

**THE ADJUDICATION OF GENOCIDE:
GACACA AND THE ROAD TO RECONCILIATION IN RWANDA**

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INTRODUCTION

In 1994, Rwanda suffered one of the worst genocides in history. During 100 days of killing, 800,000 people died.² More people died in three months than in over four years of conflict in Yugoslavia; moreover, the speed of killing was five times faster than the Nazi execution of the Final Solution.³ Unlike the killings that occurred during the Holocaust, Rwandans engaged in “a populist genocide,” in which many members of society, including children, participated in killing their neighbors with common farm tools (the most popular was the machete).⁴ While not all Hutus engaged in killing and not all victims were Tutsi, Hutus executed the vast majority of the killings and Tutsis were largely the target of their aggression.⁵

Fourteen years after the genocide, Rwanda is still struggling with how to rebuild the country and handle the mass atrocities that occurred. During the first four years following the genocide, four types of courts developed to prosecute genocidaires:⁶ the International Criminal Tribunal of Rwanda, foreign courts exercising universal jurisdiction, domestic criminal courts, and a domestic military tribunal. Regrettably, none of these courts has been able to resolve the enormous problems related to adjudicating genocide suspects. In 2001, the government created gacaca, a fifth system for prosecuting genocidaires, to solve the problems it saw in the other courts. Gacaca is highly lauded by the government and many outside observers as the solution to Rwanda’s genocide. A researcher, who studied two gacaca pilot programs for five months, noted that “[t]he official discourse is so

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2. HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH-CENTURY EXPERIENCE 156 (University Press of Kansas 1999).

3. *Id.* at 164, 166.

4. Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT’L L. & POL. 355, 361-63 (2002).

5. *Id.* at 365.

6. A term generally used to refer to perpetrators of Rwanda’s genocide. *See, e.g.*, YVES BEIGBEDER, JUDGING CRIMINAL LEADERS: THE SLOW EROSION OF IMPUNITY 102 (Martinus Nijhoff 2002).

passionate about gacaca and its anticipated outcome that the system is almost granted a mythical status.”⁷

Unfortunately, gacaca cannot fully operate as either a court or a customary dispute resolution mechanism because of its twin goals: retribution and reconciliation. Moreover, Rwanda's limited resources and the astounding number of suspects require enormous revisions to gacaca. This paper explores why Rwanda implemented gacaca, the reasons for gacaca's failure and possible solutions for moving forward. Part I presents an overview of the history of ethnic tension in Rwanda, the events leading up to genocide, and the genocide itself. Part II examines the four courts created before gacaca to adjudicate genocide, their failures in the eyes of the Rwandan government and international observers, and the government's creation of gacaca. Part III explores the goals of the Rwandan gacaca model, and whether they are attainable or desirable. Part IV examines gacaca courts' failure to implement criminal procedure protections. Part V suggests revisions to the current adjudication of genocide suspects, including an alternative model of gacaca. Additionally, this section highlights the importance of addressing Rwandans' economic struggles, as a necessary element of reconciliation. Part VI concludes the article.

I. HISTORICAL OVERVIEW OF RWANDA

Disagreement among Rwandans on critical aspects of the nation's history continues to be a major impediment to reconciliation. The Organization of African Unity remarks that “there are hardly any important aspects of the story that are not complex and controversial; it is almost impossible to write on the subject without inadvertently oversimplifying something or angering someone.”⁸ One of the most controversial issues is the origin of ethnic groups in Rwanda.⁹ Before the genocide, the ethnic make-up of Rwanda was 85% Hutu, 14% Tutsi, and 1% Twa.¹⁰ Although these ethnicities were clearly defined, it is unclear how they developed.¹¹ Since the end of genocide, the government has promoted a version of history in which Tutsi and Hutu peacefully co-existed before colonialism.¹² The government's official website claims that “[w]hile the relationship between the king and the rest of the population was unequal, the relationship between the ordinary Bahutu, Batutsi and Batwa¹³ was one of mutual benefit mainly through

7. Arthur Molenaar, *Gacaca: Grassroots Justice After Genocide. The Key to Reconciliation in Rwanda?*, 77 AFR. STUD. CENTER RES. REP. 1, 68 (2005), available at <https://openaccess.leidenuniv.nl/dspace/bitstream/1887/4645/1/ASC-1236144-071.pdf>.

8. Daly, *supra* note 4, at 358 (quoting AFRICAN UNION, RWANDA: THE PREVENTABLE GENOCIDE – INTERNATIONAL PANEL OF EMINENT PERSONALITIES ¶ 2.1 (2000), available at http://www.africa-union.org/Official_documents/reports/Report_rowanda_genocide.pdf).

9. *Id.* at 359.

10. BALL, *supra* note 2, at 156.

11. Daly, *supra* note 4, at 359-60.

12. *Id.* at 359.

13. Bahutu, Batutsi, and Batwa are the terms traditionally used by Rwandans to identify the ethnic groups within their country. These terms, when adopted by the West, became Hutu, Tutsi and Twa and refer to the same ethnic groups. See, e.g., WOMEN FOR WOMEN INTERNATIONAL, RWANDA FACTSHEET (2005), http://www.womenforwomen.org/downloads/country_factsheet_rwanda_sunday.pdf.

the exchange of their labour. The relationship was symbiotic.”¹⁴ However, many Hutus believe that Tutsi herders were foreigners to Rwanda who considered themselves superior to the Hutu pastoralists and took control of the region between the eleventh and fifteenth century.¹⁵ The failure of the Tutsi-controlled government to address the Hutu version of history further highlights the significant ideological split between Tutsis and Hutus. Hutus and Tutsis view themselves as different ethnic groups, even though they share the same language (Kinyarwanda), culture, clan names, customs, taboos, and have intermarried for centuries.¹⁶ The government has avoided confronting these conflicting beliefs between ethnic groups and has banned the use of ethnic categories because it is afraid of inflaming ethnic tensions.¹⁷ However, the government’s lack of healthy outlets in society for Rwandans to face these differences and resolve them has forced these tensions to erupt in courtrooms and gacaca. Since 1994, no history lessons have been taught in Rwandan schools because no consensus exists on the past, and government publications refuse to include an ethnic breakdown of society.¹⁸

Whether or not the ethnic divisions began in pre-colonial times, they were exploited during colonialism. Colonists considered Tutsis to be the missing link between blacks and whites because many Tutsi were lighter skinned, thinner, and taller than the Hutus.¹⁹ As a result, Tutsis were placed in positions of authority over Hutus. In 1935, Belgian colonists introduced ethnic identity cards (“tribal cards”) to Rwandans.²⁰ Ironically, these cards provided the lists of Tutsis to be targeted for killing during the genocide.²¹ Prior to the introduction of identity cards, Hutus could become Tutsis with the acquisition of cattle; however, ethnic identity cards ended this practice.²² For the majority of the colonial period, up until 1959, Tutsis dominated local government and the educational arena.²³ In 1959, Hutus forcibly took power following the death of the Tutsi monarch, killing Tutsis and forcing many others into exile.²⁴ By 1962, when Belgium granted independence to Rwanda, Hutus controlled the government and more than 200,000 Tutsis were in exile.²⁵

Since independence, there have been several power struggles between Hutus and Tutsis, including a series of massacres that occurred in 1963, 1964, 1973,

14. Official Website of the Republic of Rwanda: History, <http://www.gov.rw/> (last visited Feb. 27, 2007).

15. Daly, *supra* note 4, at 360.

16. BALL, *supra* note 2, at 156; Jessica Raper, *The Gacaca Experiment: Rwanda’s Restorative Dispute Resolution Response to the 1994 Genocide*, 5 PEPP. DISP. RESOL. L.J. 1, 8 (2005).

17. Marian Hodgkin, *Reconciliation in Rwanda: Education, History and the State*, 60(1) J. INT’L AFF. 199, 202, 207 (2006).

18. Eugenia Zorbas, *Reconciliation in Post-Genocide Rwanda*, 1 AFR. J. LEGAL STUD. 29, 41, 48 (2004).

19. Raper, *supra* note 16, at 6-7.

20. *Id.* at 7, 9.

21. *Id.* at 10.

22. *Id.* at 9-10.

23. BALL, *supra* note 2, at 159.

24. *Id.*

25. *Id.*

1990, 1992, and 1993.²⁶ In August 1993, Hutus and Tutsis signed the Arusha Peace Accord and appeared to reach a power sharing agreement.²⁷ The United Nations (UN) Security Council sent 2,500 UN troops to Rwanda to monitor the treaty.²⁸ Although peace seemed near to the outside world, as early as January 1994, Major General Romeo Dallaire, UN commander in Rwanda, notified the UN that the Hutu government planned to exterminate the Tutsis.²⁹ On April 6, 1994, the airplane of President Juvenal Habyarimana, a Hutu, was shot down and genocide began within the hour.³⁰ Rather than increasing the number of soldiers, as requested by Major General Dallaire, the UN withdrew troops, leaving 270 UN soldiers in Rwanda under a mandate only to “monitor” the situation.³¹ Over the next three months 800,000 people died in the genocide.³²

II. A RWANDAN PERSPECTIVE ON THE FOUR COURTS ESTABLISHED TO ADJUDICATE GENOCIDE

A. *The International Criminal Tribunal for Rwanda (ICTR)*

Shortly after the genocide, the Rwandan government requested the help of the UN to form an international tribunal to prosecute genocide suspects because there were hardly any lawyers or judges in the country.³³ In November 1994, the UN Security Council created the International Criminal Tribunal for Rwanda (ICTR).³⁴ The UN based its authority to create the ICTR on Chapter VII of the UN Charter.³⁵ The ICTR has the power to “prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring states.”³⁶ The jurisdiction of the ICTR extends to individuals³⁷ suspected of committing genocide, crimes against humanity, and violations of Article 3

26. Raper, *supra* note 16, at 13.

27. BALL, *supra* note 2, at 162.

28. *Id.*

29. *Id.* at 163.

30. *Id.* President Habyarimana’s plane was shot down by two ground-to-air-missiles. There are two competing theories of responsibility for the plane crash. One version is that radicals within Habyarimana’s regime shot the president’s plane down because they were unhappy with a peace agreement that would give rebels a stake in the government. *Id.* Alternatively, others claim that Paul Kagame and other Tutsi rebels shot the president’s plane down because they knew that the power sharing agreement that called for multiparty elections would not place Tutsis in power since they were only fifteen percent of the population. In November 2006, this theory was supported by French Judge Jean Louis Bruguiere who accused Paul Kagame of participating in the assassination of Habyarimana. Stephen Kinzer, *The France-Rwanda Affaire*, LOS ANGELES TIMES, Dec. 18, 2006, at Bus. Sec., available at 2006 WLNR 21960974; *The Heat Turns on Kagame*, THIS DAY (Nigeria), Nov. 26, 2006, available at 2006 WLNR 20647387.

