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MASS JUSTICE FOR MASS ATROCITY: TRANSITIONAL JUSTICE AND ILLIBERAL PEACE-BUILDING IN RWANDA

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ABSTRACT

Rwanda took the new, global norm of accountability to its logical extreme by putting more than one million, mostly low-level genocide suspects on trial. In doing so, Rwanda challenged the dominant model of accountability that privileges liberalism, legalism, retribution, individualism, and cosmopolitanism. Yet, even as *gacaca* deviated from this model, it reaffirmed the central nostrums of transitional justice: truth would lead to justice, and justice, in turn, would lead to reconciliation. This dissertation argues that *gacaca* largely failed to deliver on its stated goals of justice, truth, reparations, and reconciliation. First, *gacaca* fostered a culture of accusatory practices. Originally designed to deal with some 120,000 genocide suspects, *gacaca* unleashed a tsunami of accusations that led to trials against a million suspects. Second, *gacaca* was always meant to provide speedy justice on the cheap. But facing more than a million new accusations, the government had to increase the pace of hearings, sacrificing quality for quantity. That produced unfair trials which undermined truth-telling, justice, and civic trust. Third, *gacaca* imposed collective guilt for the genocide on the Hutu majority while ensuring impunity for war crimes and crimes against humanity committed by the Tutsi rebels now in power. That undercut its promise of justice and reinforced ethnic divisions. Fourth, *gacaca* was premised on voluntary participation but large numbers had to be coerced just to show up and, even then, mostly kept silent. That had a negative impact on truth-telling and trust. Finally, *gacaca* did not deliver sufficiently meaningful reparations to genocide survivors, which left many with a sense of injustice and a loss of civic trust.

STATEMENT

I, Lars Waldorf, do hereby declare that this work submitted for assessment is my own, that no part of this work has been submitted for any other degree (in this University or elsewhere), and that due credit has been given to all sources contained herein in accordance with the rules that govern the Irish Centre for Human Rights and the Faculty of Law.

October 12, 2013

PREFACE AND ACKNOWLEDGMENTS

After working as a civil rights lawyer in the US for nine years, I went to the International Criminal Tribunal for Rwanda in Arusha (Tanzania) in 2000, first as a researcher and then as a journalist. I was drawn to the Tribunal for several reasons. My parents had dragged me and my siblings off to Idi Amin's Uganda and I had never fully shaken childhood memories of frangipani and fearfulness. I also had a sense of obligation that comes from undeserved luck. This was part hand-me-down and part earned. While doing humanitarian work in apartheid-era South Africa, I once fled from state-backed vigilantes who were rampaging with machetes: we helped some into our pick-up but left many others behind. Finally, and more prosaically, I was a lawyer used to working within the constraints of a well-established domestic order and thus I was curious to see how new international institutions were creating law out of such meager precedents.

I was quickly disillusioned with the workings of international justice in Arusha. In 2001, I tagged along with Internews as they did mobile screenings of a documentary about the Tribunal in stadiums and prisons around Rwanda. Paradoxically, such outreach only seemed to emphasize the distance between international and local imaginings of justice. Audiences generally reacted with a mix of curiosity and incomprehension, except for the occasional hoot of recognition when they saw the former prime minister or a local official in the Tribunal's dock. We took a day off to search for a rumored happening and finally found a curious gathering in a stand of eucalyptus trees miles from the main road. A charismatic Rwandan prosecutor presented a succession of pink-uniformed genocide detainees to the assembled crowd while asking people to say what each had, or had not, done during the 1994 genocide.

That was an early preview of *gacaca* – the community courts that would reshape Rwandan society over the next 12 years. It was an exciting and hopeful moment that was captured in Anne Aghion's film *Gacaca: Living Together in Rwanda?* If I look hard enough, I can catch a glimpse of my younger, more optimistic self off to one side, taking notes. I could never have guessed at the time that I would spend the next 14 years trying to make some sense of *gacaca* and Rwanda.

Over the years, I have incurred far too many debts to repay. But I can at least acknowledge some of them here. *Diplomatie Judiciaire* gave me a job in Arusha, an unhealthy obsession with genocide justice, and firm friends in Thierry Cruvellier, Franck Petit, and Arnaud Grellier. Wanda Hall and Mary Kimani began as colleagues in Arusha and

ended as friends in Kigali. Along the way, they introduced me to Rwanda. Wanda encouraged me to apply for the Rwanda researcher post at Human Rights Watch when I couldn't see my way past the job requirements. Alison Des Forges ignored those requirements and hired me anyway. She was a generous mentor until her sudden death in 2009. She remains an enduring inspiration, especially on how to combine scholarly rigor with human rights advocacy. My predecessors and successors in the Kigali office make me feel part of Alison's extended family.

While a wide range of people have generously shared information and insights with me, I gained enormously over the years from repeated conversations with Klaas de Jonge, Danielle de Lame, Nigel Eltringham, Lee Ann Fujii, Aloys Habimana, Leslie Haskell, Chris Huggins, Bert Ingelaere, Benoit Joanette, Thomas Kamilindi, Mary Kimani, Kersty McCourt, Jens Meierhenrich, Zarir Merat, Cathy Newbury, David Newbury, Jean-Charles Paras, Victor Peskin, Max Rettig, Noel Twagiramungu, Peter Uvin, Don Webster, and Eugenia Zorbas. Vero Geoffroy deserves special mention for her extraordinary generosity in putting me up in Rwanda, often for months that must have seemed without end.

The four friends and intellectual companions who bear the greatest responsibility for this dissertation are Anne Aghion, Thierry Cruvellier, Scott Straus, and Carina Tertsakian. As a non-Kinyarwanda speaker, I also owe an enormous debt to the talented and resourceful Rwandans who worked with me. Sadly, I fear I wouldn't do them any favors in mentioning them by name.

Paul Gready gently prodded me to finish, and provided the time and space to do so. My Mom and especially my brother took time from their own writing to provide encouragement and comments, while Gayle Pettifer gave me the incentive to finish. I also want to thank William Schabas and Simon Halliday for their comments and sensible advice. The dissertation is definitely better for that.

I am grateful to the United States Institute of Peace for having funded much of my research in Rwanda, and the World Policy Institute (then at The New School) for administering that grant. Three people who were at USIP then deserve particular thanks: Judy Barsalou, April Hall, and Taylor Seybolt. Finally, I want to thank my dissertation supervisor, William Schabas, who managed to publish several books in the time it took me to write this dissertation. I am grateful to both him and Shane Darcy for their patient endurance.

CHAPTER 1: INTRODUCTION

"[A] justice that in this particular historical instance could only be hypothetical anyway."
– Jean Amery[1]

Overview

Large billboards sprouted along Rwanda's roadsides in 2003. Instead of Prudence condoms or Guinness beer, they advertised something radically new: mass justice for mass atrocity. The billboards depicted an open-air genocide trial with a row of lay judges facing a crowd of men in second-hand T-shirts and women in colorful *pagnes*, and a prisoner wearing the standard-issue pink uniform between them. Bold letters announced the product – *Inkiko Gacaca* (*Gacaca* Courts) – and the promised benefits – *Ukuri, Ubutabera, Ubwiyunge* (Truth, Justice, Reconciliation). The sponsors' logos were tucked into a bottom corner: the Rwandan government seal and the Belgian Technical Cooperation emblem.

In what looked like a deliberate rebuke, one of the billboards was planted just outside the Kigali offices of the International Criminal Tribunal for Rwanda (ICTR). Indeed, Rwanda's *gacaca* quickly became the poster child for an alternate vision of transitional justice. Its community courts were a proudly home-grown response that explicitly contested the international community's preference for international criminal tribunals and national truth commissions. Several years earlier, Rwanda had opposed the Tribunal and rejected Archbishop Desmond Tutu's suggestion of a South African-style truth commission.

Gacaca appeared to correct some of the perceived failings of international tribunals and truth commissions: it was more local, more participatory, and more restorative – or, at least, that was its promise. With some 9,000 courts and 100,000 lay judges, *gacaca* also seemed to show how customary dispute resolution practices could be modernized and scaled up to provide justice for the worst international crimes. Yet, the most radical aspect of *gacaca* was its challenge to the Nuremberg model, which has dominated international criminal law and transitional justice. Instead of pursuing exemplary proceedings against a few high-level or mid-level perpetrators, *gacaca* put much of the nation on trial. Week after week, Rwandans assembled on airy hilltops, in cramped meeting halls, and under fragrant eucalyptus trees to make accusations, hear confessions, try cases, and somehow become better neighbors in the process. By the time it finished, in 2012, *gacaca* had conducted an

[1] Jean Améry, *At the Mind's Limits: Contemplations by a Survivor on Auschwitz and its Realities* trans. Sidney Rosenfeld & Stella P. Rosenfeld (Bloomington: Indiana University Press, 1980), 64.

astonishing 1.8 million trials, mostly against bystanders who had stood by or looted as their neighbors were slaughtered.

Yet, even as *gacaca* challenged the transitional justice toolkit and Nuremberg model, it reaffirmed the central nostrums of transitional justice. That billboard slogan – *Ukuri, Ubutabera, Ubwiyunge* – communicated the transfiguring tropes of transitional justice: truth would lead to justice, and justice, in turn, would lead to reconciliation. That partly explains *gacaca*'s appeal to international donors like the Belgian Technical Cooperation. Out in Rwanda's communities, however, *gacaca* confounded those expectations as it was reshaped, resisted, and appropriated by local actors.

Aims

Gacaca has attracted considerable attention from scholars, journalists, and international NGOs.[2] There are two main weaknesses to much of the existing academic literature.[3] It is mostly based on secondary sources rather than on empirical research.[4] In addition, it largely examines how *gacaca* was meant to work rather than on how *gacaca* actually did work. That was understandable when *gacaca* was still getting underway,[5] but it remains a stubborn tendency even among some scholars who have spent considerable time in

[2] Some of the most detailed monitoring of *gacaca* was conducted by Avocats sans frontières and Penal Reform International, which produced excellent reports. See, e.g., Avocats sans frontières, *Monitoring of the Gacaca Courts, Judgment Phase, Analytical Report No. 3, October 2000 – April 2007* (Kigali and Brussels: 2008); Penal Reform International, *Eight Years On . . . A Record of Gacaca Monitoring in Rwanda* (London: 2010).

[3] For a recent literature review, see Bert Ingelaere, "From Model to Practice: Researching and Representing Rwanda's 'Modernized' *Gacaca* Courts," *Critique of Anthropology* 32, no. 4 (2012), 388-414.

[4] Some authors rely entirely on secondary sources. See, e.g., Alison Corey and Sandra F. Joireman, "Retributive Justice: The *Gacaca* Courts in Rwanda," *African Affairs* 103, no. 410 (2004), 73-89; Rosemary Nagy, "Traditional Justice and Legal Pluralism in Transitional Context: The Case of Rwanda's *Gacaca* Courts," in *Reconciliation(s): Transitional Justice in Postconflict Societies*, ed. Joanna .R. Quinn (Montreal: McGill-Queen's University Press, 2009), 86-115. Others acknowledge having conducted very limited primary research. See, e.g., Aneta Wierzynska, "Consolidating Democracy Through Transitional Justice: Rwanda's *Gacaca* Courts," *New York University Law Review* 79 (2004), 1934-69.

[5] See, e.g., Erin Daly, "Between Punitive and Reconstructive Justice: The *Gacaca* Courts in Rwanda," *New York University Journal of International Law and Politics* 34 (2002), 355-96; Mark A. Drumbl, "Restorative Justice and Collective Responsibility: Lessons for and from the Rwandan Genocide," *Contemporary Justice Reviews* 5, no. 1 (2002), 5-22. For a critique of this early literature, see Lars Waldorf, "Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice," *Temple Law Review* 79, no. 1 (2006), 1-87.

Rwanda.[6] While there has been a welcome turn to more empirical studies, these are often based on limited participant-observations[7] or relatively small surveys.[8] The most impressive study, involving participant-observation of 1,917 trials, was conducted by Bert Ingelaere.[9]

For all the interest in *gacaca*, there are just two academic monographs on the topic. Paul Christoph Bornkamm presents a highly legalistic and mostly desk-based treatment of *gacaca*, describing its compliance with international law on a state's duty to prosecute and provide reparations for international crimes.[10] By contrast, Phil Clark draws on participant-observation and interviews to examine whether *gacaca* has achieved truth, justice, peace, healing, forgiveness, and reconciliation.[11] Although that book is billed as a socio-legal and ethnographic study,[12] the author frequently dismisses "the population's perspectives" of *gacaca* as mistaken and uses those as a foil for his own, highly normative interpretation of *gacaca*.[13] There are also monographs by former Rwandan Prosecutor General Gerald Gahima and Nicholas Jones that survey the international, transnational, and domestic efforts at post-genocide justice. Both of those books rely almost exclusively on secondary sources for their discussion of *gacaca*.[14]

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[6] See, e.g., Roelof H. Haveman and Alphonse Muleefu, "The Fairness of *Gacaca*" in *State Crime: Current Perspectives*, eds. Dawn L. Rothe and Christopher W. Mullins (New Brunswick, NJ: Rutgers University Press, 2010).

[7] See, e.g., Jennie Burnet, "The Injustice of Local Justice: Truth, Reconciliation and Revenge in Rwanda," *Genocide Studies and Prevention* 3, no. 2 (2008), 173-93; Alice Urusaro Karekezi et al., "Localizing Justice: *Gacaca* Courts in Post-Genocide Rwanda" in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, eds. Eric Stover and Harvey M. Weinstein (Cambridge: Cambridge University Press, 2004), 69; Susan Thomson, "The Darker Side of Transitional Justice: The Power Dynamics Behind Rwanda's *Gacaca* Courts," *Africa* 81, no. 3 (2011), 373-90. The same limitation applies to my own work.

[8] See, e.g., Karen Brounéus, "The Trauma of Truth Telling: Effects of Witnessing in the Rwandan *Gacaca* Courts on Psychological Health," *Journal of Conflict Resolution* 54, no. 3 (2010), 408-37; Max Rettig, "*Gacaca*: Truth, Justice and Reconciliation in Postconflict Rwanda?" *African Studies Review* 51, no. 3 (2008), 25-50; Bernard Rimé et al., "The Impact of *Gacaca* Tribunals in Rwanda: Psychosocial Effects of Participation in a Truth and Reconciliation Process after a Genocide," *European Journal of Social Psychology* 41, no. 6 (2011), 698.

[9] Bert Ingelaere, Peasants, Power and the Past: The *Gacaca* Courts and Rwanda's Transition from Below (Ph.D dissertation, University of Antwerp, 2012).

[10] Christoph Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation* (Oxford: Oxford University Press, 2012).

[11] Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers* (Cambridge: Cambridge University Press, 2010).

[12] Clark, *The Gacaca Courts*, 5-6, 88-89.

[13] See, e.g., Clark, *The Gacaca Courts*, 145-48, 206-19, 230-37, 248-54, 272-77, 296-307, 331-41. For a critique of Clark's methodological approach, see Ingelaere, "From Model to Practice," 400-03.

[14] Gerald Gahima, *Transitional Justice in Rwanda: Accountability after Atrocity* (London: Routledge, 2013), 158-86; Nicholas A. Jones, *The Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha* (London: Routledge, 2006), 79 n. 30.

This dissertation has two main objectives. The first aim is to fill a gap in the existing literature by presenting a more comprehensive, contextualized, and comparative analysis of mass justice in Rwanda. *Gacaca* needs to be seen as part of a grander project to remake the Rwandan state and society after the 1994 genocide and civil war. It also has to be understood in relation to what other states have done in terms of transitional justice. Overall, *gacaca* is an uneasy mix of international influences, domestic politics, and local dynamics.

The dissertation's second aim is to rethink theories and practices of accountability through the Rwandan case study. Why Rwanda? The country is an important test case for transitional justice. First, the 1994 genocide poses a real challenge to accountability given its scale, brutality, and large numbers of ordinary perpetrators. While unique, Rwanda's genocide shares important characteristics with recent mass atrocities: civil war, malleable identities, intimate violence, high levels of complicity, and hazy lines of command responsibility. Second, the post-genocide leadership had more scope to pursue accountability because they came to power through military victory. Third, Rwanda is a clear outlier in the Great Lakes region and sub-Saharan Africa, where amnesties and truth commissions are the norm and trials the exception. Finally, the country's accountability measures have prompted a rethinking of international criminal law and transitional justice by prominent theorists, such as Mark Drumbl and Larry May.[15]

Questions and Argument

As its overarching research question, this dissertation asks: Did Rwanda's maximalist accountability "succeed"? Success is defined largely in terms of the goals that the government set. Rwanda's political elites clearly borrowed those goals from the transitional justice canon but then adapted them to a post-genocide context, translated them for a Rwandan audience, and used them to serve their own political ends. While state actors frequently "vernacularize"[16] or "localize"[17] global norms, Rwanda's leaders did something truly exceptional: they took the new global norm of accountability to its logical extreme – putting more than one million, mostly low-level perpetrators on trial. Consistent with

[15] Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007); Larry May, *Genocide: A Normative Account* (Cambridge: Cambridge University Press, 2010).
[16] See Sally Engle Merry, "Transnational Human Rights and Local Activism: Mapping the Middle," *American Anthropologist* 108, no. 1 (2006), 38-51; Mark Goodale, "Introduction: Locating Rights, Envisioning Law Between the Global and the Local" in *The Practice of Human Rights: Tracking Law Between the Global and the Local* (Cambridge: Cambridge University Press, 2007), 1-38.
[17] See Koen de Feyter, et al., *The Local Relevance of Human Rights* (Cambridge: Cambridge University Press, 2011).

transitional justice thinking, Rwanda's leaders assumed that maximal accountability would produce more truth, more justice, and more reconciliation. But did that actually happen?

The dissertation also addresses several sub-questions:

- Why did Rwanda opt for maximal accountability and, just as importantly, why did it stick with that even as it ran into difficulties?
- Why did Rwanda select *gacaca* as the instrument for delivering maximal accountability?
- How did international, national, and local factors shape *gacaca*?
- Were *gacaca*'s difficulties caused by design flaws, by faulty implementation, by unintended consequences, or by bad faith?
- Did the state's increasing authoritarianism undermine *gacaca*'s chances?
- How well did *gacaca* meet its stated goals of truth, justice and reconciliation?
- How did *gacaca* impact on state-building (including the rule of law) and peace-building in Rwanda?

These questions are explored in detail in the chapters that follow.

