conflict termination, the nature of shifts in the ruling political coalition, and the way the state deals with post-conflict ethnic relations.

The Rwandan civil war was fought as a radical struggle for the liberation of Tutsi, and it ended with a clear victory of the RPF. It could be that the RPF restricted the gacaca as a strategy to prevent Hutu from reorganizing. The RPF did not need to incorporate the gacaca in the transitional process until it became impractical to address post-genocide justices through the statutory justice system alone (Corey and Joireman, 2004). RPF leaders might not have been acquainted to the gacaca. Instead, as refugees in Uganda, RPF leaders were probably more acquainted to statutory justice systems. This could explain why the RPF sought to utilize the gacaca as an extension of the statutory justice system to try the 1994 genocide suspects. And in the effort to redefine relations between Tutsi, Hutu, and Twa the Rwandan government resolved to “ignore” ethnic differences, arguing that ethnic differences were artificial inventions of colonization (Gourevitch and Kagame, 1996). This reinterpretation of ethnicity could be another reason as to why the Rwandan government has attempted to control and centralize the gacaca. In controlling the gacaca the government makes sure that the conflicting parties are identified as Rwandans and questions of ethnicity is not addressed.

In contrast to the Rwandan civil war, the Burundian civil war was not necessarily fought between Tutsis and Hutu, and it did not end with a clear winners and losers, in term of ethnic groups. The Burundian civil war was fought between a struggling
Burundian government and different Burundian Hutu and Tutsi rebel groups over a period of ten years (Vandeginste, 2007). Moreover, not only the Burundian civil war ended in a peace accord, but also the *bashingantahe* were included in the peace negotiation processes (Havermans, 2002). Hence, the *bashingantahe* might not have been a threat to a specific ethnic, or political, group. More importantly, the Burundian peace accord processes resulted in power-sharing between different ethnicities and political actors (Vandeginste, 2009). This may explain why the *bashingantahe* were able to maintain some level of autonomy, in spite of government interferences.

**Why Justice of Proximity Matters**

Although the inclusion of local mechanisms of justice in the transitional justice processes has the potential to encourage national reconciliation, it appears that the official characteristic imposed on the *gacaca* and the *bashingantahe* by the state deprived them of their critical quality of *proximity*. Does the justice of proximity matter in the context of *gacaca* and *bashingantahe*? Participation in local mechanisms of justice is dependent on the nature of social relations and the proximity between local judges, (such as the *inyangamugayo* and the *bashingantahe*) and the people (Leebaw, 2008), but government appointments of the *bashingantahe* in Burundi, and state takeover of the *gacaca* in Rwanda enlarged the distance between the people and local justice structures. State interferences with the *gacaca* and the *bashingantahe* attempt to change Burundians and Rwandans’ perception of justice, and force them to reassess social relations. But social relations do not change overnight. Even though at times shifts in social relations may be
instrumentalized, social relations obey to complex social dynamics that are beyond leadership. The decrease in local participation in the gacaca and the bashingantahe’s hearings could be a demonstration that the perception of justice is embedded in social relations; it cannot simply be imposed. It is uncertain whether true reconciliation in Rwanda and in Burundi could be achieved through the reinvented gacaca and bashingantahe alone. Growing evidence seems to indicate that some Rwandans are living on the fringe of the gacaca, and some Burundians are finding alternative justice mechanisms (Ingelaere, 2007 and Kohlhagen, 2010). Perhaps these alternative mechanisms are truly where and how Rwandans and Burundians are making peace with their recent past and carving their future. We should invest some attention to studying how these alternative mechanisms of justice operate and what could be their possible implications at the local and the national level.