31. BALL, *supra* note 2, at 163-64.

32. *Id.* at 155-56.

33. *Id.* at 171, 183. The dearth of lawyers and judges is attributable to the deaths of many of these practitioners and the destruction of their offices and supplies during the genocide.

34. BEIGBEDER, *supra* note 6, at 104.

35. JOHN R.W.D. JONES, *THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA* 465 (2d ed. 2000).

36. *Id.* at 474 (quoting Article 1 of the Statute of the International Criminal Tribunal for Rwanda).

37. The ICTR doesn’t have jurisdiction over groups or organizations. *See id.* at 500.

common to the Geneva Conventions and of Additional Protocol II.³⁸ Although the Rwandan government initially supported formation of the international tribunal, Rwanda was the only member of the UN Security Council to vote against the ICTR.³⁹

There are several reasons why Rwanda voted against the ICTR. One of its main objections was the ICTR's lack of a death penalty.⁴⁰ The Rwandan government feared that the masterminds of the genocide would receive prison terms, while subordinates and lower-ranked perpetrators, found guilty in national court, would receive the death penalty.⁴¹ Second, the government was not in favor of the limited temporal jurisdiction of the tribunal to handle incidents that occurred between January 1, 1994 and December 31, 1994.⁴² The Rwandan government was unhappy with the ICTR's time frame because genocide planning began in 1990.⁴³ Third, the government wanted the ICTR to have the power to prosecute groups and organizations responsible for promulgating the genocide, rather than its limited ability to prosecute only "natural persons."⁴⁴ Lastly, the government felt strongly that the ICTR should be located within Rwanda, rather than in Arusha, Tanzania.⁴⁵

In April 1998, Rwanda issued a formal position paper to the UN entitled *The Position of the Government of the Republic of Rwanda on the International Criminal Tribunal for Rwanda (ICTR)*.⁴⁶ The government criticized the ICTR for poor organization, personnel problems, lack of a prosecutorial and investigation strategy, poor conduct in investigations (failure to investigate some of the areas where the worst atrocities were committed), and poor prosecutorial conduct.⁴⁷ In conclusion, the Rwandan government requested implementation of the following recommendations: (1) an independent prosecutor for Rwanda;⁴⁸ (2) moving the ICTR to Kigali, Rwanda; (3) strengthening the power of the prosecutorial staff; (4) hiring more qualified staff; and (5) improving cooperation between the ICTR and

38. BEIGBEDER, *supra* note 6, at 105.

39. *Id.* at 104.

40. *Id.*

41. *Id.*

42. BALL, *supra* note 2, at 171-72.

43. *Id.*

44. *Id.* at 172.

45. Timothy Longman, *The Domestic Impact of the International Criminal Tribunal for Rwanda*, in INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE? PROCEEDINGS OF AN INTERNATIONAL CONFERENCE HELD AT THE UNIVERSITY OF TEXAS SCHOOL OF LAW, AUSTIN, TEXAS: NOVEMBER 6-7, 2003 33, 35

(Steven R. Ratner and James L. Bischoff eds., 2004).

46. BALL, *supra* note 2, at 172.

47. *Id.* at 172-73.

48. Before September 15, 2003, the ICTR and the International Criminal Tribunal for Yugoslavia (ICTY) shared a prosecutor. See Press Release, ICTR, *The New Prosecutor of the ICTR Mr. Jallow Takes Up His Mandate* (Oct. 6, 2003) available at http://www.pict-pcti.org/news_archive/03/03Oct/ICTR_100603.htm.

the Rwandan government.⁴⁹ The UN Security Council did not comply with any of these requests.⁵⁰

Many Rwandans remain unaware of the ICTR because of its distance from Rwanda and its limited impact on everyday citizens,⁵¹ but for those Rwandans who are familiar with the tribunal, the relationship between the ICTR and Rwanda remains strained. Martin Ngoga, Rwanda's Deputy Attorney General and representative to the ICTR for four years, echoes a common belief of many Rwandans that "[t]he tribunal was not created to get justice, but to nurse the guilt of the international community."⁵² Additionally, Rwandans have come to see the ICTR as a drain on international resources that could be better used within the country.⁵³

By September 2004, the ICTR had resolved only twenty-three cases, even though investigations had begun ten years earlier.⁵⁴ Over two years later, in December 2006, the ICTR had convicted twenty-six people and acquitted five people.⁵⁵ It was estimated that the ICTR would spend over 1 billion dollars prosecuting approximately forty genocidaires in the period from 1995 through 2007.⁵⁶ However, by the end of 2007, only 35 accused had been tried.⁵⁷

In addition to the limited number of people prosecuted, the UN has planned for the ICTR to complete its mandate by the end of 2008.⁵⁸ This completion strategy has led the ICTR to begin the process of transferring some of its cases to the national courts of several countries, including Rwanda.⁵⁹ This decision is

49. BALL, *supra* note 2, at 173.

50. *Id.*

51. Mark A. Drumbl, *Law and Atrocity: Settling Accounts in Rwanda*, 31 OHIO N.U. L. REV. 41, 47 (2005).

52. Dele Olojede, *A People's Court*, NEWSDAY, May 4, 2004, <http://www.pulitzer.org/year/2005/international-reporting/works/olojede7.html>.

53. Gerald Gahima, Secretary-General of the Ministry of Justice, stated that if Rwanda had 1/20 of the money given to the ICTR, many of Rwanda's problems would be solved. See BEIGBEDER, *supra* note 6, at 104.

54. Raper, *supra* note 16, at 27.

55. Andrew England, *FT Report-Rwanda: Putting Faith in the Young. Reconciliation: The Next Generation Need to Be Brought Up As Agents of Peace*, FINANCIAL TIMES (London), at 5, Dec. 5, 2006.

56. *Id.*

57. Hironelle News Agency, *ICTR Review- Tough Year Ahead for ICTR as Completion Strategy Approaches*, HIRONDELLE PRESS AGENCY, Dec. 31, 2007, <http://www.hironelle.org/arusha.nsf/English?OpenFrameSet>

58. *Id.*

59. *Id.* Several human rights groups oppose the transfer of ICTR cases to Rwanda, even though Rwanda has abolished the death penalty, which was one of the initial objections people had to adjudicating cases in Rwanda. Amnesty International urged the ICTR not to transfer cases to Rwanda until it has demonstrated that: (1) "the Rwandan justice system can operate impartially by investigating and prosecuting crimes by all sides;" (2) "the Rwanda justice system will conduct trials in accordance with international fair trial standards;" (3) "trials of any person transferred to Rwanda [will] be observed by independent experts to ensure that they are fair;" (4) "persons transferred to Rwanda for trial are not at risk of torture or subjected to other cruel, inhuman or degrading treatment;" and (5) "[v]ictims and witnesses [will] receive protection and support." Amnesty Int'l, *Rwanda: Suspects Must Not be Transferred to Rwandan Courts for Trial Until it is Demonstrated that Trials will Comply with*

somewhat surprising because the UN created the ICTR based on the premise that an international tribunal outside of Rwanda was the best method for adjudicating the worst perpetrators of genocide.⁶⁰ Additionally, this decision possesses an element of irony because, when the ICTR began, the Rwandan government's request to prosecute these cases in Rwanda was denied.

The majority of Rwandans are dissatisfied with the tribunal because it is slow and expensive, it provides perpetrators of genocide more rights and amenities than victims (i.e. comfortable living space and anti-retroviral drugs for HIV infection), and it remains removed and out of reach for local Rwandans.⁶¹

B. Domestic Criminal Courts

In response to the ICTR's limited temporal and subject matter jurisdiction, as well as to the slow speed of the ICTR, Rwanda passed Organic Law No. 08/96 of August 30, 1996 on the Organization of Prosecution for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990. The law enables Rwanda's criminal courts to prosecute all individuals who committed genocide, crimes against humanity, or crimes associated with them.⁶² Unlike the ICTR, people may be prosecuted in domestic courts for crimes committed between October 1, 1990 and 1994.⁶³ Organic Law No. 08/96, before its amendment in 2004 (due to the introduction of a new gacaca law), classified suspects into four categories: (1) leaders and organizers of the genocide, notorious murderers, and those who committed sexual torture; (2) all others responsible for "intentional homicide or of serious assault against the person causing death"; (3) persons who committed serious assaults, but did not kill anyone; and (4) persons who committed property damage.⁶⁴ Ironically, the ICTR limits the power of the national court because it possesses superseding jurisdiction.⁶⁵ This limitation may prevent Rwanda from trying some Category 1 suspects because a person prosecuted by the ICTR may not be tried before a national court for the same violations of international law.⁶⁶ Although the domestic court answers several critiques the Rwandan government had of the ICTR, the biggest obstacle to the national court system has been the slow speed of trials. The Rwandan government acknowledges that:

International Standards of Justice, AI Index AFR 47/013/2007, Nov. 2, 2007.

60. Jason Strain and Elizabeth Keyes, *Accountability in the Aftermath of Rwanda's Genocide*, in ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES 87, 98-99 (Jane Stromseth ed., 2003).

61. Drumbl, *supra* note 51, at 46-48.

62. Organic Law No. 08/96 on the Organization of Prosecution for Offences constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990, Aug. 30, 1996, art. 1, available at <http://www.preventgenocide.org/law/domestic/rwanda.htm>.

63. *Id.*

64. *Id.* at Art. II.

65. JONES, *supra* note 35, at 502 (referencing Article 8 Concurrent Jurisdiction of the Statute of the International Criminal Tribunal for Rwanda).

66. *Id.* at 504 (quoting Article 9 Non-bis-in-idem of the Statute of the International Criminal Tribunal for Rwanda).