To carry out their policy of maximal accountability, Rwanda's leaders had to dramatically reinvent the genocide trial. They redefined the international crime of genocide when they incorporated it into domestic law. Genocide was no longer the "crime of crimes" but rather any ordinary crime (murder, rape, assault, and theft) committed during the period of the genocide. That effectively removed genocide's special intent requirement, making it much easier (and quicker) to prosecute and convict. Relatedly, they encouraged perpetrators to plead guilty in exchange for radically reduced sentences. Rwanda is perhaps the only state that has handed down community service orders to convicted killers. Finally, they created a new mechanism, *gacaca*, to speed up trials – a system of some 9000 community courts presided over by laypeople. Those three changes are what made it possible to conduct nearly 1.8 million trials in just a few years.

In summary, this dissertation argues that *gacaca* largely failed to deliver on its goals of justice, truth, reparations, and reconciliation. Of course, there were trials where victims learned what had happened to family members, where the guilty were convicted and the falsely accused were acquitted, where survivors received some restitution, and where divided communities began to heal. But, in the aggregate, *gacaca* did not achieve its key objectives. There were several reasons for this. First, *gacaca* fostered a culture of accusatory practices.

Originally designed to deal with some 120,000 genocide suspects, *gacaca* unleashed a tsunami of accusations that led to trials against one million suspects. Second, *gacaca* was always meant to provide speedy justice on the cheap. But facing more than a million new accusations, the government had to increase the pace of hearings, sacrificing quality for quantity. That produced unfair trials which undermined truth-telling, justice, and civic trust. Third, *gacaca* imposed collective guilt for the genocide on the Hutu majority while ensuring impunity for war crimes and crimes against humanity committed by the Tutsi rebels now in power. That undercut its promise of justice and reinforced ethnic divisions. Fourth, *gacaca* was premised on voluntary participation but large numbers had to be coerced just to show up – and, even then, mostly kept silent. That had a negative impact on truth-telling and trust. Finally, *gacaca* did not deliver sufficiently meaningful reparations to genocide survivors, which left many with a sense of injustice and a loss of civic trust.

Methodology

Rwanda is a hard place to do fieldwork. There are cultural practices of secrecy and dissimulation developed in response to a long history of exactions, surveillance, and insecurity. The genocide and civil war generated enormous mistrust and trauma that persist among large segments of the population. During the *gacaca* years, Rwandans feared being denounced for genocide or "genocide ideology." Political indoctrination and suppression of ethnic discourse leads to more parroting of approved scripts and more concealing of "hidden transcripts."[18] The government restricts information, the press and NGOs are muted, and rumors abound.[19]

Researchers who investigate sensitive topics or who publish critical views risk being denied access to the country. The government set the tone early on with the exclusion of the Belgian academic Filip Reyntjens in late 1994. In the years since, it has shut down research projects and expelled (or threatened to expel) researchers. The government even had the

[18] James Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (New Haven: Yale University Press, 1990).

[19] On the difficulties of doing research in Rwanda, see particularly Lee Ann Fuji, "Interpreting Truth and Lies in Stories of Conflict and Violence" in *Surviving Field Research: Working in Violent and Difficult Situations*, eds. Chandra Lekha Sriram, et al. (Abingdon: Routledge, 2009), 147-62; Lee Ann Fujii, *Killing Neighbors: Webs of Violence in Rwanda* (Ithaca: Cornell University Press, 2009), 31-44. See also Jennie E. Burnet, *Genocide Lives in Us: Women, Memory, and Silence in Rwanda* (Madison: University of Wisconsin Press, 2012), 23-25, 29-30, 36; Elisabeth King, "From Data Problems to Data Points: Challenges and Opportunities of Research in Postgenocide Rwanda," *African Studies Review* 52(3) (2009), 130-37; Susan Thomson, An Ansoms, and Jude Murison, *Emotional and Ethical Challenges for Field Research in Africa: The Story Behind the Findings* (Basingstoke: Palgrave Macmillan, 2012), 42-56, 70-83, 107-22.

World Bank's household data surveys burned in 2005.[20] It has let some researchers know informally that they would be denied entry or visas. Researchers who want access sometimes shun those who are *persona non grata*. Government officials also show up to academic conferences where they make *ad hominem* attacks on researchers.[21] This reinforces the polarizing debates over post-genocide Rwanda, with favored insiders on one side, excluded critics on the other, and those who practice self-censorship in-between.

I was Human Rights Watch's researcher in Rwanda when *gacaca* was launched in June 2002. With several Rwandan assistants, I monitored some of the first hearings in several pilot locations (in Butare, Byumba, Gisenyi, Gitarama, Kibuye, Kigali, and Kigali-Ngali provinces as they were then known). I also attended pre-*gacaca* presentations of those without case files (in Butare and Ruhengeri provinces). I left Human Rights Watch and Rwanda in April 1994 and subsequently received a grant from the United States Institute of Peace (USIP) that enabled me to conduct further fieldwork on *gacaca*. During the grant period (May 2005 – November 2007), I spent several months living in Rwanda: July – September 2005; February 2006 – September 2006; August 2007. However, it was not possible to observe *gacaca* for much of the time that I was in the country as the government suspended *gacaca* activities between January and July 2006. My USIP research project and protocols were approved by the Institutional Review Board at the New School (New York).[22]

In Rwanda, research access is controlled. I needed authorization from one government agency to attend *gacaca* and authorization from another to conduct interviews out on the hills. (I never obtained authorization from a third agency to do research within prisons.) Even with authorization letters in hand, I ran into *gacaca* judges and local officials who sometimes

[20] Bert Ingelaere, "Do We Understand Life After Genocide?: Centre and Periphery in the Knowledge Construction in/on Rwanda," Institute of Development Policy and Management Working Paper 2009/02 (Antwerp: 2009), 17-19. For other forms of government interference with research, see, e.g., Filip Reyntjens, "Constructing the Truth, Dealing with Dissent, and Domesticating the World: Governance in Post-Genocide Rwanda," *African Affairs* 110, no. 438 (2011), 1-34; Susan M. Thomson, "'That Is Not What We Authorized You to Do…': Access and Government Interference in Highly Politicized Research Environments" in *Surviving Field Research*, 108-24.

[21] Most recently, Jean-Paul Kimonyo, Senior Advisor in the Office of the President, and Tito Rutaremara, Senator and former RPF Secretary-General, made personal attacks on Filip Reyntjens, Bert Ingelaere, and Nicola Palmer at "Rwanda Under the RPF: Assessing Twenty Years of Post-Conflict Governance," SOAS and Royal African Society, October 4 and 5, 2013. Author's field notes; Magnus Taylor, "Debating Rwanda Under the RPF: Gap between 'Believers' and 'Unbelievers' Remains Wide," African Arguments website, October 8, 2013.

[22] I also did some fieldwork on *gacaca* either as part of or on the side of four consultancies: Harvard Law School Human Rights Project and Front Line (October 2004); International Center for Transitional Justice (May – July 2006); Austrian Development Agency (August 2006); Interchurch Organisation for Development Cooperation (June – September 2008).

refused me permission to conduct research until they had reassurance from their immediate superiors.[23] This was understandable as my time in the field coincided with administrative upheavals. Local officials changed frequently and worried about losing their posts.

Over the years, I conducted semi-structured interviews with a wide cross-section of people involved with *gacaca*: government ministers, local officials, donors, NGO monitors, academic researchers, journalists, *gacaca* judges, and *gacaca* participants. Informants were chosen through a mix of purposive and snowball sampling. Some were interviewed just once while others were interviewed multiple times at different periods. Most of my interviews were conducted in English or French. Where informants only spoke Kinyarwanda (which I do not speak), my research assistants translated the Kinyarwanda into French. For ethical reasons, most of my informants are anonymous in the pages that follow.

From 2005 to 2008, my research assistants[24] and I directly observed numerous *gacaca* hearings, primarily in five sites: one urban (Kigali) and four rural (in Butare, Byumba, Gitarama, and Kibuye provinces). The sites were selected based on three main factors: authorization from local officials; driving distance from Kigali (where I lived); and the existence of other data about the community (e.g. court cases, NGO reports, etc.) that might be used to clarify *gacaca* narratives. I make no claims that the hearings in these sites were representative. Indeed, there was variance among my different sites and in single sites over time. Repeat visits allowed the community to become more accustomed to our attendance. Still, my presence and, to a lesser extent, that of my researchers inevitably changed the dynamics of the *gacaca* sessions we observed.

As *gacaca* sessions were conducted entirely in Kinyarwanda, I relied on research assistants (sitting next to me) to take simultaneous notes of the proceedings in French.[25] I also had research assistants monitor some of the *gacaca* hearings that I was not able to attend and provide me with notes. With *gacaca* sessions often lasting hours and my need for translation, my research assistants were not able to take verbatim notes. Consequently, the English quotes from *gacaca* sessions are, at best, approximations of what was stated.[26] Many of the narratives in *gacaca* were resolutely parochial; it was often difficult to make sense of them

[23] On one memorable occasion in 2002, a local official had my interpreter arrested as a spy. Although he was released after a few hours, that effectively ended our research in that particular community.
[24] My research assistants were male and female. They were not selected on the basis of ethnicity though, as it happened, all were Hutu.
[25] I did not have permission to record *gacaca* sessions.
[26] Although *gacaca* hearings were public, I have chosen not to attribute quotes (or clearly identify the place or date) in order to protect the speakers and my research assistants.

without the local knowledge which we as outsiders lacked. Conversations and interviews in the community could only do so much to fill in some of the gaps.

My data set of *gacaca* observations is obviously miniscule when compared to the millions of *gacaca* hearings in Rwanda between 2002 and 2012. To partly compensate for that, this dissertation presents a macro-level perspective on *gacaca*. It also leans heavily on other NGO and academic research findings to triangulate my own research findings.

Structure

The dissertation is divided into four main parts: literature review (Chapter 2), context (Chapters 3 and 4), genocide justice and *gacaca* (Chapters 5 to 7), and assessment of *gacaca*'s goals (Chapters 8 to 11). Chapter 2 presents a comparative, theoretical framework for understanding and assessing Rwanda's pursuit of maximal accountability. Chapters 3 and 4 provide the political, social, and security context for Rwanda's mass justice. Chapter 3 examines the civil war and genocide that engulfed Rwanda between 1990 and 1994. Chapter 4 then analyzes the post-genocide transition, which has been characterized by an illiberal peace at home and war in the neighboring Democratic Republic of Congo. Chapters 5 through 7 seek to explain why Rwanda opted for maximal accountability and how it implemented that strategy over the years. Chapter 5 examines the international, national, and local factors that shaped Rwanda's transitional justice policy and practice. *Gacaca*'s invention and inception are the subjects of Chapter 6. Chapter 7 then tracks *gacaca*'s considerable evolution. Chapters 8 through 11 assess how well *gacaca* met its stated goals of delivering justice, truth, reparations, and reconciliation, respectively. Each of those four chapters starts by defining the goals in relation to transitional justice theory and practice, which brings in a comparative perspective.

Implications

Gacaca and its failings have broader implications for theory and practice in four areas: norm transmission, the Nuremberg paradigm, genocide law, and transitional justice.

The Rwandan case complicates and confounds existing theories of why states comply with the globalized norm of accountability. Gary Jonathan Bass has argued that "the serious pursuit of international justice rests on principled legalist beliefs held by only a few liberal governments."[27] So, how then do we explain illiberal Rwanda's compulsion to put as many suspected *génocidaires* as possible on trial? Kathryn Sikkink's work would suggest that "the

[27] Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crime Tribunals* (Princeton: Princeton University Press, 2000), 8.

justice cascade" – the increase in human rights prosecutions based on diffusion of the norm of individual criminal responsibility – reached Rwanda.[28] But that fails to explain two key features of Rwanda's mass prosecutions: unfair trials and victor's justice. Following Jelena Subotić, it could be argued that Rwanda's political elites "hijacked" the global accountability norm for their own political gain.[29] Yet, Rwanda lacks a crucial factor that Subotić identifies: strong international pressure to adopt that norm in the first place. All in all, Rwanda reveals some telling limitations in current theorizing about the diffusion of the accountability norm.

Over the past ten years, several legal scholars have challenged the Nuremberg paradigm of exemplary prosecutions and individual criminal responsibility.[30] Some have invoked *gacaca* to support their view that the trial and punishment of ordinary bystanders will promote reconciliation.[31] In fact, *gacaca* offers a cautionary lesson in the dangers of departing from the Nuremberg model. What started out as a remarkable exercise in collective political responsibility quickly devolved into the imposition of collective guilt on the Hutu majority – something that hardly seems conducive to long-term peace-building in an ethnically divided society.

There is considerable disjuncture between how international law conceptualizes genocide and how genocide actually happens. Genocide law is rooted in the "ethnic hatred" hypothesis and focuses on perpetrator dispositions. Yet, as historians, political scientists, and social psychologists have shown, the reality of genocide owes much more to situational factors.[32] What this means is that most perpetrators lack what the law makes genocide's defining feature: the special intent to destroy the ethnic group as a group. A few scholars

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[28] Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (London: W.W. Norton & Company, 2011), 5.
[29] Jelena Subotić, *Hijacked Justice: Dealing with the Past in the Balkans* (Ithaca: Cornell University Press, 2009), 29-30.
[30] See, e.g., Drumbl, *Atrocity, Punishment and International Law*; George P. Fletcher, *Romantics at War: Glory and Guilt in the Age of Terrorism* (Princeton: Princeton University Press, 2002); Mark Osiel, *Making Sense of Mass Atrocity* (Cambridge: Cambridge University Press, 2009).
[31] Mark A. Drumbl, "Punishment, PostGenocide: From Guilt to Shame to Civis in Rwanda," *New York University Law Review* 75 (2000); May, *Genocide: A Normative Account*, 264-67; Larry May, *After War Ends: A Philosophical Perspective* (Cambridge: Cambridge University Press, 2012), 113-17.
[32] See, e.g., Christopher R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (New York: HarperCollins, 1992); Scott Straus, *The Order of Genocide: Race, Power, and War in Rwanda* (Ithaca: Cornell University Press, 2006); James Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing 2d ed.* (Oxford: Oxford University Press, 2007).

have argued for revising the law of genocide to better fit sociological realities.[33] Rwanda is one of the few states to have actually attempted that.

Recent years have seen a surge of interest in less formal, more local justice mechanisms for post-conflict states ranging from Afghanistan to Uganda.[34] Two main factors are driving this: the failures of liberal-legal justice transplants and greater attention to local norms and needs. For some, *gacaca* is a model for neo-traditional and restorative justice after conflict.[35] In truth, *gacaca* reaffirms that state cooption or transformation of customary dispute resolution mechanisms cause them to lose their legitimacy and popularity. It also points up the difficulty with scaling up the local.

[33] See, e.g., Drumbl, , *Atrocity, Punishment and International Law*; Martin Shaw, *What is Genocide?* (Cambridge: Polity, 2007), 154-71.
[34] See, e.g., Deborah Isser, ed., *Customary Justice and the Rule of Law in War-Torn Societies* (Washington, DC: United States Institute of Peace, 2011); Peter Albrecht, Helene Maria Kyed, Deborah Isser, and Erica Harper, *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform* (Rome: IDLO, 2011).
[35] See, e.g., Clark, *The Gacaca Courts*, 354.

CHAPTER 2: ACCOUNTABILITY AND ATROCITY

"Just as there is no political solution within human capacity for the crime of administrative mass murder, so the human need for justice can find no satisfactory reply to the total mobilization of a people for that purpose."
– Hannah Arendt[1]

Introduction

Rwanda was hailed in many quarters as an alternative model of accountability for atrocity. Much of the attention focused on how African tradition was providing justice and reconciliation for the worst crimes imaginable. But that missed the real story. What actually made *gacaca* so radical was not its reinvented "traditionalism" but rather its challenge to the Nuremberg paradigm of liberal-legalism, individual criminal responsibility, and cosmopolitan values. This chapter presents a comparative, theoretical framework for understanding and assessing Rwanda's pursuit of maximal accountability. It surveys the norm of accountability for atrocity, looking at its forms, contexts, goals, and effects. The chapter then describes the Nuremburg paradigm and examines two recent challenges to that paradigm: the collectivizing and the localizing of accountability.

Accountability for Atrocity

Norm

The past 30 years has seen the emergence, development, and diffusion of a new international norm that calls for state actors to be held accountable for atrocities committed within a state's borders. This represents a remarkable and radical shift in international politics and law. The 1948 UN Charter had largely reaffirmed the pre-war understanding of state sovereignty, allowing states to act more or less as they wished in "matters which are essentially within the[ir] *domestic* jurisdiction."[2] The earlier Nuremberg and Tokyo Tribunals were consistent with that understanding for they only prosecuted atrocity crimes linked to *international* aggression. By 1991, the "third wave" of democratization, the end of the Cold War, and the spectacular rise of human rights had challenged that conception of state sovereignty. That year, Diane Orentlicher, a human rights activist, wrote an influential law review article which made the newly plausible claim that international law imposed "the duty

[1] Hannah Arendt, "Organized Guilt and Universal Responsibility" in Hannah Arendt, *Essays in Understanding 1930-1954*, ed. Jerome Kohn (New York: Harcourt Brace & Co., 1994), 126.
[2] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, art. 2(7) (emphasis added).

to prosecute human rights violations of a prior regime."[3] Fourteen years later, Orentlicher was charged with updating the UN's statement of the norm of accountability for atrocity.

What is this new norm? Constructivist scholars consider a norm to be a shared, prescriptive standard of appropriate behavior, which usually advances in three stages: emergence, broad acceptance, and internalization.[4] Accountability is holding those who exercise power "to account." Broadly defined, it is a duty on power-holders to comply with certain standards, provide information and justification about their actions, and face consequences for actions that do not comply with those standards.[5] Hence, accountability has both a truth-seeking and a justice component. Finally, the term atrocity refers to a gross violation of international human rights law (e.g. torture, extrajudicial executions, enforced disappearances), international humanitarian law (e.g. war crimes), and international criminal law (e.g. war crimes, crimes against humanity, and genocide).

Perhaps the most authoritative statement of this norm is found in the UN Principles to Combat Impunity first set out in 1996 and updated in 2005 (by Orentlicher). There, accountability is defined as combating impunity. According to the updated Principles, impunity is

> the impossibility, de jure or de facto, of bringing the perpetrators of violations *to account* – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.[6]

The Principles translate this norm into enforceable rights and duties. The rights – to truth, justice, and reparations – are both individual and collective. Not only do victims' families

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[3] Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *Yale Law Journal* 100, no. 8 (1990): 2537-615.

[4] Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4 (1998), 891-905.