Justice of proximity is more than just about justice in the juridical sense, it is also about rebuilding social trust and launching the process of reconciliation (Quinn, 2007), as such justice of proximity has a role to play in transitional justice processes of pluralist societies such as Rwanda and Burundi. Perhaps the first role that justice of proximity may play in transitional justice processes is cultural. While it is pertinent to render justice, it is also crucial for the people to understand the judicial process and its implications. In virtue of their proximity, local mechanisms of justice may be culturally and socially more meaningful than statutory justice systems (Bangura, 2008), post-conflict societies could capitalize on local mechanisms of justice to launch national reconciliation and to address issues related to post-conflict justice. In spite of the
potential to foster reconciliation, difficulties of enforceability and state’s interferences impede the effectiveness of local mechanisms of justice. This is why instead of co-opting local mechanisms of justice or interfering with their processes, post-conflict state such as Rwanda and Burundi could provide a minimal level of oversight so that local mechanisms of justice and local leaders may effectively address local issues in their own terms. Admitting that the lack of enforceability have rendered ILTs and other local mechanisms of justice ineffective (Joireman 2008), post-conflict states could provide a political space where institutions such as the gacaca, the bashingantahe, the barza communautaire and the mato oput could legally operate with some autonomy on local matters.

It is simplistic to argue that the post-conflict Rwandan and Burundian states’ agenda was to control the gacaca and bashingantahe, it is equally simplistic to believe that the incorporation of local mechanisms of justice (or ILTs) in the transitional justice processes is a manifestation of a government’s will to increase local participation. What transpires from this study is that because local mechanisms of justice are based on social relations, in disrupting social structures conflicts affect by the same token local mechanisms of justice. For these reasons changes in power-relations and social structures as results of conflicts have influenced the way ILTs and other local mechanisms of justice are included in transitional justice processes.

Recommendations for Further Research

In their efforts to redefine social relations, the Rwandan and the Burundian governments have also encouraged the instauration of women as inyangamugayo and
For two ILTs that have been historically dominated by men (Nindorera 2003, Chretien 2006), the participation of women in leading positions is a substantial change. Certainly, the inclusion of women as members of *bashingantahe* and *inyangamugayo* will have some implications in the future. But it is pertinent to question whether increasing women’s representation as *inyangamugayo* and members of *bashingantahe* would increase women’s participation in the *gacaca* and *bashingantahe* hearings. It is also fair to question the motivations of the post-conflict Rwandan and Burundian states in encouraging women’s representation in the *gacaca* and the *bashingantahe*.

In addition to questions of women’s participation in the *gacaca* and the *bashingantahe*, further research is needed in the effort to understand why some post-conflict states incorporate ILTs and local mechanisms of justice in their transitional processes. Since the 1990s the African GLR has been the theater of local, national, and regional conflicts. Following these conflicts, the DRC, Rwanda, Uganda, and Burundi included local mechanisms of justice in their transitional justice processes. What does this mean for the GLR as a whole? We know that the DRC and Uganda have included the local justice mechanisms of *barza communautaires* and the *mato oput* in their transitional processes (Clark, 2010, and Angucia, 2009). Can we utilize the experience of the *gacaca* in Rwanda and the *bashingantahe* in Burundi to study the *barza communautaires* in the DRC and the *mato oput* in Uganda? For Rwanda and Burundi the study found that radical change in the ruling political coalition, and the demarcation between belligerents groups might have influenced the way the *gacaca* and the *bashingantahe* were incorporated in the transitional justice. How could ILTs and other...
local mechanisms of justice be affected in post-conflict cases where ethnicity was not a salient factor, or where there was not a clear demarcation between belligerents groups as it was the case in the DRC (Stearns, 2011)? And how can a conflict that did not result in a substantial political rearrangement, such as the case of Uganda (Eichstaedt, 2009 and Baregu, 2011), affects ILTs and other local mechanisms of justice? These questions are worth exploring. The generalized political instability and the massive human displacement of the 1990s will continue to affect the GLR for decades to come. Therefore, steps and strategies initiated by private as well as public actors to alleviate social, economic, and political disparities require careful examination.

Sometime it is critical for a post-conflict state to include local mechanisms of justice in its transitional processes, but a pertinent question is how to include local mechanisms of justice in the transitional justice without delocalizing legitimation. Post-conflict states might have different reasons to include ILTs in the transitional justice. But when critical reasons to incorporate ILTs in the transitional justice include national reconciliation and post-conflict justice, participation remains relevant, and local legitimation continues to be crucial, especially in legally pluralist contexts, such as in Rwanda and Burundi. This is the challenge that post-conflict states face: how can they encourage participation without a strong centralization? And how can they integrate local mechanisms of justice without delocalizing their legitimacy?
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