[T]he sheer bulk of genocide suspects and cases due for trial has placed severe strain on Rwanda's criminal justice system which is already crippled by poor infrastructure and the death of professionals during the genocide. Rwanda's prisons are heavily congested, and the cost of feeding and clothing prisoners is a drain on the economy.⁶⁷

Additionally, the government estimates that it would take 200 years, at the present rate, to prosecute everyone in the traditional court system.⁶⁸ As of January 2002, only 1,989 suspects had been brought to trial,⁶⁹ and a year and a half later, in August 2003, only 6,500 people had been tried.⁷⁰ Considering that over 135,000 suspects had been detained in prisons, these numbers were very low.⁷¹ This prosecutorial lethargy was attributable to the judicial system's devastation during genocide, including the departure or death of most lawyers, judges, and judicial personnel and the destruction of offices, supplies and transportation.⁷² Moreover, the slow speed of the criminal courts had created horribly overcrowded prisons.⁷³ Prior to 1994, detention facilities had a limited capacity to hold only 18,000 people.⁷⁴ Since the end of genocide, new prisons have been built, and old ones expanded, but they have only increased prison holding capacity to 51,000 people.⁷⁵ In a country greatly depleted of financial resources and in need of massive physical rebuilding, the imprisonment of such a large percentage of the population is a tremendous burden economically, socially, and psychologically.

In addition to Rwandans' displeasure with the domestic courts' speed of adjudication, a number of citizens dislike the courts' due process procedures because they render much important evidence inadmissible.⁷⁶ Moreover, some Rwandans view the requirement that victims testify, subjecting themselves to cross-examination, as harmful because it forces victims to relive their traumas.⁷⁷ Particularly disconcerting is the distrust among Hutus of the Tutsi-controlled legal system, which hinders the development of a reliable record of the past and harms

67. Daly, *supra* note 4, at 369.

68. Official Website of the Republic of Rwanda, *supra* note 14; *but see, e.g.*, Drumbl, *supra* note 51, at 45; Zorbas, *supra* note 18, at 36. These sources more conservatively estimate that it would take more than a century to prosecute all suspects in the traditional court system.

69. BEIGBEDER, *supra* note 6, at 115.

70. Drumbl, *supra* note 51, at 45.

71. BALL, *supra* note 2, at 183.

72. *Id.* In 2000, there were only sixty lawyers in private practice in Rwanda and few wanted to represent genocide suspects. Even if there were enough lawyers to represent everyone, the country could not afford to pay for their representation. REPUBLIC OF RWANDA, REPLY TO AMNESTY INTERNATIONAL'S REPORT: RWANDA: THE TROUBLED COURSE OF JUSTICE (2000) http://www.gov.rw/government/06_11_00news_ai.htm. (last visited March 20, 2008) [hereinafter Republic of Rwanda, *Reply*].

73. *Id.*

74. *Id.*

75. *Id.*

76. Drumbl, *supra* note 51, at 51-52.

77. *Id.*

the reconciliation process.⁷⁸ For the above reasons, many Rwandans and international observers are displeased with the domestic courts.

C. The Military Tribunal of Rwanda

Although Organic Law No. 08/96 appears to apply to all Rwandans, “the Military Tribunal tries in the first instance all offences committed by all Military personnel irrespective of their rank.”⁷⁹ The tribunal also possesses “powers to try Military personnel accused of the crime of genocide and crimes against humanity committed in Rwanda between October 1, 1990 and December 31, 1994, that place them in the first category irrespective of their ranks.”⁸⁰ Therefore, military personnel benefit because the government protects them from prosecution in both the criminal courts and gacaca.

Members of the Rwandan Patriotic Front (RPF)⁸¹ receive preferential treatment because “the RPF is the party in power, [hence] its armed forces are considered military personnel retroactively, whereas the armed forces and militia of the Habyarimana regimes are considered *genocidaires*.”⁸² As a result of their privileged status, even though the RPF engaged in the killing of an estimated twenty-five thousand to forty-five thousand Hutu civilians during and after the genocide, hardly any RPF members have been prosecuted.⁸³ As of late 2002, the military court had tried only twenty cases of “vengeance killings” in which an RPF member was accused of participating in Hutu revenge killings.⁸⁴ More shocking was the fact that the chief military prosecutor had no more open files on the 1994 war crimes by November 2002.⁸⁵ While the Rwandan government, which is primarily controlled by Tutsis, has no problem with these distinctions,⁸⁶ other Rwandans believe “[t]his furthers the notion of victor’s justice as those in the RPF,

78. Maya Goldstein-Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355, 375 (2005).

79. Organic Law No. 07/2004, Determining the Organisation, Functioning and Jurisdiction of Courts, April 25, 2004, art. 138, available at <http://www.kituoachakatiba.co.ug/jurisdictionofcourts.htm>.

80. *Id.*; see also *Constitution of the republic of Rwanda*, arts. 154-55 (June 4, 2003), available in French at <http://www.grandslacs.net/doc/2729.pdf> (stating that the military tribunal has jurisdiction over crimes committed by members of the military).

81. The Rwandan Patriotic Front is a group of Tutsi exiles that formed on October 1, 1990 to combat the Hutu controlled government of President Habyarimana. *E.g.*, Marie Béatrice Umutesi, *Is Reconciliation Between Hutus and Tutsis Possible?*, 60 J. INT’L AFF. 157, 157 (2006).

82. Alana Erin Tiemessen, *After Arusha: Gacaca Justice in Post-Genocide Rwanda*, 8 AFR. STUD. Q. 57, 70 Fall 2004.

83. Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 59-60 (2006).

84. *Id.* at 60.

85. *Id.*

86. The RPF has not only alienated itself from the Hutu population of Rwanda, but also from many Tutsis. This is because many of the RPF who grew up as Tutsi exiles in foreign countries learned to speak English rather than French, which has caused a strained relationship with Rwanda’s Francophone Tutsi population. Some of the complaints Tutsis have voiced since the genocide are: (1) the reintegration of suspected *genocidaires* into government and the military; (2) the government’s public display of bones and corpses to memorialize the genocide; and (3) the lack of reparations for survivors. *Id.* at 37.

as Tutsis, will not stand trial against accusations from primarily Hutu communities.”⁸⁷

D. Foreign Tribunals of Universal Jurisdiction

A handful of Rwandans have been tried in Switzerland and Belgium based upon the implementation of universal jurisdiction.⁸⁸ In 1999, Switzerland tried a former Rwandan mayor and found him guilty of grave breaches of the Geneva Convention.⁸⁹ It became the first nation to employ its domestic courts to judge a case where neither the perpetrator nor the victims were citizens of the nation and where the crime occurred outside the country's borders.⁹⁰ Following Switzerland, Belgium convicted four Rwandans of violations of the Geneva Convention.⁹¹ However, in 2003, Belgium amended its universal jurisdiction law, severely limiting its reach, but preserving one Rwandan case that had already begun.⁹² In 2005, that case led to the trial of two Rwandan businessmen implicated in mass murder.⁹³ Although these trials have gained international attention, their impact in Rwanda has been extremely limited because they affect only a handful of Rwandans living in exile in the countries that choose to prosecute.⁹⁴

III. THE GACACA COURTS

A. Historical Development of Gacaca

Given the problems with the ICTR and the national courts, on October 17, 1998, the Rwandan president, in conjunction with officials and citizens, established a commission to expedite justice and increase public participation in the process.⁹⁵ On June 8, 1999, the Commission published a proposal for gacaca.⁹⁶ Legislation enacting gacaca passed on January 26, 2001.⁹⁷ Gacaca, in Kinyarwanda (the local language), means “the grassy lawn,” and it refers to a traditional dispute resolution mechanism used by communities in Rwanda.⁹⁸ The government turned to gacaca as an alternative to the traditional courts because of citizens' familiarity with the system and its ability to engage all Rwandans in the

87. Tiemessen, *supra* note 82 at 70.

88. William A. Schabas, *National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes,'* 1 J. INT'L CRIM. JUST. 39, 47 (2003) [hereinafter Schabas, *National Courts*].

89. *Id.*

90. Human Rights Watch, *Rwanda: Belgian Genocide Trial*, Apr. 12, 2001, <http://hrw.org/press/2001/04/rwanda-trial.htm>. [hereinafter Human Rights Watch, *Rwanda*].

91. Schabas, *National Courts*, *supra* note 88.

92. Human Rights Watch, *Belgium: Universal Jurisdiction Law Repealed*, Aug. 1, 2003, <http://hrw.org/English/docs/2003/08/01/belgiu6280.htm> [hereinafter Human Rights Watch, *Belgium*].

93. Associated Press, *Two on Trial for Rwanda Genocide*, THE GUARDIAN (London), May 10, 2005, available at <http://www.guardian.co.uk/world/2005/may/10/rwanda>.

94. See Human Rights Watch, *Rwanda*, *supra* note 90.

95. Raper, *supra* note 16, at 33.

96. *Id.* at 33-34.

97. *Id.* at 34.

98. Goldstein-Bolocan, *supra* note 78, at 355 n.1.

process of accounting for a genocide that involved mass societal participation.⁹⁹ National implementation of gacaca began in 2006.¹⁰⁰

Rwanda designed gacaca to work in combination with the national criminal courts by enabling gacaca to handle crimes committed between October 1, 1990 and December 31, 1994, and by adopting the same four categories of genocide suspects as contained in Organic Law 08/96.¹⁰¹ Category 1 suspects (leaders and organizers of the genocide, notorious murderers, and those who committed sexual torture) continued to face prosecution in the criminal courts, while suspects in Categories 2, 3, and 4 were within gacaca's jurisdiction.¹⁰²

In October 2001, over 260,000 judges were elected from the community¹⁰³ to preside over 10,000 gacaca jurisdictions.¹⁰⁴ Beginning in 2002, a two year pilot phase of gacaca commenced, in which only 751 jurisdictions operated.¹⁰⁵ At the end of the pilot phase, in June 2004, the law's complexity and system inefficiency led lawmakers to revise gacaca.¹⁰⁶ The current gacaca law contains only three categories of suspects: Category 1 remains the same; Category 2 combines all perpetrators and accomplices of murder and other violent crimes; and Category 3 applies to those suspected of property offenses.¹⁰⁷ The law establishes a three-tiered court system: the Cell handles Category 3 crimes, the Sector handles Category 2 crimes, and the Gacaca Court of Appeal handles appeals from those sentenced in absentia or sentenced by the Sector.¹⁰⁸ Furthermore, the law reduces the number of judges required at the Cell level from nineteen to fifteen, and lowers the overall number of judges required from 260,000 to 170,000.¹⁰⁹ Despite the

99. National Service of Gacaca Jurisdictions, Context or Historical Background of Gacaca Courts, <http://www.inkiko-gacaca.gov.rw/En/Generaties.htm> (last visited Mar. 23, 2008) [hereinafter *Historical Background*].

100. Godwin Agaba, *Gacaca Courts to Change Structure*, THE NEW TIMES (Kigali), Jan. 7, 2007, available at http://www.rwandagateway.org/article.php3?id_article=3978.