[5] Mark Bovens, "Analysing and Assessing Accountability: A Conceptual Framework," *European Law Journal* 13 (2007), 450; Ruth Grant and Robert O. Keohane, "Accountability and Abuses of Power in World Politics," *American Political Science Review* 99, no. 1 (2005), 41-42; Andreas Schedler, "Conceptualizing Accountability" in *The Self-Restraining State: Power and Accountability in New Democracies*, ed. Andreas Schedler, Larry Diamond, and Marc F. Plattner (Boulder, CO: Lynne Rienner 1999), 17.

[6] United Nations, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1 (2005), 6 (emphasis added). Confusingly, the Updated Principles uses the terms "violations," "violations of human rights and international humanitarian law," "heinous crimes," and "serious crimes under international law" interchangeably.

have a right to know what happened to their loved ones, but "every people has the inalienable right to know the truth" about the perpetration of atrocities.[7] These rights impose correlative duties on states to: investigate violations; prosecute and punish violators; and provide reparations and prevent recurrence. These rights and obligations correspond to key accountability mechanisms: truth commissions, criminal tribunals, administrative reparations programs, and institutional reform (i.e. vetting or lustration).[8]

Over the past 20 years, the norm has been legalized, globalized, and institutionalized.[9] But it is still some way yet from being internalized or normalized.[10] The norm of accountability for atrocity has been legalized through domestic law, regional court rulings, international law, and "soft law" (such as the UN Principles on Combating Impunity). This legalization process is most evident in the field of international criminal law. After the Nuremberg and Tokyo trials, international criminal law went into lengthy hibernation during the Cold War. It was revived with the creation of the ad hoc criminal tribunals for Yugoslavia and Rwanda in 1993 and 1994 respectively. It was solidified with the launch of the International Criminal Court in 2002. Since 1993, international criminal law has developed rapidly through the jurisprudence of these three international tribunals as well as hybrid (international-national) tribunals in Bosnia, Cambodia, East Timor, Lebanon, and Sierra Leone.

This accountability norm has been globalized through the work of human rights activists, transnational advocacy networks, the United Nations, and donor agencies. Norm entrepreneurs, particularly in Argentina and South Africa, developed the norm and then exported it. Two key players in the South African Truth and Reconciliation Commission helped found the International Center for Transitional Justice (ICTJ) in 2001 with funding from the Ford Foundation. Since then, ICTJ has proselytized the norm of accountability for atrocity while providing technical assistance and capacity building to governments and NGOs around the globe. The UN has played a key role in articulating, strengthening, and

[7] United Nations, *Updated Set of Principles to Combat Impunity*, Principle 2.
[8] United Nations, *Updated Set of Principles to Combat Impunity*, 7-19.
[9] See Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31, no. 2 (2009), 321-67; Christine Bell, "Transitional Justice, Interdisciplinarity, and the State of the 'Field' or 'Non-Field,'" *International Journal of Transitional Justice* 3, no.1 (2009), 5-27; Sikkink, *The Justice Cascade*, 31-125; Jelena Subotić, "The Transformation of International Transitional Justice Advocacy," *International Journal of Transitional Justice* 6, no.1 (2012), 106-25; Ruti Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (2003), 69-94.
[10] Compare Sikkink, *The Justice Cascade*, 12 *with* Teitel, "Transitional Justice Genealogy," 71-72.

disseminating this norm, as well as incorporating it into other peace-building activities. While the norm has gone global, it is still far from universal. The norm is strongest in Latin America and Europe, and weaker in Africa, the Middle East, and Asia.[11]

The norm of accountability for atrocity has been institutionalized in both domestic and international settings. States have created new domestic accountability mechanisms, including specialized tribunals, truth commissions, and lustration commissions. Through the UN, states have created new international institutions to promote accountability, ranging from the ad hoc international tribunals for Yugoslavia and Rwanda to the United Nations Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence. The most prominent and only permanent international institution is the International Criminal Court. Civil society has also formed domestic and global institutions such as South Africa's Centre for the Study of Violence and Reconciliation and the International Center for Transitional Justice. Finally, the norm has been institutionalized as a field through academic journals (e.g. the *International Journal of Transitional Justice*), programs (e.g. the Transitional Justice Institute), and networks (e.g. the Oxford Transitional Justice Research network).

Forms

Accountability comes in many institutional forms with different degrees of legalism, liberalism, individualism, retributivism, and cosmopolitanism. These characteristics can be grouped together and presented as a single spectrum with the liberal cosmopolitanism of the International Criminal Tribunal for the Former Yugoslavia towards one end, the illiberal localism of Acholi reconciliation ceremonies towards the other end, and the restorative nationalism of the South African Truth and Reconciliation Commission somewhere in the middle.

Accountability for atrocity can be more or less legalistic. Legalism emphasizes procedural formalism or due process. Its key principle is no crime or punishment without law. Hence, trials, particularly fair trials, are "the supreme legalistic act."[12] For Judith Shklar,

[11] Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington, DC: United States Institute of Peace Press, 2010), 105-06.
[12] Judith N. Shklar, *Law, Morals, and Political Trials* (Cambridge, MA: Harvard University Press, 1986), 144.

legalism is a political ideology that views law as "extrapolitical" – as outside and above politics.[13] As such, legalism can serve both liberal and illiberal regimes.

Accountability for atrocity can be liberal or illiberal. Liberal accountability serves a democratic *rule of law* while illiberal accountability serves an authoritarian *rule by law*.[14] Shklar is especially concerned with making distinctions between liberal and illiberal "political trials" (i.e. those trials whose goal is "the destruction, or at least the disgrace and disrepute, of a political opponent").[15]

> For the liberal, troubled by political trials, there are always two questions. Is a policy of persecution being pursued in these trials, even the fair ones, which endanger freedom? Secondly, is the trial a fair one, and hence a contribution to the legalistic ethos, assuming that the object of prosecution is a justifiable one?[16]

A liberal "political trial," unlike its illiberal counterpart, expresses human rights values and contributes to the rule of law.

Accountability can target individuals or collectives. Since Nuremburg, international law has privileged individual criminal responsibility over collective responsibility (including state responsibility). Individuals, not nations or peoples, are guilty. Such methodological individualism is consistent with both liberal legalism and cosmopolitanism, but it has been criticized in recent years for its failure to tackle bystander responsibility and system criminality.

Accountability can be retributive or restorative. Whereas retribution focuses on the state punishing offenders, "restorative justice" emphasizes repairing victims, reintegrating offenders, and rebuilding communities, with apologies, community service, and restitution replacing incarceration. There is a lively debate over whether retributive or restorative justice is more effective in achieving general deterrence, offender rehabilitation, and victim satisfaction.[17] International criminal law is clearly retributive while truth commissions and local reconciliation ceremonies are more restorative.

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[13] Shklar, *Legalism*, xi. See *id*. at viii and 111. Hence the claim that legalism is depoliticizing.
[14] See Tom Ginsburg and Tamir Moustafa, ed., *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008).
[15] Shklar, *Legalism*, 149.
[16] Shklar, *Legalism*, 151.
[17] See, e.g., John Braithwaite, "Restorative Justice: Assessing Optimistic and Pessimistic Accounts," *Crime & Justice* 25, no. 1 (1999), 39; Carolyn Hoyle and Chris Cunneen, *Debating Restorative Justice* (Oxford: Hart, 2010), 81-88, 177-182.

Accountability can be cosmopolitan or communitarian. This is less about where accountability takes place – in international, national, or local fora – and more about the values it seeks to promote. Cosmopolitan accountability seeks universal justice for "crimes against humanity."[18] It also emphasizes individual criminal responsibility. Communitarian approaches to accountability take two main forms: realism and localism. Realists see international justice as impossibly utopian and argue that states (do and should) pursue their own national interests.[19] For realists, justice is ineluctably state-centric. By contrast, localists favor accountability approaches that take place within smaller moral communities.[20] The International Criminal Court represents an awkward compromise between cosmopolitan and state-centric justice.

Accountability for atrocity is dominated by liberal-legalist criminal trials with their emphasis on retributive justice, individual responsibility, and cosmopolitan norms. Truth commissions are not so much an alternative model as a pragmatic and temporary exception which holds out the possibility of future trials when political circumstances permit. Even the South African Truth and Reconciliation Commission leaned heavily on the threat of future prosecutions to motivate truth-telling.

The dominant criminal model of accountability is reflected in the work of constructivist scholar Kathryn Sikkink. Instead of an accountability norm, Sikkink talks more narrowly of a justice norm:

> Three key ideas underpin the justice norm: the first is the idea that the most basic violations of human rights – summary execution, torture, and disappearance – cannot be legitimate acts of state and thus must be seen as crimes committed by individuals. A second, related idea is that the individuals who commit these crimes can be, and should be, prosecuted. . . . The third idea

[18] For an excellent overview of contemporary cosmopolitanism and competing traditions, see Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2006), 3-16.

[19] For realist perspectives, see, e.g., Eric A. Posner, *The Perils of Global Legalism* (Chicago: University of Chicago Press, 2009); Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principles and Pragmatism in Strategies of International Justice," *International Security*, 28 no. 3 (2003), 5-44.

[20] For localist views, see, e.g., Erin Baines, "Spirits and Social Reconstruction after Mass Violence: Rethinking Transitional Justice," *African Affairs* 109 no. 436(2010), 409-30; Rosalind Shaw, "Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone" (Washington, DC: United States Institute of Peace, 2005).

> is that the accused are also bearers of rights, and deserve to have those rights protected in a fair trial.[21]

Sikkink calls the diffusion of this norm and the accompanying increase in criminal prosecutions of state officials for human rights violations "the justice cascade."[22]

Contexts

While accountability for atrocity occurs in different contexts, it is more likely to happen during political transitions marked by regime changes or peace agreements. The accountability norm emerged during the political transitions that swept Eastern Europe and Latin America in the 1980s and early 1990s. That explains why accountability is often referred to by the term "transitional justice."[23] At the time, democratizing regimes were suddenly confronted with hard choices about whether and how to hold predecessor regimes accountable for gross human rights violations. Those that chose prosecutions risked inciting coups while those that chose amnesties risked entrenching impunity. As a compromise, some opted for non-prosecutorial truth commissions.

With the wars in the former Yugoslavia and the genocide in Rwanda, the accountability norm was transposed to a very different type of transition – that from war to peace. In contrast to democratizing transitions, conflict settings usually produce a large number of atrocity crimes committed by both state and non-state actors. The norm reshaped peace agreements, peacekeeping missions, and peace-building efforts. A turning point came in 1999 with the UN's refusal to endorse the amnesty provisions of Sierra Leone's Lomé Peace Accord, which made subsequent UN-backed prosecutions for war crimes and crimes against humanity possible.[24]

There are distinct opportunities and challenges for accountability efforts during extraordinary periods of political and conflict transition.[25] Yet, the term "transitional justice" has become somewhat incoherent as accountability is increasingly applied before transitions

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[21] Sikkink, *The Justice Cascade*, 13.
[22] Sikkink, *The Justice Cascade*, 5. For an empirical testing of the justice cascade, see Olsen, Payne and Reiter, *Transitional Justice in Balance*, 97-108.
[23] For definitions of transitional justice, see Louis Bickford, "Transitional Justice," *The Encyclopedia of Genocide and Crimes Against Humanity* (Macmillan Reference USA, 2004), vol. 3, 1045-47; United Nations Secretary General, *The Rule of Law and Transitional Justice* UN Doc. S/2004/616 (2004), ¶ 8.
[24] See, e.g., Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford: Oxford University Press, 2008), 239-58; Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press, 2010).
[25] See Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), 11-26, 213-28.

or even in their absence. Today, transitional justice encompasses both the International Criminal Court's arrest warrant against Muammar Qaddafi during the Libyan civil war and Canada's Truth and Reconciliation Commission. Nor can transitional justice explain the recent surge of atrocity trials in Latin American states whose transitions ended decades ago.[26] Transitional justice also has lost coherence as its mechanisms have outgrown justice-seeking measures to include such things as revised school curricula. The UN defines transitional justice expansively as "the full range of processes and measures associated with a society's attempt to come to terms with a legacy of large-scale past abuses."[27] Furthermore, transitional justice comes burdened with the teleological assumption of the "transition paradigm" – that successor regimes are progressing towards greater democracy and/or peace.[28]

This dissertation uses the term transitional justice simply to refer to accountability for atrocity that occurs during transitions. Such periods are usually initiated by extraordinary legal moments: new constitutions or peace agreements. While the length of a transition will vary from one country to the next, a crude end-limit for a "post-conflict" transition is the 10-year mark at which the risk of relapse into civil war dramatically drops off.[29]

Goals and Effects

Initially, accountability was meant to serve a limited set of goals, but influential policymakers and scholars keep piling on more expectations of what it is supposed to accomplish. Archbishop Desmond Tutu added reconciliation, Rami Mana added peace-building, and Louise Arbour added socio-economic rights.[30] At the same time, these increasingly "irreconcilable goals" get portrayed as "mutually reinforcing and complementary."[31] Early political transitions were marked by debates over truth versus justice while early conflict transitions were marked by those over peace versus justice.[32]

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[26] See Cath Collins, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador* (University Park, PA: The Pennsylvania State University Press, 2010), 7-35.
[27] United Nations Secretary General, *The Rule of Law and Transitional Justice*, ¶ 8.
[28] Thomas Carothers, "The End of the Transition Paradigm," *Journal of Democracy* 13, no. 1 (2002), 9.
[29] See Paul Collier, Anke Hoeffler, and Mans Soderbom, "Post-Conflict Risks," Working Paper Series #WPS/2006–12, Centre for the Study of African Economics, University of Oxford (2006).
[30] See Archbishop Desmond Tutu, *No Future Without Forgiveness* (London: Random House, 2000); Rami Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity, 2002); Louise Arbour, "Economic and Social Justice for Societies in Transition," Second Annual Transitional Justice Lecture, New York University Law School, New York, October 25, 2006.
[31] Bronwyn Anne Leebaw, "The Irreconciliable Goals of Transitional Justice," *Human Rights Quarterly* 30, no. 1 (2008), 98.
[32] See, e.g., Robert I. Rotberg and Denis Thompson, ed., *Truth v. Justice: The Morality of Truth Commissions* (Princeton, NJ: Princeton University Press, 2000); Chandra Lekha Sriram and Suren

Now, however, it is claimed that holism and sequencing enable accountability to accomplish truth *and* justice as well as peace *and* justice.[33] This elides the tough political choices that come with accountability.[34] This section briefly describes the most common goals attributed to accountability.[35] It also quickly reviews some of the evidence for whether those goals have been met.

Immediate Goals

Accountability for atrocity has three immediate goals: truth, justice, and reparations. The harder issue is how to define and measure these, particularly given the manifold and contested meanings of truth and justice.[36] The UN Updated Principles to Combat Impunity provide a useful, if legalistic, starting point. The Principles define truth in forensic terms: "the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led . . . to the perpetration of those crimes."[37] Truth also requires information about "the victims' fate."[38] Subsequently, the Office of the High Commissioner for Human Rights clarified that truth also includes knowing perpetrators' identities.[39] According to the Principles, justice entails "prompt, thorough, independent, and impartial investigations" of atrocities, along with the prosecution, trial, and punishment of perpetrators.[40] Trials must be fair and guarantee the rights of the accused.[41] This ensures that accountability does not result in political show trials. Finally, the Principles define

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Pillay, *Peace versus Justice? The Dilemma of Transitional Justice in Africa* (Scottsville: University of KwaZulu-Natal Press, 2009).

[33] See United Nations, *The Rule of Law and Transitional Justice*, ¶¶ 1 and 18.

[34] Leebaw, "The Irreconciliable Goals of Transitional Justice," 106.

[35] For an important reinterpretation of these goals not discussed here, see United Nations, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff*, UN Doc. A/HRC/21/46 (2012), ¶¶ 19-46.

[36] See Audrey R. Chapman, "Truth Finding in the Transitional Justice Process" and Hugo van der Merwe, "Delivering Justice during Transition: Research Challenges" in *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, ed. Hugo van der Merwe, Victoria Baxter and Audrey R. Chapman (Washington, DC: United States Institute of Peace Press, 2009), 91-114 and 115-42.

[37] United Nations, *Updated Set of Principles to Combat Impunity*, Principle 2.

[38] United Nations, *Updated Set of Principles to Combat Impunity*, Principle 4.

[39] United Nations, *Study on the Right to the Truth: Report of the Office of the High Commissioner for Human Rights*, UN Doc. E/CN.4/2006/91 (2006), ¶¶ 38-40.

[40] United Nations, *Updated Set of Principles to Combat Impunity*, Principle 19.

[41] United Nations, *Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher*, UN Doc. E/DN.4/2005/102 (2005), ¶ 37.

reparations as "measures of restitution, compensation, rehabilitation, and satisfaction" as well as the return of victims' bodies in cases of enforced disappearances.[42]

Some accountability mechanisms are better able to achieve these goals than others. For example, truth commissions are often better than trials at producing the truth about the political, economic, and social "circumstances" of atrocity crimes. Also, different accountability mechanisms do better or worse depending on factors such as funding, and political support. These immediate goals and their attainability will be explored in more detail in Chapters 8-10.

Legal Goals

Legal accountability largely borrows its rationales and goals – deterrence, retribution, and expressivism – from domestic criminal law. This makes some sense as states are supposed to domesticate international criminal law by incorporating it into domestic law and then prosecuting those crimes in domestic tribunals. International trials of international crimes are meant to be a last resort only if states prove "unwilling or unable" to hold domestic trials.

Proponents of legal accountability claim it will promote general deterrence: punishing certain individuals for atrocities will dissuade others from committing atrocities in the future. So far, at least, deterrence has not been convincingly demonstrated.[43] For example, warlords in the eastern Democratic Republic of Congo continue to commit atrocity crimes despite the International Criminal Court's recent prosecution of their fellow warlords.

Accountability serves retributive ends by punishing those who commit atrocities. The problem with retribution, however, is that "no punishment is severe enough" for these crimes.[44] In a famous exchange with Karl Jaspers, Hannah Arendt captured the inadequacy of retribution:

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[42] United Nations, *Updated Set of Principles to Combat Impunity*, Principle 34. These reparations measures correspond to those set out in United Nations, *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law*, UN Doc. A/Res/60/147/Annex (2006).

[43] Compare Sikkink, *The Justice Cascade*, 169-77, 185-88 *with* David Mendeloff, "Deterrence, Norm Socialization, and the Empirical Reach of Kathryn Sikkink's *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*," *Journal of Human Rights* 11, no. 2 (2012), 290-92; Kenneth A. Rodman, "Darfur and the Limits of Legal Deterrence," *Human Rights Quarterly* 30, no. 3 (2008), 529-60.

[44] Letter from Hannah Arendt to Karl Jaspers, August 17, 1946 in *Hannah Arendt Karl Jaspers Correspondence 1926-1969*, ed. Lotte Kohler and Hans Saner (New York: Harcourt Brace Jovanovich, 1992), 54. The punishments handed down for these extraordinary crimes are typically no

> The Nazi crimes, it seems to me, explode the limits of the law; and that is precisely what constitutes their monstrousness. For these crimes, no punishment is severe enough. It may well be essential to hang Göring, but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems. That is the reason why the Nazis in Nuremberg are so smug.[45]

She further stated "We are simply not equipped to deal, on a human, political level, with a guilt that is beyond crime."[46] In these statements, Arendt conflates the limits of retribution with the limits of law as a whole. Defending a positivist notion of criminal guilt as that defined by law, Jaspers wrote back:

> You say that what the Nazis did cannot be comprehended as "crime" – I'm not altogether comfortable with your view, because a guilt that goes beyond all criminal guilt inevitably takes on a streak of "greatness" – of satanic greatness – which is, for me, as inappropriate for the Nazis as all the talk about the "demonic" element in Hitler and so forth. It seems to me that we have to see these things in their total banality.[47]

Arendt found Jaspers' rebuttal "half-convincing": she agreed that she had "come dangerously close to that 'satanic greatness' that I, like you totally reject." Years later, Arendt called her account of the Eichmann trial "a report on the banality of evil."[48]

Given the difficulties of accomplishing deterrence and retribution for atrocity crimes, expressivism offers the most convincing rationale and goal for international criminal law. But what norms are being expressed and how? For Mark Drumbl, expressivism has "as a central goal the crafting of historical narratives, their authentication as truths, and their pedagogical

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more severe than those for serious domestic crimes. Drumbl, *Atrocity, Punishment and International Law*, 154-63.

[45] Letter from Hannah Arendt to Karl Jaspers, August 17, 1946 in *Hannah Arendt Karl Jaspers Correspondence*, 54.

[46] Letter from Hannah Arendt to Karl Jaspers, August 17, 1946 in *Hannah Arendt Karl Jaspers Correspondence*, 54.

[47] Letter from Karl Jaspers to Hannah Arendt, October 19, 1946 in *Hannah Arendt Karl Jaspers Correspondence*, 62.

[48] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1984).

dissemination to the public."[49] That saddles expressivism with the separate, instrumental goal of didactic history – something that trials for international crimes are not good at.[50]

David Luban offers a more compelling version of international criminal law's expressivist goal: it "aims to reconceptualize political violence . . . as mere crime."[51] Luban rightly perceives atrocity crimes as essentially political crimes rather than crimes of hate[52] or manifestations of evil.[53] Trials of international crimes send the message that the worst political crimes are also subject to law. Following Jaspers, international criminal law cuts perpetrators down to size, reducing them from "satanic greatness" to banal criminals.

There are two critiques of such expressivism. The first is that it is depoliticizing. Bronwyn Leebaw writes that:

> The judgments rendered in the context of a criminal trial are inherently depoliticizing to the extent that they condemn politically authorized violence and actions in accordance with legal criteria, and evaluate systematic patterns of violence by isolating the guilt of individual perpetrators. Where trials deviate from this in an effort to teach a history lesson or stage a political drama, they sacrifice their integrity and risk devolving into show trials.[54]

The second critique is exactly the inverse: the criminalizing of political violence through trials is too politicizing. Gerry Simpson writes that "When we treat our enemies as criminals, when world-historical evils are proceduralized . . . we end up with political trials."[55] Both critiques point up the risky nature of using atrocity trials to express norms. Depoliticizing trials may fail to show that atrocity crimes are political, whereas politicizing trials may fail to show that atrocity crimes are crimes.

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[49] Drumbl, *Atrocity, Punishment and International Law*, 173.
[50] See, e.g., Arendt, *Eichmann in Jerusalem*; Richard Ashby Wilson, *Writing History in International Criminal Tribunals* (Cambridge: Cambridge University Press 2011).
[51] David Luban, "State Criminality and the Ambition of International Criminal Law" in *Accountability for Collective Wrongdoing*, ed. Tracy Isaacs and Richard Vernon (Cambridge: Cambridge University Press, 2010), 70 and 75. Compare David Luban, "Beyond Moral Minimalism," *Ethics & International Affairs* 20, no. 3 (2006), 354-55.
[52] José E. Alvarez, "Crimes of States/Crimes of Hate: Lessons from Rwanda," *Yale Journal of International Law* 24, no. 2 (1999), 482.
[53] Claudia Card, *Confronting Evils: Terrorism, Torture, Genocide* (Cambridge: Cambridge University Press, 2010).
[54] Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (Cambridge: Cambridge University Press, 2011), 178.
[55] Gerry Simpson, *Law, War, and Crime* (Cambridge: Polity Press, 2007), 14.

Political Goals

Accountability for atrocity is credited with serving larger political goals, such as human rights, the rule of law, democratization, state-building, and reducing conflict recurrence. It promotes human rights by "naming and shaming" human rights violations, deterring potential violations, and expressing human rights norms. It improves the rule of law, whose essence is government compliance with law and equality before the law. It contributes to liberal democracy, which incorporates both human rights and the rule of law. It strengthens the capacity and legitimacy of state institutions to fulfill core state functions (such as justice and security). Finally, it reduces the possibility of future conflict by marginalizing spoilers, strengthening democracy, and promoting reconciliation.

There is limited evidence as to whether accountability mechanisms actually achieve any of these political goals. This partly reflects the difficulty of defining and measuring the goals, as well as the availability of good cross-national data. So far, there have only been a few large-sample comparative studies looking at the impact of accountability mechanisms on human rights, democracy, and conflict.[56]

Olsen, Payne, and Reiter examine the impact of trials and truth commissions on human rights, democratization, rule of law, and conflict recurrence. They find trials have an "inconclusive" effect on human rights and democratization, while truth commissions on their own have "a significant, negative effect."[57] Even more surprisingly, states which adopt impunity (in the form of de facto amnesties) show greater improvement in their rule of law indicators.[58] In addition, they "find very little evidence that transitional justice choices following conflict termination make conflicts any more or less likely to recur."[59]

Kathryn Sikkink and her colleagues look at the effect of trials and truth commissions on human rights. They discover that both post-authoritarian and post-conflict

> countries with human rights prosecutions have better human rights practices than countries without prosecutions. In addition, transitional countries that have experienced more prosecutions over time (and thus a greater likelihood

[56] For a thorough review of the empirical research on the effects of trials and truth commissions, see Oskar N.T. Thoms, James Ron, and Roland Paris, "State-Level Effects of Transitional Justice: What Do We Know?" *International Journal of Transitional Justice* 4, no. 3 (2010), 329-54. See also van der Merwe, Baxter, and Chapman, *Assessing the Impact of Transitional Justice*.
[57] Olsen, Payne and Reiter, *Transitional Justice in Balance*, 153.
[58] Olsen, Payne and Reiter, *Transitional Justice in Balance*, 138 n.12.
[59] Andrew G. Reiter, Tricia D. Olsen, and Leigh A. Payne, "Transitional Justice and Civil War: Exploring New Pathways, Challenging Old Guideposts," *Transitional Justice Review* 1, no. 1 (2012), 165.

> of punishment for past violations) have better practices than countries that have had no or fewer prosecutions.[60]

They also find that truth commissions have a positive, if smaller, improvement on human rights.[61]

Lie, Binningsbø, and Gates analyze the effects of post-conflict accountability on peace in 200 post-conflict societies. Their findings show that

> trials contribute to peace duration, but the results are weak and sensitive to how the conflict terminated. Conflicts terminating by victory increase the chances of trials and prolong the peace period, though this finding is somewhat weaker when we look at post-conflict democratic societies only. . . . reparation to victims and truth commissions, have a prolonging effect on the duration of peace in post-conflict democratic societies.[62]

Their research suggests that conflict termination and post-conflict regime type may have more effect on peace than accountability mechanisms.

These three large-N studies represent an important methodological shift in assessing whether accountability meets some of its political goals. Still, they leave some key questions unanswered. The first is whether trials and truth commissions are "the result of a profound normative shift or a pragmatic, material, or cynically instrumental one."[63] A second question is *how* trials and truth commissions affect human rights, democratization, and peace. Sikkink hypothesizes that trials may reduce human rights violations through deterrence and through "communicating and dramatizing societal norms" but she acknowledges the need for further research.[64] A third asks how differences in the design and implementation of trials and truth commissions impact outcomes. The last question is how political and legal contexts (e.g. post-transition regime type) change outcomes. Leslie Vinjamuri questions "whether justice always contributes to more robust human rights practices, or whether this is the case only when institution are strong, spoilers are contained, and governments generally favor democracy and the rule of law anyway."[65]

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[60] Sikkink, *The Justice Cascade*, 185.
[61] Sikkink, *The Justice Cascade*, 184-85.
[62] Tove Grete Lie, Helga Malmin Binningsbø, and Scott Gates, "Post-Conflict Justice and Sustainable Peace," World Bank Policy Research Working Paper 4191 (2007), 17.
[63] Mendeloff, "Deterrence, Norm Socialization," 290.
[64] Sikkink, *The Justice Cascade*, 185, 187-88.
[65] Leslie Vinjamuri, "Review of Kathryn Sikkink's *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*," *Journal of Human Rights* 11, no. 2 (2012), 286.

Overall, then, there is limited empirical evidence that accountability mechanisms actually meet the goals, particularly the longer-term political goals, that have been assigned to them. But the problem may lie not so much with the mechanisms but with the setting of unrealistic goals. Should we really expect trials and truth commissions to contribute to peace and democracy? Assigning trials the responsibility to make a meaningful contribution to peace and then criticizing them for failing to achieve this goal may be another "example of how conceptual profligacy with [] goals . . . may discredit [programs] in general."[66]

An Ultimate Goal: Reconciliation

Accountability mechanisms – from the South African Truth and Reconciliation Commission to the International Criminal Tribunal for Rwanda – have promised reconciliation. Yet, reconciliation has proved maddeningly elusive, both as a concept and as an end-state. There is a real lack of clarity over whether reconciliation is process or outcome, inter-personal or inter-communal, local or national, bottom-up or top-down, attitudinal or behavioral, psychological or political.[67] Here, the focus is on the community and national levels.

David Crocker helpfully distinguishes among three competing conceptions of reconciliation that range from minimalist to maximalist: peaceful coexistence, civic trust, and mutual forgiveness.[68] This section quickly addresses the minimalist and maximalist accounts before focusing on the middle position. Peaceful coexistence is simply the absence of conflict. At bottom, it is about tolerating others. While peaceful coexistence is clearly an accomplishment after mass violence, it strikes some theorists as insufficiently ambitious or morally anaemic. Johan Galtung famously calls it "negative peace" and unfavorably contrasts it with "positive peace."[69] Crocker argues that "transitional societies should aim for more" than coexistence.[70] By contrast, Steven Sampson offers a spirited defense of coexistence. He sees coexistence as a more accurate description of how societies, and not just post-conflict

[66] Pablo de Greiff, "Establishing Links between DDR and Reparations" in *Disarming the Past: Transitional Justice and Ex-Combatants*, ed. Ana Cutter Patel, Pablo de Greiff, and Lars Waldorf (New York: SSRC, 2010), 132.
[67] For an excellent guide through the thicket of competing interpretations, see Audrey R. Chapman, "Approaches to Studying Reconciliation" in *Assessing the Impact of Transitional Justice*, 144-51.
[68] David A. Crocker, "Truth Commissions, Transitional Justice and Civil Society," in *Truth v. Justice*, 108.
[69] Johan Galtung, "After Violence, Reconstruction, Reconciliation, and Resolution" in *Reconciliation, Justice and Coexistence: Theory and Practice*, ed. Mohammed Abu-Nimer (Lanham, MD: Lexington Books, 2001), 3-24.
[70] Crocker, "Truth Commissions, Transitional Justice and Civil Society," 108.

societies, actually function. As he puts it, "Reconciliation postulates a situation prior to conflict that is marked by peace, friendship, and understanding – yet these circumstances most likely existed only as someone's nostalgia."[71]

Reconciliation as forgiveness comes in both religious and secular versions. The best known religious variant comes from Archbishop Desmond Tutu in his work with the South African Truth and Reconciliation Commission.[72] Jens Meierhenrich proffers a secular conception of reconciliation that requires both forgiveness ("the forswearing of resentment") and mercy ("an act of compassion to the undeserving person").[73] In his view, reconciliation "calls for nothing less than an ethics of caring for the enemy."[74] The problem with making reconciliation depend on forgiveness is that, as Susan Dwyer says, it "will fail to be a realistic model of reconciliation for most creatures like us."[75] But Meierhenrich deliberately adopts such a demanding standard precisely to ensure that reconciliation is a rare achievement: "The formulation of realistic concepts of reconciliation that are more attainable in practice . . . is counterproductive, for if reconciliation is everywhere, it is nowhere."[76] While Meierhenrich's attempt to rein in the conceptual profligacy of reconciliation is commendable, it appears to be a lost cause. Thus, it seems more fruitful to carve out a realistic concept – civic trust – that lies between coexistence and forgiveness, and which resolutely avoids the devalued currency of reconciliation.

Before moving on to civic trust, it is worth addressing another secular and maximalist conception of reconciliation that has gained traction. Some scholars define reconciliation as political, economic and social transformation.[77] For Erin Daly and Jeremy Sarkin, such transformation is necessarily democratic. They reconceptualize reconciliation as restructuring society "to promote the values common to an inclusive democratic state."[78] Under this view,

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[71] Steven L. Sampson, "From Reconciliation to Coexistence," *Public Culture* 15, no. 1 (2003), 181.
[72] Tutu, *No Future Without Forgiveness*.
[73] Jens Meierhenrich, "Varieties of Reconciliation," *Law & Social Inquiry* 33, no. 1 (2008), 206.
[74] Meierhenrich, "Varieties of Reconciliation," 211. This shares an affinity with those who argue that reconciliation requires empathy and rehumanizing the other. See Jodi Halpern and Harvey Weinstein, "Rehumanizing the Other: Empathy and Reconciliation," *Human Rights Quarterly* 26, no. 3 (2004), 561-83.
[75] Susan Dwyer, "Reconciliation for Realists," *Ethics & International Affairs* 13, no. 1 (1999), 97-98.
[76] Meierhenrich, "Varieties of Reconciliation," 211.
[77] See, e.g., Brandon Hamber and Gráinne Kelly, "Beyond Coexistence: Towardss a Working Definition of Reconciliation" in *Reconciliation(s): Transitional Justice in Postconflict Societies*, ed. Joanna R. Quinn (Montreal: McGill-Queen's University Press, 2009), 291-92.
[78] Erin Daly and Jeremy Sarkin, *Reconciliation in Divided Societies: Finding Common Ground* (Philadelphia: University of Pennsylvania Press, 2007), 189. See *id*., xiv, 256-58.

reconciliation is not about groups getting along, but about groups going along with shared democratic values.[79] Stover and Weinstein share a similar perspective. They propose replacing reconciliation with "an ecological model of social reconstruction."[80] For them, social reconstruction comprises "(1) security; (2) freedom of movement; (3) the rule of law; (4) access to accurate and unbiased information; (5) justice; (6) education for democracy; (7) economic development; and (8) cross-ethnic engagement."[81] The latter is defined as more than contact and coexistence: engagement involves "efforts to rehumanize perceptions of former enemies through empathy-building."[82] All these secular, maximalist conceptualizations share a common problem: they are overly expansive and wind up conflating reconciliation with democratic peace-building.[83]

Turning now to the middle view of reconciliation, civic trust is more than mere toleration but less than forgiveness: "former enemies . . . respect each other as fellow citizens."[84] In an early piece, Amy Gutmann and Dennis Thompson argue that reconciliation-as-forgiveness is "deeply undemocratic" in its attempt to coerce moral and political consensus.[85] By contrast, they advocate civic trust because it permits dissensus and promotes deliberative democracy. In addition, civic trust allows individuals to freely choose forgiveness *or* resentment, both of which are moral responses to suffering.[86] For Gutmann and Thompson, some accountability mechanisms are better at fostering deliberative democracy:

> Unlike a trial that depends on making a definite binary choice between guilt and innocence, a truth commission can encourage accommodation to

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[79] Daly and Sarkin, *Reconciliation in Divided Societies*, 199.
[80] Harvey M Weinstein and Eric Stover, "Introduction: Conflict, Justice and Reclamation" and Eric Stover and Harvey M. Weinstein, "Conclusion: A Common Objective, A Universe of Alternatives" in *My Neighbor My Enemy* 13-20 and 323-42. Somewhat confusingly, they continue using the term "reconciliation" within their model.
[81] Stover and Weinstein, "Conclusion," 327-28.
[82] Stover and Weinstein, "Conclusion," 339. See Halpern and Weinstein, "Rehumanizing the Other."
[83] See Chapman, "Approaches to Studying Reconciliation, " 151.
[84] Crocker, "Truth Commissions, Transitional Justice and Civil Society," 108.
[85] Amy Gutmann and Dennis Thompson, "The Moral Foundations of Truth Commissions" in *Truth v. Justice*, 32. Similarly, Ash argues that such reconciliation is "deeply illiberal." Timothy Garton Ash, "True Confessions," *New York Review of Books*, July 17, 1997, 37.
[86] For a bracing moral defense of resentment, see Jean Améry, *At the Mind's Limits: Contemplations by a Survivor on Auschwitz and its Realities*, trans. Sidney Rosenfeld and Stella P. Rosenfeld (Bloomington: Indiana University Press, 1980), 70. For an application of Améry to transitional justice, see Thomas Brudholm, *Resentment's Virtue: Jean Améry and the Refusal to Forgive* (Philadelphia: Temple University Press, 2008).