101. See Organic Law, No. 40/2000, Setting Up Gacaca Jurisdictions and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Between October 1, 1990 and December 31, 1994, Jan. 26, 2001, arts. 3 & 51, available at www.inkiko-gacaca.gov.rw/pdf/Law.pdf.

102. *Id.* at arts. 2, 39-42. Originally gacaca had four jurisdictions, arranged hierarchically like the court system, to handle the various levels of suspects: the Cell handled Category 4 crimes; the Sector handled Category 3 crimes; the District handled Category 2 crimes; and the Province handled appeals of sentences from the District and sentences rendered in absence of the accused.

103. BEIGBEDER, *supra* note 6, at 115.

104. Sarah L. Wells, *Gender, Sexual Violence and Prospects for Justice at the Gacaca Courts in Rwanda*, 14 S. CAL. REV. L. & WOMEN'S STUD. 167, 174 (2005).

105. Goldstein-Bolocan, *supra* note 78, at 380.

106. *Id.* at 378.

107. See Organic Law, No. 16/2004, Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994, June 19, 2004, art. 51, available at www.inkiko-gacaca.gov.rw/pdf/newlaw1.pdf [hereinafter, *Organic Law, No. 16/2004*].

108. See *id.* at arts. 41-43.

109. See *id.* at art. 13; William A. Schabas, *Genocide Trials and Gacaca Courts*, 3 J. INT'L CRIM. JUST. 879, 894 (2005) [hereinafter Schabas, *Genocide Trials*].

2004 reduction in the number of judges necessary for gacaca, low judicial participation has led the Executive Secretary of the National Service of Gacaca Jurisdictions (NSGC), Domitille Mukantanzwa, to propose a law in parliament to further reduce the number of judges required by almost half.¹¹⁰ Notwithstanding the major changes NSGC has made to gacaca law, many Rwandans remain skeptical of gacaca's ability to provide an effective method to adjudicate genocide suspects.

B. The Objectives of Gacaca

The government instituted gacaca to achieve the following five objectives: (1) "[t]o reveal the truth about what has happened;" (2) "[t]o speed up the genocide trials;" (3) "[t]o eradicate the culture of impunity;" (4) "[t]o reconcile the Rwandans and reinforce their unity;" and (5) "[t]o prove that Rwandan society has the capacity to settle its own problems through a system of justice based on the Rwandan custom."¹¹¹

From the government's perspective, these goals are fundamental to effective adjudication of genocide suspects. The government continues to champion gacaca as a success,¹¹² even though gacaca has hardly achieved the five objectives it purports to address. Rather than generating solutions, gacaca has created more problems for Rwandan society to solve, which forces people to question whether the government is addressing the right goals with gacaca and whether the objectives it has established can be achieved through the current gacaca system.

1. To Reveal the Truth About What Has Happened

The official Rwandan government website states that "justice can become true only if the truth about events is established."¹¹³ The government asserts that gacaca will forward the process of uncovering the truth by providing eyewitnesses the opportunity to speak about the genocide and by developing lists of individuals in each community who were genocide victims or participants.¹¹⁴ Unlike traditional criminal trials, in which the goal is to prosecute an individual for the crimes he committed against the state and where the focus of the trial remains on the defendant, gacaca focuses on the effect of the suspect's actions on the community and invites testimony from every person affected by the crime. Moreover, each local community has its own gacaca tribunal, increasing the chances of societal participation in the justice process by enabling convenient access to hearings.

While there is real potential for gacaca to provide a more complete picture of what transpired during genocide, the search for truth is rife with obstacles. One of the most lauded aspects of gacaca is the plea bargaining system. The system

110. Agaba, *supra* note 100.

111. National Service of Gacaca Jurisdictions, The Objectives of the Gacaca Courts, <http://www.inkiko-gacaca.gov.rw/En/EnObjectives.htm> (last visited April 20, 2008) [hereinafter *Objectives*].

112. *See, e.g.*, Official Website of the Republic of Rwanda, *supra* note 14.

113. *Objectives*, *supra* note 111.

114. *Id.*

provides for a 50% reduction in prison time for Category 2 suspects who confess during gacaca.¹¹⁵ Additionally, if a person confesses prior to his gacaca hearing, his sentence may be reduced by up to two thirds.¹¹⁶ A valid confession requires a suspect to provide a detailed description of the committed offenses, reveal all accomplices in the crime, and publicly apologize for the offense.¹¹⁷

Although public confessions could lead to uncovering the truth, the majority of confessions made in pilot programs have not provided full disclosure of people's participation in the genocide.¹¹⁸ Requiring suspects who confess to incriminate their accomplices pressures some suspects into falsely accusing others.¹¹⁹ However, the most common problem is that almost all confessors admit to only one or two minor crimes and blame third parties for the more serious crimes.¹²⁰ This is done to avoid harsher sentences, placement in Category 1, and adjudication in the criminal courts.¹²¹ Even those who admit to murder minimize their involvement in the genocide.¹²² Gabriel Gabiro, a Rwandan journalist, states, "I've never heard anybody confessing to more than one murder. You'd think nobody in Rwanda killed twice."¹²³ It is estimated that between 250,000 and 500,000 women were raped during the genocide;¹²⁴ however, out of 1,881 confessions made in the province of Ginkogoro, no one confessed to rape, a Category 1 crime.¹²⁵

Similar to the disincentives suspects possess for complete confession, witnesses face pressure not to disclose what they have seen. Rather than encouraging observers of genocide to come forward and testify, gacaca has silenced many of them because they too face criminal liability for failing to render assistance to genocide victims.¹²⁶ Several survivors believe that people talked more openly about the genocide prior to gacaca, when they did not fear jail time.¹²⁷

In addition to rapists refusing to confess and witnesses refusing to come forward, the victims of rape are highly unlikely to testify.¹²⁸ A 2002 study, by the Rwandan Unity and Reconciliation Commission, found that 60% of sexual abuse survivors forecasted that women would testify much less than men because of the

115. *Organic Law No. 16/2004*, *supra* note 107, at art. 73.

116. Ali Mao, *Traditional Justice*, NEW VISION (UGANDA), Dec. 9, 2006, available at 2006 WLNR 21382971.

117. *Organic Law No. 16/2004*, *supra* note 107, at art. 54.

118. Molenaar, *supra* note 7, at 72-73.

119. Zorbas, *supra* note 18, at 36-37.

120. Molenaar, *supra* note 7, at 140.

121. *Id.*

122. See Stephan Faris, *Open Court*, 165 TIME EUROPE 12, Mar. 21, 2005, available at <http://www.time.com/time/printout/0,8816,1037615,00.html>.

123. *Id.*

124. Wells, *supra* note 104, at 182.

125. Molenaar, *supra* note 7, at 115.

126. Waldorf, *supra* note 83, at 81. The 2001 gacaca provision, which provided immunity to bystanders from criminal liability, was deleted in the 2004 gacaca law.

127. Molenaar, *supra* note 7, at 74.

128. Wells, *supra* note 104, at 187.

intimate nature of the crime.¹²⁹ According to Gaudelive Mukasavais, a Rwandan social worker:

At first women who were raped used to testify, but nowadays they don't want to because nothing happened after their testimony. No one helped them. That's why it is difficult to tell these women that they should tell it to their neighbors during Gacaca, neighbors who have no training and who cannot help them with their trauma. We tell them to testify but most are not willing.¹³⁰

While many survivors worry that if they tell the truth they might suffer violence, ostracism or counter-allegations that they committed crimes, the risks of testifying for rape survivors are much higher.¹³¹ In Rwanda, rape victims fear they will become ineligible to marry and will face ostracism from their families and husbands.¹³² Frequently, parents refuse to allow young girls to testify because of a commonly held belief that discussing sexual abuse will only worsen ethnic tension and harm the reconciliation process.¹³³

Victims are also reluctant to testify because they fear for their own safety.¹³⁴ To reduce the fears associated with testifying, gacaca judges possess the ability to imprison anyone who threatens or pressures a witness not to testify.¹³⁵ In March 2004, fourteen people were sentenced to death and three to life imprisonment for killing survivors expected to testify in gacaca.¹³⁶ However, this has not stopped the threatening or killing of survivors and witnesses. Between July and December 2006, there were at least 16 killings and 24 attempted killings of witnesses.¹³⁷ Several of the murdered individuals were executed with machete,¹³⁸ the same farm tool used to carry out the genocide.

The biggest challenge to obtaining the truth is getting both sides to participate and believe in gacaca. While a Johns Hopkins survey found that 87% of the population was willing to provide evidence in gacaca,¹³⁹ this statistic is unreliable

129. *Id.*

130. Internews Rwanda, *Child of Rape: Child of Genocide*, Apr. 2005, available at <http://www.internews.org.rw/articles7.htm#child>.

131. Wells, *supra* note 104, at 186-88.

132. *Id.*

133. *Id.*

134. Goldstein-Bolocan, *supra* note 78, at 391.

135. See *Organic Law, No. 16/2004*, *supra* note 107, at art. 30. These prison sentences can range from three months to two years.

136. Goldstein-Bolocan, *supra* note 78, at 392.

137. Karen McVeigh, *Spate of Killings Obstructs Rwanda's Quest for Justice*, THE OBSERVER, Dec. 3, 2006, at 41, available at <http://www.guardian.co.uk/world/2006/dec/03/rwanda.karenmcveigh>. One particularly gruesome story is of Martin Havugivaremye who testified in front of gacaca. When Mr. Havugivaremye was attacked with machetes he called out for help, but no one in his village would assist him because he had given the names of killers in gacaca. These murders have also been perpetrated against gacaca judges.

138. *Id.*

139. SIMON GASIBIREGE AND STELLA BABALOLA, PERCEPTIONS ABOUT GACACA LAW IN RWANDA: EVIDENCE FROM A MULTI-METHOD STUDY 14 (Johns Hopkins Univ. Sch. of Pub. Health, Ctr. for Commc'n Programs, 2001).

because although people's words support gacaca, their actions do not.¹⁴⁰ In two pilot programs studied, only genocide survivors accused people of committing crimes, with one exception.¹⁴¹ Initially, Hutus in both communities remained silent during gacaca hearings.¹⁴² However, in Gatovu, as gacaca progressed, the Hutu population began defending the accused, fighting with survivors and calling them liars.¹⁴³ In Vumwe, Hutus stopped going to assemblies and by the end of the observation, only 10% of the community attended hearings.¹⁴⁴ Throughout fifteen cases, only seventeen people in the community testified, other than the defendants.¹⁴⁵

The government's control over gacaca further obstructs the process of uncovering a truthful version of the genocide because the government forwards its own version of truth and ignores voices in the community.¹⁴⁶ Because the majority of the government is run by the RPF (the group of Tutsis responsible for ending genocide), massacres performed by the Rwandan Patriotic Army (RPA) (the military wing of the RPF) are not addressed in gacaca, even though gacaca law enables adjudication of crimes against humanity.¹⁴⁷ As a result, many Hutus and outside observers believe gacaca is a form of victor's justice, portraying all Hutus as perpetrators of genocide and all Tutsis as faultless victims.¹⁴⁸ This one-sided version of the genocide is only capable of providing half-truths.

Another obstacle to discovering the truth is many villagers' fundamental lack of trust in gacaca, which has led some of them to abuse the gacaca system by using the pretence of genocide accusations to settle land disputes and family feuds.¹⁴⁹ "By failing to provide an adequate forum for hearing property disputes, the government may have unwittingly encouraged people to try to resolve those disputes through false accusations of genocide in gacaca."¹⁵⁰ Even without purposeful deception, many survivor accounts are inaccurate because survivors were hiding or fleeing and did not witness the event in question, or because they no longer have a clear memory of the event due to the trauma they suffered during genocide.¹⁵¹

While gacaca has expanded the opportunities for truth and healing by enabling survivors to share their stories and by requiring suspects to give confessions to detail their crimes, it has had limited success. Gacaca is unable to

140. Molenaar, *supra* note 7, at 73-74.

141. *Id.* at 105.

142. *Id.* at 105-06.

143. *Id.* at 106.

144. *Id.* at 103.

145. *Id.* at 106.

146. See Tiemessen, *supra* note 82, at 58.

147. *Id.* at 69-70.

148. See *id.* at 67-69.

149. Paul Willis, *No Lawyers but Rwanda's Village Courts Could Pass Death Sentence*, SUNDAY TELEGRAPH (UK), Apr. 9, 2006, available at 2006 WLNR 5967489. In the Ginkongoro province, a man was falsely accused of rape during gacaca because he owed the alleged victim's family money.

150. Waldorf, *supra* note 83, at 72.

151. *Id.* at 71.

produce truthful accounts of the past because both suspects and victims are reluctant to invest in the system.

2. To Speed Up the Genocide Trials

When gacaca began, the government guaranteed that gacaca would speed up the adjudication of genocide suspects because, rather than having only twelve specialized courts, the country would have 11,000 gacaca jurisdictions to handle genocide crimes.¹⁵² However, during the first six years of gacaca, it appeared that it was no better equipped than the criminal courts to quicken the pace of adjudication.

Although gacaca passed into law in January 2001, elections for gacaca judges did not begin until October of 2001.¹⁵³ The first pilot program began in June of 2002 with twelve gacaca jurisdictions.¹⁵⁴ By November, 2003, there were only 750 pilot programs,¹⁵⁵ even though the government's plan would eventually lead to the creation of 12,100 gacaca courts.¹⁵⁶ On March 10, 2005, the first pilot gacaca programs finally moved from the investigative stage (involving collection of data and categorization of crimes) to the trial stage.¹⁵⁷ The first four months of trials from March 10, 2005 to June 30, 2005 produced only 1,950 judgments.¹⁵⁸ Finally, in mid-July 2006, gacaca courts were extended to the whole country.¹⁵⁹

At the end of October 2006, it appeared that it would take many years to conclude gacaca because the National Service of Gacaca Jurisdictions (NSGC) estimated that there were 766,489 genocide suspects whose cases had not been adjudicated.¹⁶⁰ However, on December 19, 2006, the Rwandan Minister of Justice, Mr. Tharcisse Karugarama, declared that the gacaca tribunals would conclude by the end of 2007.¹⁶¹ This appeared to be an unrealistic goal because at the beginning of 2007, approximately 40,000 accused had been tried in gacaca courts.¹⁶² Additionally, the mandatory weekly gacaca meetings were placing an

152. The Republic of Rwanda, *supra* note 14.

153. Jacques Fierens, *Gacaca Courts: Between Fantasy and Reality*, 3 J. INT'L CRIM. JUST. 896, 914 (2005).

154. Schabas, *Genocide Trials*, *supra* note 109, at 894.

155. *Id.* at 893-94.

156. England, *supra* note 55.

157. See *Gacaca: Prime Minister Testifies*, INTERNEWS: RWANDA ARTICLES, Apr. 2005, <http://www.internews.org.rw/articles7.htm#prime>.

158. Hirondele News Agency, *Rwanda/Gacaca- Over 2000 Cases Completed by Gacaca Courts*, HIRONDELLE PRESS AGENCY, Sept. 7, 2005, <http://www.hirondele.org/arusha.nsf/LookupUrlEnglish/8B6CF68B52AFF9F4432570750021D6A8?OpenDocument>.

159. Agaba, *supra* note 100.

160. *Id.* Of these suspects, 72,539 of them were placed in Category 1 and were to receive criminal trials; whereas, the 397,103 suspects in Category 2 and the 296,847 in Category 3 were to receive gacaca hearings.

161. Hirondele News Agency, *Rwanda: Rwanda/Gacaca- Conclusion of Gacaca Trials Next Year (Rwandan Minister of Justice)*, HIRONDELLE PRESS AGENCY, Dec. 20, 2006, <http://www.hirondelenews.com/content/view/34/26/> [hereinafter, Hirondele, *Conclusion of Gacaca Trials*].

162. See *id.*

economic strain on both community members¹⁶³ and judges¹⁶⁴ and it appeared that gacaca courts could not sustain their current pace of adjudication. Furthermore, rather than decreasing the number of genocide suspects, gacaca resulted in a huge increase in suspects.¹⁶⁵

Despite the factual data from 2006 that pointed to an end date for gacaca many years into the future, on November 19, 2007, the President of Rwanda, Paul Kagame, announced that gacaca would conclude at the end of 2007.¹⁶⁶ Miraculously, according to the National Service of Gacaca Courts (SNJG), more than 800,000 suspects had been tried in gacaca courts by the end of 2007.¹⁶⁷ The remarkable speed with which the gacaca courts operated in 2007 is almost unbelievable. Gacaca proceedings remain poorly documented, leaving it difficult to ascertain how so many cases were resolved in such a short amount of time. However, it is clear that this radically quickened pace of adjudication raises concerns regarding whether the courts exercised procedural fairness and engaged in sufficient community participation.

Regardless of the President's statement that gacaca would conclude at the end of 2007, gacaca continues in 2008.¹⁶⁸ According to Domitille Mukantanzwa, approximately 15% of Category 3 suspects and 3% of Category 2 suspects are still awaiting hearings by the gacaca courts.¹⁶⁹ Additionally, it is possible that gacaca courts will begin trying Category 1 genocide suspects.¹⁷⁰ Currently, the Rwandan government's plan is to devote 2008 to completing gacaca.¹⁷¹

Although gacaca began very slowly, the Rwandan government kept its promise to speed up the genocide trials. While the Rwandan government may see this as a triumph, it is difficult to imagine that a country with a population of

163. Hirondele News Agency, *Stunned by Growing Numbers of Genocide Suspects, Rwanda Revisits Categorisation*, HIRONDELLE PRESS AGENCY, Sept. 7, 2005, <http://tj-forum.org/archives/Gacaca%20numbers,%20Oct%2005.html> [hereinafter Hirondele, *Rwanda Revisits Categorisation*].

164. Molenaar, *supra* note 7, at 102. Judges receive no compensation for their participation in gacaca, which has led to the common sentiment, aptly expressed by one judge that, "[i]f you didn't eat, you cannot come to gacaca, but you must go and find some money or food. Should my children or me die because of gacaca? . . . They don't give us anything[.]"

165. Hirondele News Agency, *Rwanda/Gacaca: Approximately a Million People Have Appeared Before Gacaca Courts*, HIRONDELLE PRESS AGENCY, Dec. 12, 2007, available at <http://www.hirondellenews.com/content/view/1357/461/>. The Rwandan government now estimates that around one million people participated in the genocide and require gacaca hearings. This greatly increased number of suspects is the result of gacaca's confession system which requires all genocidaires to name their accomplices. See Schabas, *Genocide Trials*, *supra* note 109, at 881.

166. President Paul Kagame, Address at the ACP-EU Parliamentary Assembly in Kigali (Nov. 19, 2007), available at <http://www.acp-eu.gov.rw/index.php?iro=news&obj=39&details=235>.

167. Hirondele News Agency, *Rwanda: Controversial Assessment of the Gacaca Courts*, HIRONDELLE PRESS AGENCY, Jan. 3, 2008, <http://www.hirondellenews.com/content/view/1394/309/>.

168. *See id.*

169. Hirondele News Agency, *Rwanda: Gacaca Trials Could Also Try First Category Defendants*, HIRONDELLE PRESS AGENCY, Jan. 4, 2008, available at <http://www.hirondellenews.com/content/view/1406/474/>.

170. *Id.*

171. *Id.*

approximately 9 million people¹⁷² was able to fairly adjudicate over 700,000 genocide suspects in one year¹⁷³ when only 40,000 had been tried in the previous six years.¹⁷⁴ The decision to adjudicate so many suspects in such a short amount of time may ultimately prove to be an unwise choice.

3. To Eradicate the Culture of Impunity

Many Rwandans believe that a culture of impunity exists in Rwanda because perpetrators of prior massacres in the country received impunity.¹⁷⁵ Some Rwandans believe that if this culture of impunity did not exist, the 1994 genocide would not have occurred.¹⁷⁶ The government claims to support an end to the culture of impunity:

In their cells, the citizens will play an important role in the reconstruction of the facts and in the accusation of those who perpetrated them. None of those who took part in them will escape punishment. Thus, people will understand that the infringement implies the punishment for the criminal without exception.¹⁷⁷

Rwanda has been successful at punishing Hutu genocidaires because the country has refused to grant amnesty to most suspects and gacaca provides prison sentences for any genocide participant who committed a more severe crime than property damage. However, the government has not truly ended impunity because of its refusal to try RPA soldiers responsible for committing crimes against humanity. Additionally, crimes that the government acknowledges RPA soldiers have committed are tried behind closed doors in front of a military tribunal run by their peers.¹⁷⁸ Without publicly addressing the crimes committed by both sides, gacaca is little more than victor's justice.