> conflicting views that fall within the range of reasonable disagreement . . . a practice that itself is an exercise in democratic politics.[87]

Similarly, Leigh Payne argues that the clash of competing interpretations in truth commissions promotes "contentious coexistence" – that is, "a conflictual dialogic approach to democracy in deeply divided societies."[88] Payne explicitly limits her claim to states transitioning from an authoritarian past to a democratic present.[89]

Other scholars also define reconciliation largely in terms of civic trust. James Gibson treats reconciliation "as something of a meta-concept" that incorporates inter-racial trust, political toleration, trust in political institutions, and support for human rights. While he acknowledges this is a "conceptual innovation," he points to the advantage of having measurable components.[90] In like fashion, Audrey Chapman defines national-level reconciliation as a long-term process with two strands:

> First, it involves transforming social and political relationships among former antagonists. Members of major social groups and communities need to achieve sufficient accommodation, tolerance, and trust to be able to live together peacefully and cooperate and collaborate with one another. Second, it involves establishing a new type of relationship between the citizens and the government. To that end, reconciliation requires the development of political institutions and processes that nurture and sustain a stable, decent, and equitable society based on the rule of law and respect for human rights. The evolution of a new political covenant also involves inculcating political legitimacy and trust on the part of the people and a commitment to a common future.[91]

Trust is both horizontal (between groups) and vertical (between citizens and the state). Chapman helpfully lists several contextual factors that affect the reconciliation process,

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[87] Gutmann and Thompson, "The Moral Foundations of Truth Commissions," 40.
[88] Leigh Payne, *Unsettling Accounts: Neither Truth Nor Reconciliation in Confessions of State Violence* (Durham: Duke University Press, 2008), 3. Payne's emphasis on democratic dialogue is what distinguishes "contentious coexistence" from the "peaceful coexistence" discussed above. See *id*., 35-40.
[89] Payne, *Unsettling Accounts*, 3, 34-35. Her case studies are Argentina, Brazil, Chile, and South Africa. It is not clear how democratic states need already be for confessional performances to have this effect.
[90] James L. Gibson, "Taking Stock of Truth and Reconciliation in South Africa: Assessing Citizen Attitudes through Surveys" in *Assessing the Impact of Transitional Justice*, 176-80.
[91] Chapman, "Approaches to Studying Reconciliation," 151-52.

including: sources, type, and scale of past abuses; passage of time; personal security; sense of shared national belonging; and effectiveness, inclusiveness, and legitimacy of political institutions.[92]

Does Transitional Justice Promote Reconciliation?

Reconciliation discourse has migrated from peace-building to transitional justice, where it sits uneasily with more legalistic, rights-based approaches.[93] Now, accountability mechanisms frequently promise reconciliation. There are three main arguments as to how transitional justice might advance reconciliation. The first posits that accountability, particularly through trials, can break cycles of violence. The second argument holds that truth-telling leads to forgiveness and closure for individuals and, by extension, society. Finally, and more modestly, it is argued that transitional justice fosters civic trust. These three accounts partly line up with the differing conceptions of reconciliation: peaceful coexistence, mutual forgiveness, and civic trust.

Criminal trials supposedly break cycles of violence by demonstrating that individuals, rather than collectives, are guilty. Martha Minow, for example, contends that "The emphasis on individual responsibility offers an avenue away from the cycles of blame that lead to revenge, recrimination, and ethnic and national conflicts."[94] However, researchers have found that trials at the International Criminal Tribunal for the Former Yugoslavia actually reinforced collective ethnic identities.

> On the one hand, the intention of the court is to individualize guilt and to take the burden off a whole nation. . . . On the other hand, members of the national group from which the convicted persons originated often personalized those trials and experienced them as trials directed against "their" collective. Hence the oft-repeated admonition: "We are the only ones that are tried in The Hague."[95]

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[92] Chapman, "Approaches to Studying Reconciliation," 155-58.
[93] See Lorna McGregor, "Reconciliation: I Know It When I See It," *Contemporary Justice Review* 9, no. 2 (2006), 159-60.
[94] Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), 40; Martha Minow, "Breaking the Cycles of Hatred" in *Breaking the Cycles of Violence: Memory, Law and Repair*, ed. Martha Minow and Nancy L. Rosenblum (Princeton: Princeton University Press, 2002), 14-30.
[95] Dinka Corkalo et al., "Neighbors Again? Intercommunity Relations after Ethnic Cleansing" in *My Neighbor, My Enemy*, 143, 148.

Those findings have been replicated by other scholars.[96] In addition, Eric Stover found that "criminal trials – especially those of local perpetrators – often divided small multiethnic communities by causing further suspicion and fear."[97]

Transitional justice has been dominated by a post-Freudian faith in talk therapy: speaking memories of violence will promote catharsis, closure, and ultimately healing. This was encapsulated by the South African Truth and Reconciliation Commission's banner "Revealing is Healing." However, a study of black South African victims who testified before the Commission demonstrated that the act of testifying had no therapeutic effect.[98] After research with Yugoslav witnesses at the International Criminal Tribunal for the Former Yugoslavia, Stover warned that war crimes tribunals "should not be viewed as vehicles for individual psychological healing."[99] Overall, there is little evidence that truth-telling, whether through truth commissions or trials, produces individual or social healing.[100]

Pablo de Greiff conceptualizes transitional justice as a means of promoting civic trust, the recognition of individuals as citizens, and social solidarity.[101] He defines civic trust as "a mutual sense of commitment to shared norms and values" among "members of the same political community."[102] De Greiff's notion of civic trust like Payne's contentious coexistence seems premised on the successor regime transitioning towardss democracy.[103] Gibson uses opinion survey data to argue that inter-racial and political trust in South Africa improved as a result of the Truth and Reconciliation Commission.[104]

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[96] See, e.g., Miklos Biro et al., "Attitudes Towards Justice and Social Reconstruction in Bosnia and Herzegovina and Croatia" in *My Neighbor, My Enemy*, 183-205; Laurel E. Fletcher and Harvey M. Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation," *Human Rights Quarterly* 24, no. 3 (2002), 615.

[97] Stover, *The Witnesses*, 15.

[98] Debra Kaminer, et al., "The Truth and Reconciliation Commission in South Africa: Relation to Psychiatric Status and Forgiveness among Survivors of Human Rights Abuses," *British Journal of Psychiatry* 178, no. 4 (2001), 373-77. See Office of the United Nations High Commissioner for Human Rights (OHCHR), "Rule-of-Law Tools for Post-Conflict States: Truth Commissions," HR/PUB/06/1 (2006), 2.

[99] Stover, *The Witnesses*, 32.

[100] See David Mendeloff, "Truth-Seeking, Truth-Telling, and Post-Conflict Peace-building: Curb the Enthusiasm?" *International Studies Review* 6, no. 3 (2004), 355-80.

[101] See, e.g., De Greiff, "Justice and Reparations," 460-66. Arguably, recognition and solidarity are constituent components of civic trust.

[102] De Greiff, "Justice and Reparations," 462.

[103] De Greiff, "Justice and Reparations," 464.

[104] See James L. Gibson, *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?* (New York: Russell Sage Foundation, 2004). For a critique of Gibson's concept and measurement of reconciliation, see Meierhenrich, "Varieties of Reconciliation," 215-24; van der Merwe and Chapman, "Did the TRC Deliver?" 261-62.

So far, there is very little empirical evidence that transitional justice actually promotes reconciliation. In part, this reflects the difficulty in defining and measuring reconciliation. Not surprisingly, most of the empirical research that does exist has focused on the South African Truth and Reconciliation Commission. That research suggests the Commission did not break cycles of (black-on-black) violence[105] or lead to mutual forgiveness.[106] However, it may have increased civic trust somewhat.[107]

Challenging the Nuremberg Paradigm

For all its actual flaws, the Nuremberg Tribunal gave rise to an enduring paradigm of accountability for atrocity: liberal-legalist trials dispensing retributive justice for individuals and expressing cosmopolitan norms for humanity. While Shklar recognizes that Nuremberg was a political trial, she defends it as a fair trial that "serve[d] liberal ends, where they promote legalistic values in such a way as to contribute to constitutional politics and to a decent legal system."[108] She justifies Nuremberg in expressivist terms as the communication of liberal-legalist norms. Following Shklar, Gary Bass sees Nuremberg and subsequent international criminal tribunals as the principled expression of liberal-legalist states.[109]

The Nuremberg Tribunal famously pronounced the Nazi crimes to have been committed "by men, not by abstract entities."[110] The Tribunal emphasized its adherence to "well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided."[111] This legal principle dictates a strategy of exemplary prosecutions focused on those individuals deemed most criminally responsible. The Nuremberg Tribunal tried 22 defendants in just over a year. The idea of trying several thousand mid-ranking Nazis was quickly dropped as too impractical. The US conducted another 12 thematic trials of some 185 Germans between 1946 and 1949.

Subsequent international, hybrid, and national tribunals have largely followed suit in pursuing exemplary prosecutions. As of August 2013, two accused had been judged at the International Criminal Court, 87 at the International Criminal Tribunal for the Former Yugoslavia, 75 at the International Criminal Tribunal for Rwanda, 88 at East Timor's Special

[105] See Wilson, *The Politics of Truth and Reconciliation*, 156-87.
[106] See Audrey Chapman, "Perspectives on the Role of Forgiveness in the Human Rights Violations Hearings" in *Truth and Reconciliation in South Africa*, 66-89.
[107] See Gibson, *Overcoming Apartheid*.
[108] Shklar, *Legalism*, 145.
[109] Bass, *Stay the Hand of Vengeance*. For a critique, see Simpson, *Law, War & Crime*, 24.
[110] *France et al. v. Goering et al.*, 22 IMT 411, 466 (Int'l Mil. Trib. 1946).
[111] Quoted in Osiel, *Making Sense of Mass Atrocity*, 18.

Panels for Serious Crimes, nine at the Special Court for Sierra Leone, and one at the Extraordinary Chambers in the Courts of Cambodia. The notable exception was the War Crimes Chamber in Bosnia-Herzegovina which has judged hundreds of accused. All domestic jurisdictions, apart from Rwanda, have conducted exemplary prosecutions. The numbers vary considerably, even within Latin America, which has seen the most domestic human rights trials. For example, Argentina has judged more than 400 compared to Peru with 179.[112] Domestic courts have judged very few accused under universal jurisdiction.[113]

This exemplary prosecution strategy is partly dictated by logistics: the number of perpetrators frequently outstrips judicial capacity and resources. Still, it can be argued that the prosecution of a limited number who are "most responsible" better serves deterrent, retributivist, and expressivist goals. In reality, though, tribunals often make examples of relatively low-level perpetrators who were easier to apprehend and prosecute: the first cases before the Yugoslavia and Rwanda Tribunals involved a sadistic prison guard and a local mayor. As a result, exemplary prosecutions start to look less than principled.[114]

Recent years have seen two key challenges to the Nuremburg paradigm: the collectivizing and the localizing of accountability.

Collectivizing Accountability

Since Nuremberg, individual criminal responsibility has been the defining principle of accountability for atrocity.[115] It is now enshrined in the Rome Statute of the International Criminal Court.[116] Individual criminal responsibility has three distinct advantages:

> simplicity (it is no longer necessary to explain the reasons why crimes are committed . . .), parsimony (the question of guilt is pared down to an investigation of one person's mental state and capacity) and depoliticization

[112] For the Latin American estimates, see Cath Collins, Lorena Balardini and Jo-Marie Burt, "Mapping Perpetrator Prosecutions in Latin America," *International Journal of Transitional Justice* 7, no. 1 (2013), 8-28; Marcela Valente, "A Year of Progress in Argentina's Human Rights Trials," IPS News Agency, December 26, 2012; Human Rights Trials in Peru, available at http://rightsperu.net/index.php?option=com_content&view=article&id=118&Itemid=57.

[113] See Luc Reydams, "The Rise and Fall of Universal Jurisdiction" in *Routledge Handbook of International Criminal Law*, ed. William A. Schabas and Nadia Bernaz (Abingdon: Routledge, 2011), 337-54.

[114] See Drumbl, *Atrocity, Punishment, and International Law*, 151-54.

[115] See Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd ed. (2001), 3-25; Sikkink, *The Justice Cascade*.

[116] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, art. 25.

(the central questions become narrowly psychological rather than expansively political).[117]

Antonio Cassesse, the distinguished legal scholar and first President of the International Criminal Tribunal for the former Yugoslavia, wrote in 2003 that "collective responsibility is no longer acceptable."[118] That pronouncement was ill-timed. International tribunals were already developing legal doctrines to hold individuals accountable for atrocities committed by collectives. Several legal scholars were already challenging the Nuremburg paradigm of individual criminal responsibility and exemplary prosecutions. Rwanda was already implementing a maximalist prosecution strategy that sought to promote collective political responsibility (if not collective criminal guilt).

In recent years, international and hybrid tribunals have developed legal doctrines that make it easier to convict members of a collective for atrocities committed by others in that collective. Those in "command responsibility" within hierarchical organizations can be held criminally responsible for atrocities committed by their subordinates.[119] Persons can also be convicted as co-perpetrators based on membership in an amorphous "joint criminal enterprise" – even in the absence of actual agreement or shared intent – so long as atrocities by other members were vaguely foreseeable.[120] Finally, influential bystanders can be successfully prosecuted as "approving spectators" even if they were not actually present at the commission of atrocities.[121] These legal doctrines are understandably popular with prosecutors but are criticized by scholars, some of who worry about the erosion of individual criminal responsibility.[122]

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[117] Simpson, *Law, War, and Crime*, 67.

[118] Antonio Cassesse, *International Criminal Law* (Oxford: Oxford University Press, 2003), 136.

[119] See, e.g., Robert Cryer, "The Ad Hoc Tribunals and the Law of Command Responsibility: A Quiet Earthquake" in *Judicial Creativity at the International Criminal Tribunals*, ed. Shane Darcy and Joseph Powderly (Oxford: Oxford University Press, 2010), 159-83; Shane Darcy, *Collective Responsibility and Accountability under International Law* (Leiden: Transnational Publishers, Inc., 2007), 293-357.

[120] See, e.g., *Prosecutor v. Édouard Karemera, et al.*, Decision on Jurisdictional Appeals: Joint Criminal Enterprise (ICTR-98-44-AR72.5, ICTR-98-44-AR72.6), 12 April 2006; Darcy, *Collective Responsibility and Accountability*, 226-255; Mohamed Shahabuddeen, "Judicial Creativity and Joint Criminal Enterprise" in *Judicial Creativity at the International Criminal Tribunals*, 184-203.

[121] See e.g., *Prosecutor v. Joseph Nzabirinda* (Case No. ICTR-01-77), Judgment, 23 Feb. 2007; Gideon Boas, "Omission Liability at the International Criminal Tribunals – A Case for Reform" in *Judicial Creativity*, 204-27.

[122] See e.g., Osiel, *Making Sense of Mass Atrocity*, 48-90; Harmen van der Wilt, "Joint Criminal Enterprise and Functional Perpetration," in *System Criminality in International Law*, ed. André Nollkaemper and Harmen van der Wilt (Cambridge: Cambridge University Press, 2009), 158-82; Alison Marsten Danner and Jenny S. Martinez, "Guilty Associations: Joint Criminal Enterprise,

At the same time as these new legal doctrines emerged, several scholars started questioning the orthodoxy around individual criminal responsibility. Addressing post-genocide justice in Rwanda, Mark Drumbl asks: "are there not times and places where collective wrongdoing needs to be exposed and not hidden by the criminal trial's preference for individual fault?"[123] Thinking about Argentina's Dirty War, Mark Osiel suggests imposing collective sanctions on an officer corps.[124] Martti Koskenniemi provocatively argues that "the individualization of guilt is a policy – namely a policy of collective impunity."[125] He contends that individual trials create a distorted, intentionalist historiography of mass atrocity by "exonerating from responsibility those larger (political, economic, even legal) structures within which the conditions for individual criminality have been created."[126] Similarly, Leebaw notes that "the goal of 'individualizing guilt' is also in direct tension with the goal of countering denial regarding widespread complicity in systematic political violence."[127] These scholars and others have sought to make collective responsibility and its close cousin, system criminality, respectable.[128]

To fully understand the debates over collective responsibility, it is necessary to go back to the work of Karl Jaspers and Hannah Arendt. The Nuremberg trial prompted Jaspers to write *The Question of German Guilt* in which he famously distinguished between criminal guilt and political responsibility. Criminal guilt is fundamentally individual: "A people . . . cannot be a criminal." By contrast, political responsibility is inescapably collective: "Everybody is co-responsible for the way he is governed." Jaspers considered that all Germans – even those like him who had opposed Nazism – were collectively responsible as citizens for the Nazi crimes. Consequently, German citizens should pay reparations to the victims of Nazi crimes.[129]

Command Responsibility and the Development of International Criminal Law," *California Law Review* 93, no. 1 (2005).

[123] Drumbl, "Restorative Justice and Collective Responsibility."

[124] Mark Osiel, "The Banality of Good: Aligning Incentives against Mass Atrocity," *Columbia Law Review* 105, no. 6 (2005), 1751-1862.

[125] Martti Koskenniemi, "Between Impunity and Show Trials" in *The Politics of International Law*, ed. Martti Koskenniemi (Oxford: Hart, 2011), 182 n. 51.

[126] Koskenniemi, "Between Impunity and Show Trials," 182.

[127] Leebaw, "The Irreconciliable Goals of Transitional Justice," 110.

[128] See, e.g., Isaacs and Vernon, ed., *Accountability for Collective Wrongdoing*; Nollkaemper and van der Wilt, ed., *System Criminality in International Law*; Alette Smeulers, ed., *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* (Mortsel, Belgium: Intersentia Publishers, 2010).

[129] Karl Jaspers, *The Question of German Guilt*, trans. E.B. Ashton (New York: Fordham University Press, 2000), 25-26, 35-36.

Hannah Arendt subsequently drew an even "sharper dividing line between political (collective) responsibility, on one side, and moral and/or legal (personal) guilt on the other."[130] She rejected the notion of collective guilt, which "only served to exculpate to a considerable degree those who actually were guilty":

> Where all are guilty, nobody is. Guilt, unlike responsibility, always singles out; it is strictly personal. It refers to an act, not to intentions or potentialities.[131]

Like Jaspers, she sees collective responsibility as "always political," as when "a community is being held responsible for what has been done in its name."[132] For members of that political community, collective responsibility is inescapable:

> This vicarious responsibility for things we have not done, this taking upon ourselves the consequences for things we are entirely innocent of, is the price we pay for the fact that we live our lives not by ourselves but among our fellow men, and that the faculty of action, which, after all, is the political faculty par excellence, can be actualized only in one of the many and manifold forms of human community.[133]

According to this conception, all German citizens are collectively responsible for the crimes that the Nazis committed in their name.