4. To Reconcile the Rwandans and Reinforce Their Unity

The government believes that gacaca will unify the nation by producing truth.¹⁷⁹ As the government explains, once "the truth will be known, there will be no more suspicion, the author will be punished, justice will be done to the victim and to the innocent prisoner who will be reintegrated into Rwandan society."¹⁸⁰ Unfortunately, gacaca is unable to produce a completely truthful version of the genocide; and successful reconciliation will require much more than the truth.

172. U.S. DEP'T OF STATE, BUREAU OF AFRICAN AFFAIRS, BACKGROUND NOTE: RWANDA, June 2007, available at <http://www.state.gov/r/pa/ei/bgn/2861.htm> [hereinafter *Background Note: R.wanda*].

173. Hirondele, *Rwanda Revisits Categorization* supra note 163.

174. Hirondele, *Conclusion of Gacaca Trials* supra note 161.

175. Stephanie Wolters, *The Gacaca Process: Eradicating the culture of impunity in Rwanda?* INSTITUTE FOR SECURITY STUDIES, Aug. 5, 2005, 12, available at <http://www.reliefweb.int/library/documents/2005/iss-rwa-05aug.pdf>.

176. *Id.*

177. *Objectives*, supra note 111.

178. See Tiemessen, supra note 82, at 61-68.

179. *Objectives*, supra note 111.

180. *Id.*

There is much scholarly debate over defining reconciliation. To require “apology and forgiveness and the willingness to embark on a new relationship based on acceptance and trust”¹⁸¹ as part of reconciliation, may automatically prevent its achievement because in a society that has experienced such mass atrocity, these goals may be unachievable. Professor Louis Kreisberg provides a more practical definition of reconciliation, one that Rwandans can realistically achieve: “Reconciliation refers to the process by which parties that have experienced an oppressive relationship or destructive conflict with each other move to attain or to restore a relationship that they believe to be minimally acceptable.”¹⁸² Kreisberg’s definition of reconciliation accurately reflects most Rwandans’ view of reconciliation, as “the way to overcome a history of conflict and to rebuild better social relations in which people cooperate, share meals, and drink beer together.”¹⁸³ For Rwandans to cooperate, to share food and drink, and to forward national reconstruction, they must achieve “minimally acceptable” social relations.¹⁸⁴

Sadly, reconciliation remains a distant hope. In pilot studies, gacaca created more divisiveness than communal bonds.¹⁸⁵ Many survivors perceive confessions by genocide suspects as insincere,¹⁸⁶ promoting resentment between Hutus and Tutsis rather than reconciliation. As Klaas de Jonge, a monitor of gacaca for Penal Reform International, stated, “[t]he accused think because they ask for forgiveness, they are entitled to forgiveness. You hear these people confessing as if they are describing a movie. There’s absolutely no compassion.”¹⁸⁷ Although genocide suspects are the ones on trial, many survivors feel that the community is judging them. As explained by one survivor, “the population dislikes you and says that you accuse people of their family. When I encounter them on the road, they ignore me.... Even when I want to buy beer for other people, they will refuse because they are afraid that I will poison them.”¹⁸⁸ While many survivors experience community ostracism, many perpetrators are afraid of community responses to their actions during genocide.

An increasing problem, not documented until 2005, has been a string of suicides and suicide attempts by genocide suspects.¹⁸⁹ Between March and the end

181. Molenaar, *supra* note 7, at 32 (quoting Wendy Lambourne, *Justice and Reconciliation: Postconflict Peacebuilding in Cambodia and Rwanda*, in RECONCILIATION, JUSTICE AND COEXISTENCE: THEORY AND PRACTICE 322 (Mohammed Abu-Nimer ed., 2001)).

182. *Id.* at 31 (quoting Louis Kreisberg, “*Changing Forms of Coexistence*”, in RECONCILIATION, JUSTICE AND COEXISTENCE: THEORY AND PRACTICE, 47-64, 48 (Mohammed Abu-Nimer ed., 2001)).

183. *Id.* at 33.

184. In traditional gacaca, drinking of beer together was an aspect of reconciliation, in which the losing party was required to provide beer to the community. Waldorf, *supra* note 83, at 49.

185. Molenaar, *supra* note 7, at 91.

186. Waldorf, *supra* note 83, at 73.

187. *Id.* (quoting Interview with Klaas de Jonge, Penal Reform International, in Kigali, Rwanda (Sept. 2002)).

188. Molenaar, *supra* note 7, at 134.

189. Craig Timberg, *Suicides Slow Search for Justice, Closure in Rwanda*, THE WASHINGTON POST, Feb. 17, 2006. Front, available at 2006 WLNR 2911892. Some means by which genocide suspects have killed or attempted to kill themselves include hanging oneself, ingestion of pesticide, and

of December, 2005, sixty-nine suspects killed themselves and forty-four others attempted suicide.¹⁹⁰ Some genocide survivors view the suicides as dashing their hopes for closure.¹⁹¹ Benoit Kaboyi, executive director of Ibuka, the largest association of genocide survivors, expresses a commonly held sentiment of survivors, that “[n]o person has the right to punish themselves.... They [perpetrators] have to suffer for what they have done.”¹⁹² Citizens’ anger toward suspects, who killed themselves, rather than truthfully accounting for their participation in the genocide, is a further impediment to reconciliation.

Reconciliation is a long process that may take decades or generations to achieve. However, it has been fourteen years since the genocide, and post-gacaca Rwanda still lacks signs that the country is moving toward unity. Rwandans must recognize the following if they want successful reconciliation: (1) different people have very different understandings of reconciliation; (2) reconciliation only occurs if the two parties can openly discuss their differences and accept the reconciliation process; and (3) reconciliation cannot be achieved until a society has peace and personal security.¹⁹³ Unfortunately, none of these factors have been properly addressed by the Rwandan government.

Due to the government’s top-down implementation of gacaca, members of society had no influence over the goals of gacaca or discussions concerning reconciliation and its significance to different groups within Rwanda. Reconciliation has been difficult to achieve because there is no mutually held understanding of what it means. When Rwandans were asked to define elements of reconciliation, their answers varied widely, from confession and forgiveness, the release of innocent prisoners, justice and uncovering the truth, to holding both Tutsis and Hutus responsible for their crimes.¹⁹⁴

Another obstacle to reconciliation is gacaca’s failure to produce full disclosure of the truth. Inability to fully and openly discuss the genocide prevents reconciliation because Hutus and Tutsis remain skeptical of each other. Furthermore, Rwandans do not fully accept the gacaca process because their participation is mandated by the state and they face criminal sanctions if they refuse to comply.¹⁹⁵ Gacaca lacks credibility because it is not an accurate representation of traditional gacaca and many Rwandans perceive it to be a foreign system thrust upon their communities.¹⁹⁶ Additionally, many Hutus do not accept the reconciliation process because it is government controlled, which has resulted in a failure to address Tutsi crimes.¹⁹⁷

swimming in crocodile infested water.

190. *Id.*

191. *Id.*

192. *Id.*

193. Molenaar, *supra* note 7.

194. *Id.* at 29.

195. *See Id.*; *Organic Law No. 16/2004*, *supra* note 107, at art. 29.

196. Goldstein-Bolocan, *supra* note 78, at 392. For a discussion of the difference between traditional and modern gacaca, *see infra* pp. 28-30.

197. *Id.* at 390.

Furthermore, although the genocide is over, many people do not feel personally secure. Continued violations of human rights in prisons, and the anger of many Hutus toward the government's imprisonment of them and/or their family without trial (or even charges for some)¹⁹⁸ makes the Rwandan majority unwilling to trust the reconciliation process. These Hutus fear that gacaca's retributive emphasis will result in more prison time for them or their loved ones.

Lastly, there is little incentive for Rwandans to invest in the designated reconciliation process. Although gacaca promises to provide victims with financial compensation from the accused,¹⁹⁹ no compensation has been provided.²⁰⁰ While the government's plea bargaining system requires perpetrators who confess to perform community service, it has not created adequate measures to monitor people's performance of this service.²⁰¹ When 1,676 people were asked what they perceived the major current problems were in Rwanda, 81.9% of them identified poverty/economic hardship as a main concern.²⁰² Without providing victims with material benefits through compensation or community service, there exists little reason to invest in gacaca. Reconciliation remains possible for Rwandans; however, it is unattainable under the current gacaca system.

5. To Prove That Rwandan Society Has the Capacity to Settle Its Own Problems Through a System Based on the Rwandan Custom

Allegedly, gacaca reflects the historical dispute resolution mechanism employed for centuries in Rwanda. However, other than a shared name, modern gacaca barely resembles traditional gacaca. Traditionally, Rwandans used gacaca to resolve minor disputes, such as land/property disputes and petty thefts.²⁰³ Gacaca had no written rules and was conducted on an *ad hoc* basis when disputes arose.²⁰⁴ Reconciliation was the primary focus of gacaca; therefore, sentences were purely compensatory²⁰⁵ and could not be imposed without acceptance by both parties.²⁰⁶ The system inflicted penalties on the entire family of the accused because gacaca was based on an assumption of collective responsibility.²⁰⁷ Customarily, elder male heads of family acted as arbitrators and women were excluded from the process.²⁰⁸ Gacaca shunned the use of law to resolve conflicts and deemed confessions to be a form of provocation.²⁰⁹ Voluntary participation by

198. Molenaar, *supra* note 7, at 71.

199. *Organic Law No. 16/2004*, *supra* note 107, art. 95.

200. Molenaar, *supra* note 7, at 47.

201. Pernille Ironside, *Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation*, 15 N.Y. INT'L L. REV. 31, 55 (2002).

202. GASIBIREGE AND BABALOLA, *supra* note 139, at 7.

203. Goldstein-Bolocan, *supra* note 78, at 376-77.

204. Molenaar, *supra* note 7, at 13.

205. *Id.* at 14.

206. Jennifer G. Riddell, *Addressing Crimes Against International Law: Rwanda's Gacaca in Practice* 48 (2005) (unpublished L.L.M. thesis, University of Aberdeen) (available at <http://www.restorativejustice.org/resources/docs/ridelljennifer>).