Some contemporary scholars worry that individual criminal responsibility lets states, like post-Milosevic Serbia, off the hook.[134] After all, genocide and crimes against humanity are most often committed as a matter of state policy. Put another way, Eichmann and the *Interahamwe* only become criminals within a criminal state.[135] Thomas Franck, who represented Bosnia in its genocide case against Yugoslavia at the International Court of Justice, argued:

> When a state deliberately leads, helps, trains, arms, clothes, pays, and inspires

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[130] Hannah Arendt, "Collective Responsibility" in Hannah Arendt, *Responsibility and Judgment*, ed. Jerome Kohn (New York: Shocken Books, 2003), 150-51.
[131] Arendt, "Collective Responsibility," 147.
[132] Arendt, "Collective Responsibility," 149. This considerably simplifies the philosophical differences between Jaspers and Arendt. See Andrew Schaap, "Guilty Subjects and Political Responsibility: Arendt, Jaspers and the Resonance of the 'German Question' in Politics of Reconciliation," *Political Studies* 49, no. 4 (2001), 758-59.
[133] Arendt, "Collective Responsibility," 158.
[134] Jelena Subotić, "Expanding the Scope of Post-Conflict Justice: Individual, State and Societal Responsibility for Mass Atrocity," *Journal of Peace Research* 48, no. 2 (2011), 157-58. See Drumbl, *Atrocity, Punishment and International Law*, 35.
[135] Arendt, *Eichmann in Jerusalem*, 240; Luban, "State Criminality," 77.

> those who do commit genocide, then, while the passive citizenry does not share the perpetrators' guilt, it does share responsibility for the enormity of what was done in the citizenry's name *and the citizens' responsibility to help make amends*.[136]

Citizens can make amends through having their state pay reparations. Franck contends that state responsibility is good public policy in that it:

> puts all citizens on notice that they cannot escape responsibility for the crimes committed by those acting in their name. This may even encourage them to summon the courage to bring their government's unlawful activity to a halt. They should, in any event, be aware that their society's tolerance of, or complicity in, illegal and harmful conduct cannot be expiated by the punishment of a few leaders.[137]

Franck's position resembles that of Jaspers and Arendt. The International Court of Justice ruled that Serbia had civil liability for the Srebrenica genocide but did not award reparations to Bosnia. While the Court noted that state responsibility coexists with individual responsibility, its reasoning and decision demonstrate that state responsibility takes a back seat to individual criminal prosecutions.[138]

Other legal scholars focus less on state accountability. Instead, they want to address the mass complicity that makes mass atrocity possible in the first place.[139] Both Mark Drumbl and Larry May seek ways to punish the collective wrongdoing of bystanders to genocide. Drumbl looks beyond international criminal law to other accountability mechanisms that could impose non-criminal, collective sanctions.[140] May, on the other hand, proposes ways to tweak the law of genocide. His most radical suggestion is to expand legal complicity to encompass omissions:

> Atrocities are fueled by the omissions of many people, and deterring such atrocities as genocide will require prosecuting those who were complicit in that they failed to act in ways that would have prevented the genocide.[141]

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[136] Franck, "Individual Criminal Liability and Collective Responsibility," 572-73.
[137] Thomas Franck, "State Responsibility in the Era of Individual Accountability," Rapoport Center Workshop on Human Rights and Justice, Sept. 25, 2006, 26.
[138] Drumbl, "Collective Responsibility and Postconflict Justice," 46-54.
[139] See e.g., Osiel, *Making Sense of Mass Atrocity*, 16-30; Drumbl, *Atrocity, Punishment and International Law*, 25-26.
[140] Drumbl, *Atrocity, Punishment and International Law*, 202-04.
[141] May, *Genocide*, 168.

May does not go so far as imposing a duty to rescue or strict liability on bystanders. Rather, he proposes that the act of omission "must have made some difference" with the difference being that "the harm (i.e. the genocidal killing) would have been 'significantly less likely'" if the bystander had not committed his/her omission.[142] The accomplice need not share the principal perpetrator's specific genocidal intent to destroy the group in whole or in part. May states that his notion of complicity is still grounded in individual criminal responsibility "[b]ut there is a sense that a wider group is implicated when an individual is tried for complicity."[143] A further way to implicate that "wider group" is to prosecute as many individuals for complicity as possible.[144]

Localizing Accountability

Accountability for atrocity often reflects an awkward mix of cosmopolitan values and state interests. Although Nuremberg prosecuted "crimes against humanity," it was four states that did the prosecuting. The International Criminal Court represents a significant advance with its 122 state parties. Still, the ICC is uncomfortably dependent on states for obtaining jurisdiction, evidence, and suspects. Under the doctrine of complementarity, it can only assert jurisdiction if states prove "unwilling or unable" to prosecute crimes against humanity, genocide, and war crimes. But states unwilling to prosecute may not be any more willing to let the ICC prosecute – as Sudan and Libya show.

There is growing criticism of accountability's cosmopolitanism and state-centrism. Some argue the international community is imposing Western values (e.g. liberal-legalism, individualism) on local communities in the name of moral universalism.[145] Others contend that international criminal justice crowds out more local, restorative approaches to accountability.[146] Still others critique accountability for strengthening the state which played such a large role in perpetrating atrocities in the first place.[147]

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[142] May, *Genocide*, 168.
[143] May, *Genocide*, 174-75.
[144] Larry May, "Complicity and the Rwandan Genocide," *Res Publica* 16, no. 2 (2010), 151.
[145] See, e.g., Abdullahi Ahmed An-Na'im, "Editorial Note: From the Neo-Colonial 'Transition' to Indigenous Formations of Justice," *International Journal of Transitional Justice* 7, no. 2 (2013), 197-204; Moses Chrispus Okello, "Afterword: Elevating Transitional Local Justice or Crystallizing Global Governance?" in Rosalind Shaw and Lars Waldorf, *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (Stanford: Stanford University Press, 2010), 277-80.
[146] See, e.g., Drumbl, *Atrocity, Punishment and International Law*, 147-48.
[147] See, e.g., Kieran McEvoy, "Letting Go of Legalism: Developing a 'Thicker' Version of Transitional Justice" in *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, ed. Kieran McEvoy and Lorna McGregor (Oxford: Hart, 2008), 25-28.

Drumbl worries that the International Criminal Court's complementarity doctrine creates a strong incentive for states to adopt legalistic criminal trials to preclude the Court from asserting jurisdiction. For him, complementarity encourages legal mimicry and legal transplants, thereby displacing local conceptions and practices of accountability. To prevent that, he proposes "cosmopolitan pluralism" where international mechanisms would grant qualified deference to national and local justice mechanisms that do not conform to liberal-legalism. Drumbl sets out six criteria – including "good faith" and "the democratic legitimacy of the procedural rules" – for deciding on deference. Relying on those criteria, Drumbl states that Rwanda's *gacaca* would be entitled to qualified deference, but that Afghanistan's *Pashtunwali* would not.[148]

While the ICC has promoted some homogenization among state parties (particularly with respect to domestic incorporation of the Rome Statute), there has been far less than Drumbl predicted. There are several reasons for this. First, complementarity has not prodded states to mimic liberal-legalist trials. Instead, states have proved only too happy to make "self-referrals" to the ICC[149] or to refuse cooperation with the ICC. State parties have recognized the ICC is a weak institution with limited reach. Second, international justice may actually (if unwittingly) spur local resistance and alternative justice mechanisms – as the ICC did with *mato oput* in northern Uganda and the ICTR did with *gacaca* in Rwanda. Third, as we shall see, Rwanda is a counter-example to Drumbl's claim that "national and local actors will take their cues, and model their behavior, from how international institutions process those deemed most responsible for atrocity."[150] Finally, the notion of legal mimicry fails to capture the agency and creativity of national and local actors. Sally Engle Merry has described how these actors vernacularize and indigenize international norms.[151]

In recent years, accountability has increasingly turned to the local.[152] This reorients the focus from cosmopolitan norms and state agendas to particularist practices and

[148] Drumbl, *Atrocity, Punishment and International Law*, 181-94.
[149] Drumbl recognizes that this weakens his legal mimicry argument. Drumbl, *Atrocity, Punishment and International Law*, 146. On self-referrals more generally, see William A. Schabas, "Complementarity in Practice: Some Uncomplimentary Thoughts," *Criminal Law Forum* 19, no. 1 (2008), 5-33; Sarah Nouwen, and Wouter Werner, "The Law and Politics of Self-Referrals" in *System Criminality in International Law*, 255-71.
[150] Drumbl, *Atrocity, Punishment and International Law*, 147.
[151] Merry, "Transnational Human Rights and Local Activism."
[152] See Alexander Laban Hinton, ed., *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence* (New Brunswick: Rutgers University Press, 2010); McEvoy and

community needs. Several factors account for this turn: the expense and disappointments of international criminal justice; greater attention to local-level conflicts; and a growing recognition that one size does not fit all. Since 2004, the United Nations Secretary-General has called for more emphasis on local ownership, cultural contexts, and local needs in setting up accountability mechanisms.[153] He also gives qualified support to customary law: "due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their often vital role and to do so in conformity with both international standards and local tradition."[154]

There has been a recent surge of enthusiasm for adding local customary law to the accountability "toolkit."[155] Customary law is seen as emblematic of the local, while still being recognizably law-like. It is not a stable body of fixed rules but rather a set of flexible and adaptive practices. There is a common tendency to romanticize and essentialize customary law as "traditional" and "restorative" even though anthropologists have long exposed its colonial and Christian construction, social control, elite manipulation, male bias, and "harmony ideology."[156]

Both colonial and post-colonial states viewed customary law as an obstacle to state-building and brought it within their regulatory purview.[157] Several post-colonial states also sought to extend their control over the countryside through state-sponsored "informalism."[158] Overall, state efforts to marry formal state systems and informal local systems have yielded disappointing results:

> Linking the two systems tends to undermine the positive attributes of the informal system. The process becomes no longer voluntary and is backed up by state coercion. As a result, the court need no longer rely on social

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McGregor, ed., *Transitional Justice from Below*; Shaw and Waldorf, ed., *Localizing Transitional Justice*.

[153] United Nations Secretary General, *The Rule of Law and Transitional Justice*, ¶¶ 15-17.

[154] United Nations Secretary General, *The Rule of Law and Transitional Justice*, ¶ 36; see United Nations Secretary General, *The Rule of Law and Transitional Justice*, UN Doc. S/2011/634 (2011), ¶ 39.

[155] See, e.g., Luc Huyse and Mark Salter, eds., *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (Stockholm: International IDEA, 2008); Waldorf, "Mass Justice for Mass Atrocity."

[156] See Sally Falk Moore, *Law as Process: An Anthropological Approach* (Oxford: James Currey, 2000); Laura Nader, *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* (Stanford: Stanford University Press, 1990).

[157] Sally Engle Merry, "Legal Pluralism," *Law & Society Review* 22, no. 5 (1988), 871-72.

[158] Richard L. Abel, *The Politics of Informal Justice: The American Experience* (1982), 275.

> sanctions, and public participation loses its primary importance. . . .
>
> Procedural requirements invariably become greater and public participation is curtailed.[159]

In addition, "the overlapping of jurisdictions leads to competition rather than cooperation between them, and thus to a breakdown in the abilities of both the state and community to exert social control."[160]

Initially, customary law was seen as a way to complement and legitimize national truth commissions. The Sierra Leone Truth and Reconciliation Commission was authorized to "seek assistance from traditional and religious leaders to facilitate its public sessions and in resolving local conflicts arising from past violations or abuses or in support of healing and reconciliation."[161] Traditional leaders participated in several hearings, while some closing ceremonies involved adapted reconciliation rituals. In general, though, the Commission largely avoided traditional structures and local rituals.[162] East Timor's Truth and Reconciliation Commission made more use of customary law. Nearly three-quarters of its community reconciliation hearings involved adaptations of a local dispute resolution practice, *nahe biti boot*, named for the unfolding of a large woven mat where disputants and community notables typically resolve differences. Hearings often began with customary incantations and ended with reconciliation ceremonies that entailed chewing betel nut, sacrificing small animals, and celebratory feasting. Local ritual leaders generally participated in the hearings and reconciliation ceremonies.[163]

In the past few years, customary law has been touted as an accountability mechanism in its own right. Some Acholi leaders in northern Uganda adapted customary law and local rituals to cleanse, welcome, and reconcile former rebels of the Lord's Resistance Army

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[159] Joanna Stevens, *Traditional and Informal Justice Systems in Africa, South Asia, and the Caribbean* (London: Penal Reform International, 1999), 44.

[160] Philip Parnell, "Village or State? Competitive Legal Systems in a Mexican Judicial District" in *The Disputing Process—Law in Ten Societies*, ed. Laura Nader & Henry F. Todd Jr. (New York: Columbia University Press, 1978), 349.

[161] Sierra Leone Truth and Reconciliation Commission Act (2000), Part III.6.1., § 7(2).

[162] Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission* (2004), Vol. 3B, 438; Tim Kelsall, "Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone," *Human Rights Quarterly* 27, no. 2 (2005), 385.

[163] Commission for Reception, Truth and Reconciliation in East Timor, *Chega!* [*Enough!*]: *Final Report* (2006), Part 9, at 7, 18, 23-24, 27; Tanja Hohe and Rod Nixon, *Reconciling Justice: Traditional Law and State Judiciary in East Timor* (Washington, D.C.: United States Institute of Peace, 2003), 55; Piers Pigou, *Crying Without Tears: In Pursuit of Justice and Reconciliation in Timor-Leste* (New York: International Center for Transitional Justice, 2003), 64.

(LRA).[164] In 2008, the Ugandan government and the LRA signed a peace agreement that, had it been implemented, would have assigned a "central part" to "traditional justice" in achieving accountability and reconciliation.[165]

There are serious and unresolved issues with using customary law as accountability for atrocity. It depends on social capital, which is often frayed or destroyed by authoritarianism and conflict. It was never designed to deal with widespread atrocities. It may reconstitute the structures of subordination and exclusion that contributed to the conflict in the first place.[166] Finally, it violates international human rights norms; in particular, it discriminates against women and children.[167]

Conclusion

Accountability for atrocity has been dominated by the international criminal justice model which privileges liberalism, legalism, retribution, individualism, and cosmopolitanism. As will be shown, *gacaca* fundamentally challenged this set of preferences. It served an authoritarian state. It was legalistic but did not guarantee due process. It combined retributive and restorative justice. It envisioned hundreds of thousands of trials promoting collective political responsibility if not collective criminal guilt. It promoted communitarian rather than cosmopolitan values.

[164] For the debate over the authenticity and efficacy of these Acholi rituals, see, e.g., Tim Allen, "The International Criminal Court and the Invention of Traditional Justice in Northern Uganda," *Politique Africaine* 107 (2007), 147–66; Sverker Finnström, *Living with Bad Surroundings: War, History, and Everyday Moments in Northern Uganda* (Durham, NC: Duke University Press, 2008); Thomas Harlacher, et al., *Traditional Ways of Coping in Acholi: Cultural Provisions for Reconciliation and Healing from War* (Kampala, Uganda: Caritas Gulu Archdiocese, 2006).
[165] Annexure to the Agreement on Accountability and Reconciliation (2007).
[166] See Rosalind Shaw, "Linking Justice with Reintegration? Ex-Combatants and the Sierra Leone Experiment" in Shaw and Waldorf, *Localizing Transitional Justice*, 130-32.
[167] See International Council on Human Rights Policy, *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (2009); World Bank, *World Development Report 2011: Conflict, Security and Development* (Washington, D.C.: World Bank, 2011), 167.

CHAPTER 3: RWANDA'S MASS ATROCITY

"[G]etting people to murder and torment their neighbours is not hard; in some ways, it turns out to be ridiculously easy."
– David Luban[1]

Introduction

The Nuremberg paradigm of individual criminal responsibility and exemplary prosecutions fits the Nazi's administrative genocide better than it does Rwanda's participatory genocide. Mass complicity in Rwanda posed an extraordinary challenge for justice after genocide. The involvement of so many ordinary people as perpetrators and bystanders made a compelling case for collectivizing and localizing accountability. *Gacaca* was deliberately designed to address the collective, participatory, and local nature of that genocide. So, to appreciate *gacaca*, it is first necessary to understand the 1994 genocide.

This chapter begins with a brief look at theories of violence. It next situates the Rwandan genocide in the larger context of ethnicity and conflict in Rwanda. The chapter then sketches the basic historical outlines of the civil war and genocide. The bulk of the chapter reviews recent explanations for the Rwandan genocide by addressing three questions: why genocide?; why mass participation?; and how did ordinary Rwandans participate? The answers to these questions inform the later analysis of *gacaca*.

Genocidal Violence

From the outset, it is important to distinguish violence from conflict. Violence is the process of inflicting harm that takes place within conflict.[2] Whether using a sociological or legal definition, genocide is a particular form of violence. In the past several years, anthropologists and political scientists have turned their attention to interpreting violence as a cultural and political phenomenon – that is, as rule-governed and meaning-making behaviour in contradistinction to popular accounts of irrational frenzy.[3]

Recent empirical scholarship into the micro-level causes of violence has cast further doubt on the ethnic hatred hypothesis. Stathis Kalyvas and other political scientists show that

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[1] David Luban, "Intervention and Civilization: Some Unhappy Lessons of the Kosovo War" in *Global Justice and Transnational Politics*, ed. Pablo de Greiff and Ciaran Cronin (Cambridge: MIT Press, 2002), 107.
[2] Stathis N. Kalyvas, *The Logic of Violence in Civil War* (New York: Cambridge University Press, 2006), 19-22.
[3] See Alexander Laban Hinton, *Why Did They Kill? Cambodia in the Shadow of Genocide* (Berkeley: University of California Press, 2005), 22-31; Charles Tilly, *The Politics of Collective Violence* (Cambridge: Cambridge University Press, 2003); Neil Whitehead, ed., *Violence* (Santa Fe: School of American Research Press, 2004).

local-level violence is often opportunistic and motivated by local greed and grievances.[4] To his credit, Mark Drumbl recognizes that this scholarship challenges his efforts to distinguish between atrocity crimes ("a product of conformity and collective action") and ordinary crimes (the result of "delinquency and individual pathology").[5] As Drumbl notes, "one inference that arises from Kalyvas' research is that ordinary criminal modalities may be appropriate to capture individuals who commit war crimes when acting upon materialistic motivations." But Drumbl argues that Kalyvas' findings into civil war violence are inapposite to genocidal violence: "material motivations exert much greater influence on routine civil war participants than on actors in ethnic eliminationism for whom ideology constitutes the catalytic motivator."[6] As this chapter will demonstrate, there are two difficulties with Drumbl's argument. The Rwandan genocide happened in the context of an ongoing civil war. More importantly, several scholars have shown that ethnic hatred and genocidal ideology did not motivate many of the Rwandan perpetrators.

Dispositional Versus Situational

James Waller and Philip Zimbardo emphasize situational rather than dispositional factors in explaining why ordinary people participate in mass killing.[7] Waller's model emphasizes three proximate factors

> that converge interactively to impact individual behaviour in situations of collective violence. The cultural construction of worldview examines the influence of cultural models – related to collectivistic values, authority orientation, and social dominance – that are widely shared by the members of a perpetrator group. The psychological construction of the "other" analyzes how victims of genocide and mass killing become simply the "objects" of perpetrators' actions through the process of us-them thinking, moral disengagement, and blaming the victims. Finally, the social construction of cruelty explores the influence of professional socialization, group identification, and the binding factors of the group in creating an immediate

[4] Stathis N. Kalyvas, "The Ontology of 'Political Violence': Action and Identity in Civil Wars," *Perspectives on Politics* 1, no. 3 (2003).
[5] Drumbl, *Atrocity, Punishment and International Law*, 8.
[6] Drumbl, *Atrocity, Punishment and International Law*, 35.
[7] James Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing* 2d ed. (Oxford: Oxford University Press, 2007); Philip Zimbardo, *The Lucifer Effect: How Good People Turn Evil* (London: Rider, 2009). See Herbert C. Kelman and V. Lee Hamilton, *Crimes of Obedience* (New Haven: Yale University Press, 1989), 12-22.

> social context in which perpetrators initiate, sustain, and cope with their cruelty.[8]

Zimbardo, who is best known for the Stanford Prison Experiment, further emphasizes the need to look at how situations are shaped by "systems of power."[9] This is not to say that disposition is irrelevant. But dispositional factors (such as ideological commitment or sadism) play less of a role among ordinary, rank-and-file perpetrators.[10] Social psychology has also demonstrated how passive bystanding is situational. Individuals in larger groups are more likely to be bystanders due to a diffusion of responsibility: they assume someone else has more responsibility to intervene.[11]

These insights from social psychology dovetail with empirical studies of genocide. Donald Bloxham rightly observes that "The very existence of mass participation in most genocides shows that the context is generally more important than the disposition and beliefs of the individual perpetrator, since in the 'right' situation so many people of demonstrably different characters and values participate."[12]

Ethnicity and Conflict in Rwanda

In Rwanda, the majority Hutu and minority Tutsi are complicated, socially constructed ethnic identities: both groups speak the same language, share the same culture, practice the same religions, live together, and sometimes intermarry. Rwanda is a patrilineal society in which children take the ethnicity of the father. It is commonly estimated that Hutu make up 85 percent, Tutsi 14 percent, and the indigenous Twa forest people less than 0.5 percent of Rwanda's population of 11.5 million people.[13]

In pre-colonial times, Hutu and Tutsi were somewhat fluid identities based largely on socio-political status and economic activity. There is a contentious debate about the origins

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[8] Waller, *Becoming Evil*, 139.
[9] Zimbardo, *Lucifer Effect*, 9-10
[10] See Claus-Christian W. Szejnmann, "Perpetrators of the Holocaust: A Historiography" in *Ordinary People as Mass Murderers: Perpetrators in Comparative Perspective*, ed. Olaf Jensen and Claus-Christian W. Szjenmann (London: Palgrave, 2008), 44. Of course, disposition plays a key role in understanding rescuers. See Ervin Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (Cambridge: Cambridge University Press, 2002), 165-69.
[11] Waller, *Becoming Evil*, 248; Zimbardo, *Lucifer Effect*, 314-15.
[12] Donald Bloxham, "The Organization of Genocide: Perpetration in Comparative Perspective" in *Ordinary People as Mass Murderers*, 187. See Jürgen Matthaus, "Historiography and the Perpetrators of the Holocaust" in *The Historiography of the Holocaust*, ed. Dan Stone (Hampshire: Palgrave Macmillan, 2005), 208.
[13] For political reasons, the government census no longer records ethnicity.

and content of differences between Hutu and Tutsi.[14] Tutsi were mostly pastoralists, while Hutu were mostly cultivators. Identity was strongly linked to clans and lineages, which contained both Hutu and Tutsi. The German and then the Belgian colonialists treated Hutu and Tutsi as fixed, racial identities and viewed the Tutsi as racially superior "Hamites" who supposedly came from Ethiopia.[15] The Belgians imposed a system of ethnic identity cards and favored the Tutsi elite who had governed the pre-colonial kingdom. In 1959, the Belgians switched allegiance from the Tutsi elite to the Hutu majority and supported the 1959 "social revolution" that led to an independent Hutu republic in 1962.[16]

The post-colonial Hutu regimes further instrumentalized ethnic identities. Despite claims to represent the Hutu majority, the post-independence, neo-patrimonial regimes discriminated among Hutu: Grégoire Kayibanda's First Republic favored Hutu from central and southern Rwanda, while Juvénal Habyarimana's Second Republic benefited Hutu in the northwest. Both regimes discriminated against Tutsi and occasionally incited violence against them to serve their own political interests.

Ethnic violence in Rwanda is a modern, sporadic, and mostly state-initiated phenomenon: Hutu political elites whipped up violence against the Tutsi minority in the face of intra-Hutu and Tutsi political challenges in four distinct periods.[17] The first major round of ethnic violence between Hutu and Tutsi occurred in the context of the independence struggle from 1959 to 1963 and was partly instigated by the Belgian colonialists. Approximately 400,000 Tutsi fled the violence and became refugees in neighboring countries.[18] Under Kayibanda's First Republic (1962-1973), the regime engaged in periodic pogroms against Tutsi, often in response to incursions from Tutsi guerrillas seeking to reinstate the Tutsi monarchy. Habyarimana came to power in a 1973 military coup, promising to end the violence between Hutu and Tutsi that Kayibanda had fomented that year to shore up his

[14] The best accounts are Catharine Newbury, *The Cohesion of Oppression: Clientship and Ethnicity in Rwanda 1860-1960* (New York: Columbia University Press, 1988), 11; Jan Vansina, *Antecedents to Modern Rwanda: The Nyiginya Kingdom* (Madison: University of Wisconsin Press, 2004), 134-39.
[15] Jean-Pierre Chrétien, *The Great Lakes of Africa: Two Thousand Years of History*, trans. Scott Straus (New York: Zone Books, 2003), 281-88; Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton: Princeton University Press, 2001), 76-102.
[16] Rene Lemarchand, *Rwanda and Burundi* (London: Pall Mall, 1970), 118-96.
[17] Alison Des Forges, *Leave None to Tell the Story* (New York: Human Rights Watch, 1999), 41-49; Scott Straus, *The Order of Genocide: Race, Power, and War in Rwanda* (Ithaca: Cornell University Press, 2006), 175-200.
[18] Gérard Prunier, "The Rwandan Patriotic Front" in *African Guerrillas*, ed. Christopher Clapham (Oxford: James Currey, 1998), 119, 121 n.11.

slipping power. Habyarimana created a one-party dictatorship, in which all Rwandans, both Hutu and Tutsi, were members of the single party from birth. Despite widespread, institutionalized discrimination against Tutsi, there was no ethnic violence against Tutsi until 1990, when the civil war began.

Rwanda's Extraordinary Violence

Civil War

In October 1990, the Rwandan Patriotic Front ("RPF"), a rebel movement dominated by Rwandan Tutsi refugees in Uganda, invaded Rwanda and set off a civil war that lasted four years.[19] The RPF demanded political power sharing and the right of return for all Tutsi refugees (then numbering almost one million). Many of the RPF's leaders and soldiers had helped propel Yoweri Museveni and his National Resistance Movement into power in Uganda.[20]

At the same time, President Habyarimana's sclerotic, authoritarian regime came under increasing pressure from the international community and domestic Hutu opponents to move from a one-party state to multi-party democracy. In response to those political threats, Habyarimana and his allies militarized Rwandan society, creating a civilian defense program to prevent rebel infiltration as well as youth militias (the infamous *Interahamwe* and *Impuzamugambi*) to battle opposition parties. These elites ordered the massacres of Tutsi civilians and the assassinations and arrests of political opponents. They stoked fear among the Hutu peasantry that returning Tutsi refugees would dispossess them of their land. They also demonized Tutsi civilians and the Hutu democratic opposition as *ibitsyo* (accomplices) of the RPF.

In July 1992, the RPF and Rwandan government (which, by then, included Hutu democrats) signed a ceasefire and, a month later, signed the first of several peace agreements (collectively known as the Arusha Peace Accords). In response to a series of massacres of Tutsi civilians, the RPF violated the ceasefire in February 1993, making a large-scale attack in northwest Rwanda that displaced hundreds of thousands of people. The *Forces Armées Rwandaises* (FAR) was only able to halt the RPF advance with French military support. Peace talks resumed and the final agreement was signed in August 1993, but only after international donors threatened Habyarimana with a cut-off in foreign assistance.

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[19] The best overview of the civil war period is Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (New York: Columbia University Press, 1997), 93-212.
[20] On the RPF's relations with Uganda, see Mamdani, *When Victims Become Killers*, 159-84.

The Arusha Accords created a broad-based transitional government that left Habyarimana in place, but sharing power with the RPF and the internal opposition. Under the Accords, the FAR and the RPF would each have to demobilize half their forces; the remainder would be integrated into a new national army. Facing retrenchment, numerous Rwandan army officers and soldiers opposed the peace agreement. The Arusha Accords also called for a UN peacekeeping mission (known by its acronym, UNAMIR). Still smarting from the debacle in Somalia, the UN Security Council only approved a small and under-funded force of some 2,500 peacekeepers, drastically limited their mandate, and eliminated their responsibility for disarmament altogether.

Genocide

On April 6, 1994, Habyarimana was returning from a regional peace summit in Tanzania when his plane was shot down over Kigali, killing all on board. To this day, it remains unclear whether Habyarimana was assassinated by Hutu extremists or by the RPF.[21] That assassination prompted Hutu extremists within the ruling party and military to seize power, murder political opponents and Belgian peacekeepers, restart a civil war with the RPF, and unleash an extermination campaign against the Tutsi minority. When Belgium withdrew its soldiers and the UN drastically reduced its peacekeeping mission, the extremists took that as a green light to ramp up the killing.[22]

The 1994 Rwandan genocide was remarkable for its speed, intimate violence, and widespread participation. Over the course of 100 days, extremists incited and pressured large

[21] In November 2006, Judge Jean-Louis Bruguière, one of France's most prominent investigating magistrates, accused President Kagame and several top-ranking RPF officers of shooting down Habyarimana's plane. Tribunal de grande instance, Delivrance de mandats d'arrêt internationaux par le Juge Jean-Louis Bruguière, Nov. 17, 2006. In response, the Rwandan government set up its own investigating commission, which exonerated the RPF and found the FAR responsible for bringing down the plane. Independent Committee of Experts, *Report of the Investigation into the Causes and Circumstances of and Responsibility for the Attack of 06/04/1994 against the Falcon 50 Rwandan Presidential Airplane, Registration Number 9XR-NN* (2010).

[22] On the failure of the international community to intervene, see Michael Barnett, *Eyewitness to Genocide: The United Nations and Rwanda* (Ithaca: Cornell University Press, 2003); Roméo Dallaire with Brent Beardsley, *Shake Hands with the Devil* (Toronto: Random House Canada, 2003); Des Forges, *Leave None*, 595-691; Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (London: Zed Books, 2000); Samantha Power, *"A Problem from Hell": America and the Age of Genocide* (New York: Basic Books, 2002), 329-89. For a contrarian position, see Alan J. Kuperman, *The Limits of Humanitarian Intervention: Genocide in Rwanda* (Washington, DC: Brookings Institute, 2001). In recent years, several books have charged France, Britain, and the US with complicity in the Rwandan genocide. See, e.g., Daniela Kroslak, *The Role of France in the Rwandan Genocide* (London: Hurst & Co., 2007); Hazel Cameron, *Britain's Hidden Role in the Rwandan Genocide* (Abingdon: Routledge, 2012); and Jared Cohen, *One Hundred Days of Silence: America and the Rwanda Genocide* (Lanham, MD: Rowman & Littlefield, 2007).

numbers of ordinary Hutu peasants to massacre Tutsi civilians. Key figures in the genocidal regime visited different parts of the country, delivering incendiary speeches and disciplining local officials who resisted the massacres. They helped incite massacres by deploying racist stereotypes of Tutsi as supposed "Hamites" (i.e. Ethiopian origin) who wanted to re-impose a feudal monarchy and dispossess Hutu of their land.[23]

The genocide ended in mid-July with the RPF's military victory over the genocidal forces. By that point, approximately three-quarters of the Tutsi population had been exterminated. Human Rights Watch estimates 507,000 genocide victims while the Rwandan government puts the number at 927,118.[24] Thousands of Hutu were also killed, including political opponents of the genocide, suspected RPF collaborators, rescuers of Tutsi, those mistaken for Tutsi, and victims of opportunistic intra-Hutu violence.[25]

Explaining Rwanda's Genocide

It is difficult to comprehend the Rwandan genocide, and not simply because of its scale and speed. The genocide lacked a central, charismatic leader, and little evidence has emerged of a pre-existing genocidal conspiracy or plan. The International Criminal Tribunal

[23] The best overall accounts of the Rwandan genocide are Des Forges, *Leave None*; Straus, *Order of Genocide*.

[24] Des Forges, *Leave None*, 15; Ministère de L'Administration Locale, de L'Information et Des Affaires Sociales, *Dénombrement des Victimes du Genocide, Final Report* (Kigali: Ministry of Local Administration, 2002), 24. On the methodological difficulties in ascertaining the number of genocide victims, see Des Forges, *Leave None*, 15-16; Straus, *Order of Genocide*, 51-52. Reyntjens states the government's estimate is "contradicted by demographic data (Tutsi numbered well under 1 million) and empirical fact (over 200,000 Tutsi survived the genocide …)." Filip Reyntjens, "Rwanda, Ten Years On: From Genocide to Dictatorship," *African Affairs* 103, no. 411 (2004), 178 n.1. The debate over the number of victims is highly contentious. On the one hand, those who do not accept the government's estimate are accused of minimizing the genocide. See, e.g., Richard Johnson, "The Travesty of Human Rights Watch on Rwanda" (2013), 17-18, available at https://docs.google.com/file/d/0B1rjz4zva3CFV0RRaV8way1LUXc/edit?pli=1. On the other hand, there are some who deliberately minimize the numbers of Tutsi killed in the genocide in an effort to show the RPF has killed more Hutu. See, e.g., Christian Davenport and Allan C. Stam. "What Really Happened in Rwanda?" (October 6, 2009), available at http://www.thirdworldtraveler.com/East_Africa/Rwanda_WhatReallyHappened.html. Sibomana once described this as "a more furtive but equally dangerous" form of denial while observing "Deaths don't compensate for each other; they don't cancel each other out; they simply add up." André Sibomana, *Hope for Rwanda: Conversations with Laure Guilbert and Hervé Deguine*, trans. Carina Tertsakian (London: Pluto Press, 1999), 117.

[25] Estimates range from 10,000 to 56,000. Compare Prunier, *The Rwanda Crisis*, 265 *with* Ministère de L'Administration Locale, *Dénombrement*, 24.

for Rwanda found that Colonel Theoneste Bagasora, the presumed architect of the genocide, was only in charge for three days and acquitted him of conspiracy to commit genocide.[26]

Why Genocide?

There are several competing explanations for the Rwandan genocide. The dominant popular accounts are ethnic hatred and genocidal ideology.[27] Some scholars counter that political elites whipped up ethnic fear to maintain or augment their power.[28] Others fault political and economic liberalization.[29] Still others blame structural violence, over-population, or globalization.[30] There is no question that structural adjustment programs and democratization heightened anxieties and fostered instability, but it does not explain why Rwandan leaders opted for genocide. Similarly, the structural violence and over-population theses are over-deterministic: they cannot explain why the genocide happened when it did and why there have not been more outbreaks of genocide in Rwandan history.

In the best recent account, Straus points to three main factors: war, state authority, and ethnicity. The genocidal violence was intimately linked to the resumption of the civil war in April 1994 following the president's assassination. As Browning observes with regards to the Holocaust, "War is the most conducive environment in which governments can adopt 'atrocity by policy' and encounter few difficulties in implementing it."[31] The civil war enabled both extremists and ordinary civilians to collectively label all Tutsi civilians as the enemy – a fifth column for the mostly Tutsi rebels. Straus convincingly argues that "By the perpetrators' logic, killing Tutsis would deplete the rebel ranks; stymie infiltration; and deter

[26] *Prosecutor v. Théoneste Bagasora, et al.* (Case No. ICTR-98-41-T), Judgment and Sentence, Dec. 18, 2008.
[27] On ethnic hatred, see Bill Berkeley, *The Graves Are Not Yet Full: Race Tribe and Power in the Heart of Africa* (New York: Basic Books, 2001), 245-84. On genocide ideology, see Philip Gourevitch, *We Wish to Inform You that Tomorrow We Will Be Killed With Our Families: Stories from Rwanda* (London: Picador, 2000), 17; Josias Semujanga, *Origins of Rwandan Genocide* (Amherst, NY: Humanity Books, 2003).
[28] See Des Forges, *Leave None*, 1-2; Linda Melvern, *Conspiracy to Murder: The Rwandan Genocide* (London: Verso, 2006).
[29] See Roland Paris, *At War's End: Building Peace after Civil Conflict* (Cambridge: Cambridge University Press, 2004), 78; Michael Mann, *The Dark Side of Democracy: Explaining Ethnic Cleansing* (Cambridge: Cambridge University Press, 2005), 473.
[30] See respectively Peter Uvin, *Aiding Violence: The Development Enterprise in Rwanda* (West Hartford: Kumarian Press, 1998), 141-60; Catherine André, and Jean-Phillipe Platteau, "Land Relations Under Unbearable Stress: Rwanda Caught in a Malthusian Trap," *Journal of Economic Behavior and Organization* 34, no. 1 (1998), 1-47; Arjun Appadurai, *Fear of Small Numbers: A Essay on the Geography of Anger* (Raleigh: Duke University Press, 2006).
[31] Browning, *Ordinary Men*, 162.

the rebels."[32] Rwandans themselves often identify the civil war as an important causal factor in the genocide. In their interviews with Straus, many perpetrators rationalized the violence against Tutsi civilians as revenge and self-defense against the RPF.[33]

The Rwandan genocide was truly a crime of state.[34] Hutu extremists captured a strong administrative state that was able to project power from the capital out to local hills and to mobilize large segments of the population. They used state instruments – the army, Presidential Guard, *géndarmerie,* and local officials – to conduct the slaughter. Straus describes the centrality of the state in effecting the genocide:

> First, the state in Rwanda has unusual depth and resonance at the local level, which meant that, by controlling the state, the hardliners had the capacity to enforce their decisions countrywide. Second, control of the state allowed the hardliners to associate killing Tutsis with authority, thus equating violence with de facto policy. Third, Rwanda has a long history of obligatory labor, and expectations derived from that history contributed to large-scale civilian mobilization during the genocide.[35]

Straus also links the state's capacity for social control to Rwanda's topography: its densely populated hills facilitate surveillance (and denunciation) by state agents, informers, and neighbors.[36] The "land of a thousand hills" is also a country of panopticons. As André Sibomana explains, "It was extremely difficult to save Tutsi, to hide them and feed them. In Rwanda, in normal times, everyone sees and knows everything immediately. So in this context, where everyone is spying on each other, you can imagine!"[37]

Ethnicity played an important role in two ways. Hutu extremists used ethnicity to mobilize Hutu. Challenging popular conceptions of the Rwandan genocide, Straus argues that "intra-ethnic coercion and pressure [among Hutu] appear to have been greater determinants

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[32] Straus, *Order of Genocide*, 162.
[33] Straus, *Order of Genocide*, 153. See Timothy Longman and Theoneste Rutagengwa, "Memory, Identity and Community in Rwanda" in *My Neighbor, My Enemy*, 162, 172; Fujii, *Killing Neighbors*, 14-15, 101.
[34] Alvarez misses this point by wrongly seeing Rwanda as a collapsed state and mistakenly characterizing the genocide as a crime of hate. Alvarez, "Crimes of States," 378, 438.
[35] Straus, *Order of Genocide*, 8. See *id*. at 201-23.
[36] Straus, *Order of Genocide*, 8. See *id*. at 214-16.
[37] Sibomana, *Hope for Rwanda*, 68.

of genocidal participation than interethnic enmity [between Hutu and Tutsi]."[38] Hutu extremists also used ethnicity to portray all Tutsi in homogenous terms as RPF fighters and their accomplices.