207. Molenaar, *supra* note 7, at 14.

208. Fierens, *supra* note 153, at 913; Molenaar, *supra* note 7, at 12.

209. Fierens, *supra* note 153, at 913.

members of society was crucial to gacaca and to resolving local disputes based on the best interests of the community.²¹⁰

The only key feature of modern gacaca that remains similar to traditional gacaca is a highly accessible system, based on community participation.²¹¹ Otherwise, the modern gacaca framework barely resembles its namesake. All people over twenty-one years of age, regardless of their gender, can now serve as judges and participate in the gacaca process.²¹² Modern gacaca is a legal institution that meets at regularly scheduled intervals, no longer provides flexibility, and does not allow individual communities the independence to select their method of implementing dispute resolution.²¹³ Rather than using social pressure to convince members of society to participate in the process, modern gacaca relies on the coercive power of the state.²¹⁴ Punishment is legislated by the state, not based on compromise between the parties involved.²¹⁵ Additionally, gacaca now focuses on retribution and judges possess the ability to imprison individuals.²¹⁶ Furthermore, while traditional gacaca disdained confessions, modern gacaca promotes plea bargaining as an effective tool for discovering the truth.²¹⁷

One of the government's central justifications for gacaca is that it empowers communities to adjudicate crimes perpetrated by community members against their neighbors.²¹⁸ However, the make-up of the communities that existed during genocide has greatly changed. One reason for the change has been the influx of approximately 750,000 Tutsi exiles into Rwanda after the genocide and the exodus of many Hutus.²¹⁹ Additionally, Rwanda's villagization program has relocated hundreds of thousands of people into new villages from hillside farms.²²⁰ These people were not a community during genocide and may not feel connected to each other.²²¹ While a central goal of traditional gacaca was to restore communities to their condition before the conflict, it is impossible for modern gacaca to do this because many of these communities never existed.

210. Maureen E. Laflin, *Gacaca Courts: The Hope For Reconciliation in the Aftermath of the Rwandan Genocide*, 46 *ADVOC. (IDAHO)* 19, 20 (2003).

211. Molenaar, *supra* note 7, at 24.

212. *Id.*

213. *Id.* at 25.

214. See Waldorf, *supra* note 83, at 68 (explaining that methods the State has employed to coerce participation in gacaca include threatening fines and imprisonment to people who were absent from gacaca, closing up shops and rounding people up for gacaca, and preventing people from leaving once a session begins).

215. Leah Werchick, *Prospects for Justice in Rwanda's Citizen Tribunals*, 8 *NO. 3 HUM. RTS. BRIEF* 15, 17 (2001).

216. Molenaar, *supra* note 7, at 25.

217. Fierens, *supra* note 153, at 913.

218. See Donald L. Hafner Elizabeth B.L. King, *Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability Could and Should Work Together*, 30 *B.C. INT'L & COMP. L. REV.* 91, 105-06 (2007).

219. Daly, *supra* note 4, at 379-80.

220. *Id.* at 378.

221. *Id.*

IV. THE NEED FOR CRIMINAL PROCEDURE PROTECTIONS FOR CRIMINAL DEFENDANTS IN GACACA COURTS

Several scholars have shied away from using the word court to refer to gacaca because it lacks many of the due process protections that courts provide, and because traditional gacaca was solely an arbitration system. However, the Rwandan government refers to “Gacaca Courts,”²²² and the law implementing gacaca confirms that “Gacaca Courts have competences similar to those of ordinary courts...”²²³ Like court systems, gacaca’s organization is hierarchical; it has the power to summon witnesses, issue search warrants, confiscate goods, pronounce prison sentences, and consider appeals.²²⁴

The Rwandan government labels gacaca a court, it functions like a court, and most importantly, it possesses the power of a court to imprison individuals.²²⁵ Therefore, if the government wants gacaca to operate as a court, it should follow the due process requirements of a court, as enumerated in domestic law and the international and regional treaties to which Rwanda subscribes. Failure to do so weakens gacaca in the eyes of the local populace and the international community. The Rwandan government agrees, and has stated, “[w]e acknowledge that Gacaca jurisdictions are tribunals to which the international human rights instruments, to which Rwanda is a party, apply.”²²⁶ Despite this recognition by the government, gacaca violates several fair trial procedures provided for by international and domestic law.

Rwanda joined the International Covenant on Civil and Political Rights (ICCPR) in 1975, the African [Banjul] Charter on Human and People’s Rights (African Charter) in 1983, and signed the Arusha Peace Accord in 1993, which incorporated the Universal Declaration of Human Rights (UDHR) into domestic law.²²⁷ Domestically, Rwanda provides for fair trial standards in the Rwandan Code of Criminal Procedure (CCP). The ICCPR, African Charter, UDHR and CCP all recognize an accused’s right to defense counsel.²²⁸ However, in gacaca, the accused are not entitled to counsel. Additionally, the ICCPR and the CCP guarantee defendants the right to cross-examine adverse witnesses and call witnesses in their own defense, neither of which is provided for in gacaca.²²⁹ The

222. *Historical Background*, *supra* note 99.

223. *Organic Law No. 16/2004*, *supra* note 107, at art. 39.

224. *Id.* at arts. 39, 41-43.

225. *Id.* at art. 39; *Historical Background*, *supra* note 99.

226. The Republic of Rwanda, *Reply*, *supra* note 72, at § X, E.

227. Werchick, *supra* note 215, at 16 (summarizing from the Arusha Peace Accord, Art. 17 which states, “the principles enshrined in the Universal Declaration of Human Rights of the 10th of December 1948 shall take precedence over corresponding principles enshrined in the Constitution of the Republic of Rwanda, especially when the latter are contrary to the former.”).

228. See International Covenant on Civil and Political Rights (ICCPR), G.A. Res 2200A (XXI), art. 14(3)(b, d), U.N. Doc. A/6316 (Dec. 16, 1966); African [Banjul] Charter on Human and People’s Rights, June 26, 1981, 21 I.L.M. 58, art. 7; Universal Declaration of Human Rights (UDHR), G.A. Res. 217A (III), art. 11(1), U.N. Doc. A/810 (Dec. 10, 1948); Werchick, *supra* note 215, at 16 (citing the Rwandan Code of Criminal Procedure (CCP) art. 75(1)).

229. See ICCPR, *supra* note 228, at art. 14(3)(e); Werchick, *supra* note 215, at 16 (citing CCP art.

government allows the prosecutor access to witnesses in developing the evidentiary record before a hearing, but defendants do not have access to witnesses or their files prior to hearings.²³⁰ This appears to violate the ICCPR provision that a defendant is entitled "to have adequate time and facilities for the preparation of his defense."²³¹

Key to the UDHR, ICCPR, and African Charter is the guarantee of an impartial and independent tribunal.²³² Gacaca law requires judges to be "Rwandans of integrity" with "high morals and conduct," who have not participated in genocide or crimes for which they received a sentence of over six months.²³³ Despite these requirements, judicial impartiality and independence remain questionable because judges are members of the community, they experienced genocide themselves, and some have very strong biases. Gacaca judges receive only six days of training²³⁴ and no compensation for their work.²³⁵ Large numbers of poorly trained, unpaid judges threaten impartiality because judges are ripe for corruption²³⁶ and manipulation. Moreover, judicial impartiality clearly does not exist in all gacaca locations because 14,885 gacaca judges have been charged with genocide.²³⁷

Furthermore, the ICCPR and the African Charter guarantee a right to appeal to a higher tribunal.²³⁸ However, in gacaca all appeals are handled within the gacaca courts and under no circumstances reach the criminal courts. As a result of gacaca's violations of fair trial standards, enumerated in the ICCPR and African Charter, the appeal system is inadequate.²³⁹

To counter accusations of international law violations, Rwanda claims that it is complying with international treaties, and points to Article 4 of the ICCPR, which states:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the

76(6)).

230. Werchick, *supra* note 215, at 17.

231. ICCPR, *supra* note 228, at art. 14(3)(b).

232. UDHR, *supra* note 228, at art. 10; ICCPR, *supra* note 228, at art. 14(1); African [Banjul] Charter on Human and People's Rights, *supra* note 228, at art. 7 & 26.

233. *Organic Law No. 16/2004*, *supra* note 107, at art. 14..

234. BEIGBEDER, *supra* note 6, at 115.

235. Bolocan, *supra* note 78, at 387.

236. *Id.* at 388.

237. Hirondele News Agency, *Rwandan/Gacaca- Over 14,000 Gacaca Judges Charged with Genocide*, HIRONDELLE PRESS AGENCY, Sept. 13, 2005, <http://www.hirondele.org/arusha.nsf/English?OpenFrameSet>.

238. ICCPR, *supra* note 228, at art. 14(5); African [Banjul] Charter on Human and People's Rights, *supra* note 228, at art. 7(1)(a).

239. Ironside, *supra* note 201, at 54.

exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law....²⁴⁰

While the categorization of this situation as an “emergency” is debatable, Article 4 explicitly prevents derogation of responsibilities that are inconsistent with Rwanda’s other international legal obligations. Despite the Rwandan government’s acceptance that Article 4 applies to Rwanda, the country still does not provide the fair trial guarantees provided by international and domestic law. Since gacaca functions as a court, and adjudicates cases with criminal sanctions, the rules Rwandans agreed to internationally and domestically should apply.

V. LOOKING FORWARD: REVISING GACACA AND RWANDA’S GOALS FOR THE FUTURE

At the outset of gacaca many scholars supported the system because they believed it was better than the alternatives. The ICTR was limited to only a select few Rwandans; those identified as the masterminds of the genocide. The criminal justice system, which originally intended to prosecute all genocide suspects (not tried by the ICTR), was incapable of timely prosecution. Scholars supported gacaca, even though it was rife with due process violations, because they believed in its potential to promote reconciliation.²⁴¹ Unfortunately, the past seven years, since gacaca’s inception, demonstrate that gacaca is a failure because of several flaws in the system’s design and because of its failure to address the economic struggles of Rwandans. There is a need for new solutions that address both the prosecution of genocidaires and the re-growth of the economy.

A. *Fundamental Flaws of Gacaca and Proposals for a New System of Justice*

There are several problems with the current gacaca system. One problem is that the government promotes gacaca as both a traditional dispute resolution system and a court; it simultaneously attempts to provide criminal retribution and reconciliation.²⁴² However, it achieves neither of these goals successfully. The uncomfortable blend of reconciliation and retribution has alienated many Rwandans from the process.

Since its inception, the government has failed to critically examine gacaca. Instead of acknowledging the many signs in 2006 that gacaca was not successfully leading to truth finding and reconciliation, the government decided in 2007 to radically speed up the adjudication process in an effort to complete gacaca by the end of that year. When gacaca could not be completed in 2007, the government agreed to extend the process into 2008.

In addition to its goal of concluding all Category 2 and Category 3 cases in 2008, the government is entertaining the idea of creating a National Gacaca Court to handle Category 1 suspects.²⁴³ The government has continuously ignored the

240. The Republic of Rwanda, *Reply*, *supra* note 72.

241. *See* Raper, *supra* note 16, at 48-49.

242. *See id.* at 31.

243. *Genocide/Gacaca- Gacaca Trials Could Also Try First Category Defendants*, *supra* note 169. The government discussed gacaca trying Category 1 suspects as early as 2005. *See* Edwin Musoni,

due process problems inherent in gacaca. These due process violations are the most worrisome aspect of the government's plan to incorporate Category 1 suspects into gacaca because Category 1 suspects are the individuals who committed the most serious high-profile crimes, including mass murder, rape, and torture,²⁴⁴ and face the highest risks if they are not provided with criminal procedure protections.

Despite the due process concerns, the most disturbing aspect of gacaca remains its failure to relieve ethnic tensions or provide a truthful account of the past. Although the majority of gacaca suspects have now been tried, it is questionable whether they have received a fair and adequate hearing. Rather than continuing on its rushed path toward completion of gacaca by the end of 2008, the government should focus on establishing an appellate process within gacaca and within the criminal court system that enables people who do not feel they received a fair hearing to challenge their conviction. A proper appellate process may lead to many new community hearings where the factual record has been inadequately established or presented in a biased manner. Additionally, rather than continuing to artificially boost a system that many Rwandans view as antithetical to reconciliation, the Rwandan government should alter gacaca to restore community trust in the system.

A new decentralized gacaca system should be established that more closely resembles traditional gacaca. Unlike the current system, which relies on government-generated lists of suspects,²⁴⁵ local community members should be responsible for bringing cases forward and should be encouraged to name both Hutu and Tutsi suspects who engaged in Category 2 and Category 3 offenses leading up to genocide, during the genocide, and in the months following the genocide, when the RPF took control. The power to imprison individuals should be removed from gacaca in order to promote reconciliation. Rather than RPF-mandated prison sentences, or penalties for genocide suspects, each community should work toward creating its own system of justice for genocide suspects. The elimination of prison sentences would significantly reduce due process concerns and increase the chance that genocide suspects would fully disclose their role in the genocide.

While a more localized form of gacaca is necessary to return people's confidence in the process, abolishing government oversight poses the risk that some communities and suspects will not take gacaca seriously. To prevent Rwandans from feeling that this system perpetuates the culture of impunity, the government should retain records of all Category 2 and Category 3 suspects and these suspects should be informed that if they commit a new offense they may face

Rwanda: Gacaca Wants to Try Category One Suspects, THE NEW TIMES, Nov. 6, 2005, <http://www.afrika.no/Detailed/10791.html> (stating that a plan to create a National Gacaca Court is in the draft stage and still needs cabinet and parliament approval).

244. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, RWANDA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2006), available at <http://www.state.gov/g/drl/rls/hrrpt/2006/81364.htm> [hereinafter *Rwanda: Country Report*].

245. Musoni, *supra* note 243.

criminal prosecution for any crimes committed during genocide,²⁴⁶ as well as for their current crimes. Additionally, the government should continue criminal prosecution of Category 1 suspects, the leaders and organizers of the genocide and those who committed acts of rape and sexual torture.²⁴⁷ To ensure some modicum of impartiality, government trained gacaca judges should continue to oversee the gacaca process in their communities. Furthermore, the government should retain the power to prevent communities from implementing solutions that violate the civil rights of those found guilty. The government may also want to provide communities with suggestions on how to develop their own solutions for resolving cases.

Since the majority of genocide suspects have already been tried in gacaca, any changes to gacaca must be retroactively applied. For people currently serving prison sentences, who were found guilty in gacaca, their sentences should be converted to community service. Each individual's local gacaca should be responsible for determining the type of service that must be performed and overseeing that service. The release of these prisoners into society will have a positive effect on the economy because it will reduce Rwanda's prison costs and it will invigorate Rwanda's workforce. Additionally, the money Rwanda currently allocates to prisons can be given to communities to implement service programs.

B. Gacaca's Failure to Address Rwandans' Economic Hardships and Proposals for How to Include These Concerns in the Future

Rwanda is ranked 158th out of the 175 poorest countries in the world, according to the Human Development Index.²⁴⁸ It is an extremely poor country in which 90% of its citizens rely on primary agriculture to survive.²⁴⁹ It is one of the world's most densely populated agrarian societies and has a population of approximately nine million people living in a country smaller than Maryland.²⁵⁰

246. The system would function like an unsupervised pre-trial diversion program does in the United States. Charges are re-instituted only if the defendant commits new violating conduct. *See, e.g.*, Pa.R.Crim.P. Rule 318 (2001) (Procedure on Charge of Violation of Conditions of Accelerated Rehabilitative Disposition Program). Because the offenses in question were committed at least fourteen years earlier, and suspects should have an expectation of finality at some point, like the American counterpart, charges should be dismissed after a specified period of time with no new violating conduct. *See, e.g.*, Pa.R.Crim.P. Rule 316(B) (2001) (period of program not to exceed two years); Pa.R.Crim.P. Rule 319 (2001) (providing for dismissal of charges upon successful completion of the program). One exception to this time limitation may be advisable. As is the case, generally, in the United States, homicide charges could potentially be prosecuted at any time. *Cf., e.g.*, 42 Pa.C.S. § 5551 (1990) (generally no time limit for prosecution of homicide cases).

247. *Rwanda: Country Report*, *supra* note 244. Community groups and international donors should pressure the government to expand Category 1 suspects to include military members and Tutsis who participated in the killing of civilians in the months following the genocide.

248. Branch Office Kigali for the United Nations High Commissioner for Refugees, *Country Operations Plan 2007: Rwanda*, UNHCR, Mar. 31, 2006, available at <http://www.unhcr.org/protect/PROTECTION/44f546c72.pdf> [hereinafter *Country Operations Plan*].

249. *Id.*

250. *Background Note: Rwanda*, *supra* note 172; Timberg, *supra* note 189.

The main socio-economic problem is the large population and lack of access to land.²⁵¹ Most genocide survivors are extremely poor.²⁵²

Although the 1996 Genocide Law and the 2001 Gacaca Law called for reparations for victims of genocide, these reparations have never been realized.²⁵³ In 2004, the revised gacaca law deferred the issue of reparations.²⁵⁴ For survivors there are few options for receiving compensation for their losses. While some criminal courts have awarded compensation to victims from convicted genocidaires, most of these genocidaires are indigent and unable to pay.²⁵⁵ Moreover, the Rwandan government has immunized itself from civil liability for its role in the genocide.²⁵⁶ The only government fund for survivors is the Fonds d'Assistance aux Rescapes du Genocide (FARG), which provides the neediest survivors assistance with healthcare and education costs.²⁵⁷ However, this is not a compensation fund and cannot be accessed by the gacaca or criminal courts to award survivors reparations.²⁵⁸

A major impediment to gacaca has been the government's failure to address survivor's financial needs. It is impossible for this small country with limited financial resources to prosecute every individual who participated in genocide. Rather than helping Rwandans to reconcile, gacaca has further divided communities by draining the crucial financial resources²⁵⁹ necessary for rebuilding Rwanda and for providing reparations to genocide victims. Without economic incentives, many survivors are less inclined to participate in gacaca.²⁶⁰ Additionally, many Rwandans are reluctant to participate in gacaca as witnesses or judges because it means time away from their economic livelihood.²⁶¹

If the government revises gacaca as suggested, it has the potential to reduce the economic suffering of survivors, which thus far has been ignored. Coerced community participation in gacaca should be eliminated and replaced with incentives created by the community to encourage local participation. Rather than mandatory weekly meetings, in which all members of the community must attend, each community should devise its own schedule for meetings and requirements for community participation. Each village should create an individualized gacaca plan that possesses the power to consider the economic strains particular to its area and

251. *Country Operations Plan*, *supra* note 248.

252. Waldorf, *supra* note 83, at 56.

253. *Id.*

254. *Id.*

255. *Id.* at 56-57.

256. *Id.* at 57.

257. *Id.* at 57-58. FARG was created by the government in 1998. The government finances the program with 5% of the yearly tax revenues. FARG has experienced scandals involving corruption. In 2002, a draft reparations law was proposed by the Council of Ministers that would increase government funding to 8% of tax revenues and replace FARG, but it has been shelved since then.

258. *Id.* at 57.

259. Waldorf, *supra* note 83, at 85. The government and international donors have spent millions on the incarceration and trials of genocide suspects.

260. *Id.* at 59.

261. Molenaar, *supra* note 7, at 100-02.

to develop community specific solutions. One method of relieving economic stress may be found in communities' creation of penalties for people who have been found responsible for property offenses. Some possible solutions that communities may develop for people found liable for property offenses include community service projects, return of property to its rightful owner, repair of property damaged during genocide, and reparations. These punishments possess the potential to spark economic growth.

Regardless of the possibilities gacaca possesses for empowering Rwandans to change their future and their economy, changing Rwanda's system for adjudicating genocide suspects is only one step in the process of reconciliation. Resources that are no longer needed to detain and prosecute Category 2 and Category 3 suspects should be diverted toward rebuilding the economy, creating support groups for survivors, opening spaces for dialogue between Hutus and Tutsis, and designing education programs that advance reconciliation.

VI. CONCLUSION

The present gacaca system is not succeeding. Rather than bringing Rwandans together, gacaca has proven divisive. Moreover, gacaca violates several fair trial standards established by Rwanda through domestic and international law. In order to successfully reunite and rebuild the nation, major revisions to gacaca are necessary. However, gacaca alone will never solve Rwanda's problems.

Reconciliation is a slow process that may take decades or generations. Whether Rwanda chooses to use national courts, gacaca, amnesty, or some combination of these to tackle the problems associated with the genocide, reconciliation requires more than addressing the question of what to do with the perpetrators. As posed by one genocide survivor, "[h]ow can I forgive, when my livelihood was destroyed and I cannot even pay for schooling for my children?"²⁶² Reconciliation is not possible without addressing the economic hardship suffered as a result of genocide. Rwandans cannot move forward unless their government addresses the physical, psychological, and social traumas that they suffered. Genocide has not only affected the victims emotionally, it has also affected the entire Rwandan population by causing massive economic upheaval. For too long, the government has focused on the criminal prosecution of genocide suspects. The end of criminal prosecution of Category 2 and Category 3 suspects will greatly increase the resources available for poverty alleviation, job creation, and education. It is now time for the government to place its primary focus on rebuilding the nation.

262. Zorbas, *supra* note 18, at 37.