Des Forges and Straus have pointed up the need to distinguish between what was happening at the national, regional, and local levels.[39] While the genocide was scripted by national actors, it was performed by local actors with considerable improvisation.[40] These local actors often used violence opportunistically to resolve local power struggles and local grievances.[41] Straus concludes that the genocidal violence "spread as a cascade of tipping points, and each tipping point was the outcome of local, intra-ethnic contests for dominance."[42]

Why Mass Participation?

Macro-level explanations for the genocide do not explain why it took the form of highly participatory, publicly performed killings at the micro-level. Why did so many ordinary people join the violence, denounce their neighbors as Tutsi, engage in opportunistic looting, or stand by while their neighbours were killed? The intimacy of the violence is particularly perplexing because there was a great deal of everyday, inter-ethnic contact, not to mention a fair amount of inter-ethnic marriage. That is, the Rwandan genocide challenges the "contact hypothesis" which predicts that increased contact among individuals of opposing groups will improve inter-group relations.[43] Straus found that almost 70% of the perpetrators he interviewed had a Tutsi family member.[44] Omar McDoom turns the contact hypothesis on its head, arguing that increased inter-group contact "makes the identification and targeting of out-group members by the in-group much easier."[45]

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[38] Straus, *Order of Genocide*, 148. Other researchers have made similar findings. See Fujii, *Killing Neighbors*, 159; Alette Smeulers and Lotte Hoex, "Studying the Microdynamics of the Rwandan Genocide," *British Journal of Criminology* 50, no. 3 (2010), 443, 445.
[39] Straus, *Order of Genocide*, 65-94; Des Forges, *Leave None*, 303-594.
[40] Fujii, *Killing Neighbors*, 12-13.
[41] On the role of opportunism in mass killing, see Tilly, *Politics of Collective Violence*, 136-42; Dirk Welmoed de Mildt, *In the Name of the People: Perpetrators of Genocide in the Reflection of Their Post-War Prosecution in West Germany* (London: Martinus Nijhoff, 1996), 311.
[42] Straus, *Order of Genocide*, 92-93.
[43] See Miles Hewstone, et al., "Why Neighbors Kill: Prior Intergroup Contact and Killing of Ethnic Outgroup Neighbors" in *Explaining the Breakdown of Ethnic Relations: Why Neighbors Kill*, ed. Victoria M. Esses and Richard A. Vernon (Oxford: Blackwell Publishing, 2008), 44.
[44] Straus, *Order of Genocide*, 127.
[45] Omar McDoom, "Who Kills? Social Influence, Spatial Opportunity, and Participation in Inter-group Violence," Political Science and Political Economy Working Group Paper, London School of Economics (2011).

Several scholars argue that ordinary Hutu were "willing executioners" motivated by ethnic hatred and anti-Tutsi ideology.[46] The Rwandan government also emphasizes the role of genocidal ideology, particularly that disseminated through Radio Télévision Libre des Milles Collines (RTLM).[47] However, a new generation of Rwanda scholars – Straus, Fujii, and McDoom – show that participants were rarely motivated by ethnic hatred or ideology, but rather by situational factors and sometimes personal greed/grievance.[48] Straus also persuasively demonstrates that hate radio had little impact in inciting local-level violence.[49] Many Rwandans, including perpetrators, do not attribute the genocidal violence to ethnic hatred or anti-Tutsi ideology.[50] These findings are consistent with recent studies of civil wars that reveal local actors taking opportunistic advantage of larger ideological or ethnic conflicts to settle personal scores and local conflicts.[51]

Several scholars invoke a supposed "culture of obedience" to explain high levels of participation and complicity in the genocide.[52] The current government also portrays the genocide in terms of an unenlightened peasantry slavishly following the commands of a bad leadership.[53] This cannot account for the numerous instances of disobedience and resistance to state authority under a succession of regimes. In the 1980s, for example, peasants uprooted state-owned coffee bushes as the world price of coffee fell, and they often shirked mandatory communal labor (*umuganda*).[54] In 1994, many individuals and some communities resisted the

[46] See, e.g., Daniel Jonah Goldhagen, *Worse than War: Genocide, Eliminationism and the Ongoing Assault on Humanity* (London: Abacus, 2012), 150-52.
[47] See, e.g., Rwandan Senate, "Genocide Ideology and Strategies for its Eradication" (2006), 13-58.
[48] Straus, *Order of Genocide*, 122-52; Fujii, *Killing Neighbors*, 89; Omar Shahabudin McDoom, "The Psychology of Threat in Intergroup Conflict: Emotions, Rationality, and Opportunity in the Rwandan Genocide," *International Security* 37, no. 2 (2012), 119-55.
[49] Scott Straus, "What is the Relationship between Hate Radio and Violence? Rethinking Rwanda's 'Radio Machete,'" *Politics & Society* 35, no. 4 (2007), 609-37.
[50] Longman and Rutagengwa, "Memory, Identity and Community in Rwanda," 169.
[51] See Kalyvas, "The Ontology of 'Political Violence,'" 475-76.
[52] See Prunier, *The Rwanda Crisis*, 141; Gérard Prunier, *From Genocide to Continental War: The 'Congolese' Conflict and the Crisis of Contemporary Africa* (London: Hurst & Co., 2009), 23 & n. 90; Helen Hintjens, "Explaining the 1994 Genocide in Rwanda," *Journal of Modern African Studies* 37, no. 2 (1999), 271; Gourevitch, *We Wish to Inform You*, 23. Clark wrongly attributes this argument to Des Forges. Phil Clark, *The Gacaca Courts*, 18-19.
[53] See Ministry of Local Governance, Community Development and Social Affairs, *Civic Education Handbook* (2004), 23.
[54] See Catharine Newbury, "Background to Genocide: Rwanda," *Issue: Journal of Opinion* 23 (1995), 14. On resistance to state authority in colonial Rwanda, see Alison Des Forges, "'The Drum is Greater than the Shout': The 1912 rebellion in Northern Rwanda" in *Banditry, Rebellion and Social Protest in Africa*, ed. Donald Crummey (Oxford: James Currey, 1986), 311, 317-20.

genocide.[55] Even those who participated in the genocide sometimes resisted orders to bury the rotting corpses.[56] As discussed in Chapter 6, the post-genocide regime had difficulty compelling people to participate in *gacaca*. All this suggests that ordinary Rwandans exercise a fair degree of agency (within structural constraints): they choose to obey when it best suits their self-interest. Straus also sees obedience during the genocide as a rational calculation given the consequences and difficulty of evading state control.[57]

Straus constructs a sophisticated explanation of what motivated participation in the genocide. He calculates that between 175,000 and 210,000 persons (90 percent of them "non-hardcore civilian perpetrators") were involved in murder or assaults – an enormous number but far fewer than the one million tried in *gacaca*.[58] Most were ordinary, middle-aged Hutu farmers, though rural elites and young thugs played a crucial role in driving the violence.[59] Many had fewer social ties with Tutsi.[60] They participated in the genocide for fairly "banal" reasons: "the Rwandans' motivations were considerably more ordinary and routine than the extraordinary crimes they helped commit."[61] These motives – which included group conformity, intra-Hutu pressure, fear of the RPF rebels, and opportunistic greed or grievance – varied among participants and varied over time. "Obedience may have led a person to kill the first time, but thereafter he may have wanted to steal goods or he might have become acculturated to killing."[62] Perpetrators often had mixed motives as well. Different researchers have placed different emphases on opportunistic greed. Whereas Straus does not see greed as

[55] See African Rights, *Tribute to Courage* (Kigali: African Rights, 2002); Penal Reform International, *Report on Monitoring and Research on the Gacaca: The Righteous: Between Oblivion and Reconciliation? Example of the Province of Kibuye* (London: Penal Reform International, 2004); John M. Janzen, "Historical Consciousness and a 'Prise de Conscience' in Genocidal Rwanda," *Journal of African Cultural Studies* 13, no. 1 (2000), 153-68.
[56] See African Rights, *The History of the Genocide in Sector Gishamvu: A Collective Account* (2003), 5.
[57] Scott Straus, "Review Forum: Reply to Simon and Welzer," *Journal of Genocide Research* 10, no. 1 (2008), 149-50. Straus also distinguishes that from Stanley Milgram's concept of obedience to legitimate authorities.
[58] Straus, *Order of Genocide*, 102-103, 116-17. By contrast, a prominent RPF official put the number of perpetrators at 2 million. Remarks of Senator Antoine Mugesera, International Conference on the Tutsi Genocide and Reconstruction of Knowledge, Kigali, Jul. 25, 2008.
[59] Straus, *Order of Genocide*, 112-13. His findings are supported by Fujii, *Killing Neighbors*, 130 and McDoom, "Who Kills?" 35-38.
[60] Straus, *Order of Genocide*, 128-29.
[61] Straus, *Order of Genocide*, 96.
[62] Straus, *Order of Genocide*, 39. On perpetrator motives more generally, see Mann, *Dark Side of Democracy*, 26-30; Benjamin A. Valentino, *Final Solutions: Mass Killing and Genocide in the Twentieth Century* (Ithaca: Cornell University Press, 2004), 39-46.

a main motivation, Verwimp comes to the opposite conclusion.[63]

Straus identifies three key situational factors behind the widespread participation: (1) anger, fear, and uncertainty caused by the renewed civil war; (2) opportunism linked to local power struggles; and (3) social pressure and coercion derived from intra-group dynamics, state authority, communal labor obligations, and social surveillance. With respect to this latter point, Longman and Des Forges also observe:

> Officials and soldiers placed substantial pressure on people to demonstrate at least nominal support for the killing. Hutu who rejected the propaganda about Tutsi and who chose not to participate in the genocide were subjected to reproach on the radio and in public meetings, humiliation, fines, imprisonment, and even death.[64]

Some scholars suggest the genocidal regime wanted to make as many people as complicit as possible. As one writes, "The result of involving everyone in the killings, whether directly or indirectly, was that all of them were made to feel equally complicit."[65]

How Did Ordinary Rwandans Participate?

There is still the issue of how genocidal violence was enacted at the local level. Most of the violence was collective: perpetrated by groups sometimes numbering more than a hundred persons.[66] Charles Mironko argues that the *igitero* (mob attack) provided the method and (less convincingly) the discursive justification for widespread participation.[67] Recruitment into these killing groups was often face-to-face: a group would knock on their neighbors' doors making it difficult to evade joining.

There is still the question why some joined but others did not. Straus recognizes the difficulty with his argument: "If my hypothesis is correct that . . . social pressure and coercion played an important role, then why were there not more genocide perpetrators?''[68] He offers three possibilities: first, some of those approached were able to get out of killing

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[63] Compare Straus, *Order of Genocide*, 149 *with* Phillip Verwimp, "An Economic Profile of Peasant Perpetrators of Genocide," *Journal of Development Economics* 77, no. 2 (2005), 297-323.
[64] Alison Des Forges & Timothy Longman, "Legal Responses to Genocide in Rwanda" in *My Neighbor, My Enemy*, 51.
[65] Charles K. Mironko, Social and Political Mechanisms of Mass Murder: An Analysis of Perpetrators in the Rwandan Genocide (Ph.D dissertation, Yale University, 2004), 200 quoted in Fujii, *Killing Neighbors*, 174.
[66] Straus, *Order of Genocide*, 116; Fujii, *Killing Neighbors*, 171.
[67] Charles Mironko, "*Igitero*: Means and Motive in the Rwandan Genocide," *Journal of Genocide Research* 6, no. 1 (2004), 47-60.
[68] Straus, *Order of Genocide*, 120.

(by paying a fine or feigning illness); second, the mobilization of perpetrators was random (and thus partly a matter of luck); and third, most of the killing was finished before more people could be mobilized.[69]

Two other researchers have explored the mechanisms of mobilization more closely. Fujii identifies local social networks – family, friendship, and group ties – as the key mechanism through which many individuals joined the killing.[70] While she also finds that intra-Hutu coercion played a role, she sees "little evidence that Joiners tried to hide, evade, resist, or free-ride in any way once they joined the violence."[71] She explains that joining groups (even under pressure) created a sense of group identity through participation in the killing. Fujii states that "The constitutive power of killing in groups turned loose collections of friends and neighbours into tightly bound, social actors called *Interahamwe*."[72] Another way to explain this is through group conformity. Browning captured the power of such conformity in his study of a German police reserve battalion in Nazi-occupied Poland:

> To break ranks and step out, to adopt overtly nonconformist behavior, was simply beyond most of the men. It was easier for them to shoot.
>
> Why? First of all, by breaking ranks, nonshooters were leaving the 'dirty work' to their comrades. . . . It was in effect an asocial act vis-à-vis one's comrades.[73]

The public and participatory nature of Rwanda's genocidal violence reinforced such group conformity.

Like Fujii, McDoom also looks to social relations to explain why some joined and others did not. Through geo-coding the homes of all the 1994 residents of one community, he shows that perpetrators were likely to live in the same household or same neighbourhood. "These micro-spheres of influence . . . suggest the importance of situational peer pressure in pulling certain individuals into the violence and others not."[74] McDoom also stresses Rwanda's very high population density which, in his view, "amplified peer pressures within communities."[75]

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[69] Straus, *Order of Genocide*, 120-21.
[70] Fujii, *Killing Neighbors*, 128-29.
[71] Fujii, *Killing Neighbors*, 165.
[72] Fujii, *Killing Neighbors*, 179; see id., 154, 175
[73] Browning, *Ordinary Men*, 162, 184-85.
[74] McDoom, "Who Kills?" 3.
[75] McDoom, "Who Kills?" 41.

Even at the height of the genocide, identity was malleable: it was constantly re-fashioned through individual agency, group dynamics, and social networks. Individuals often inhabited multiple categories – perpetrators, victims, bystanders, and rescuers – simultaneously or successively during that period. And there were even some cases of Tutsi who joined the Hutu killers with the killers' knowledge.[76] Thus, as Lemarchand observes, "Guilt and innocence do not run parallel to ethnic lines."[77]

Conclusion

One of the most perplexing and disturbing aspects of Rwanda is what impelled so many otherwise ordinary people to join in the genocide so quickly. That participation seems even less comprehensible given the violence's terrifying intimacy: ordinary killers often turned on their neighbors and family members, using machetes and other everyday tools. The most commonly advanced reasons are ethnic hatred, genocidal ideology, and obedience. Rwanda's post-genocide government also explains the 1994 genocide largely in these terms. Hence, it designed *gacaca* partly with the aim of countering these cultural and ideational factors. However, recent scholarship challenges these explanations, placing the emphasis instead on situational factors, particularly wartime fear, opportunism, and social pressures.

[76] Fujii, *Killing Neighbors*, 8, 143.
[77] Rene Lemarchand, *The Dynamics of Violence in Central Africa* (Philadelphia: University of Pennsylvania Press, 2009), 90.

CHAPTER 4: RWANDA'S TRANSITION

"Peacebuilding was nothing less than an enormous experiment in social engineering."
– Roland Paris[1]

Introduction

Rwanda is generally celebrated as a success story for peace-building and state-building. In July 1994, Rwanda was a collapsed state: its treasury looted, its infrastructure devastated, its personnel complicit or killed, and its institutions delegitimized. Twenty years later, the country is at peace and appears safely out of the "danger zone" for relapsing back into conflict.[2] State institutions have been rebuilt with greater capacity and professionalism than ever existed before. Rwanda has moved off the list of "fragile states." The country has become a showcase for post-conflict reconstruction, boasting stability, security, and economic growth. Yet, these impressive accomplishments pose a challenge to the prevailing model of liberal peace-building.

Instead of a "liberal peace," Rwanda exemplifies illiberal peace at home and war-making abroad. Post-genocide Rwanda does not fit the "transition paradigm" in which a successor regime is supposed to transition to democracy. Rather, it has become increasingly authoritarian. Today, Rwanda is an example of "dominant-power politics" where the "state's main assets . . . are gradually put in the direct service of the ruling party."[3] Since the genocide, Rwanda has never been truly at peace. The Rwandan civil war, which began with the RPF's invasion in October 1990, not only continued inside Rwanda, it was also exported to the Democratic Republic of Congo, where it sucked in eight states and left five million dead. Despite a 2002 peace agreement, Rwanda remains deeply implicated in Congo's ongoing conflict through periodic military interventions along with covert support to various rebel groups.

This chapter sets out the larger security, political, and economic backdrop to *gacaca*. It begins by describing Rwanda's post-genocide conflict. It then examines and explains the regime's authoritarianism. The chapter next describes the economic transition. Finally, it

[1] Paris, *At War's End*, 4.
[2] Paul Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It* (Oxford: Oxford University Press, 2008), 32.
[3] Carothers, "End of the Transition Paradigm," 12; see Filip Reyntjens and Stef Vandeginste, "Rwanda: An Atypical Transition," in *Roads to Reconciliation*, ed. Elin Skaar et al. (Lanham, MD: Lexington Books, 2005), 101, 103.

describes how Rwanda's current leaders are engaged in ambitious social engineering in which *gacaca* formed a crucial part.

Liberal Peace-Building

Peace-building aims to ensure sustainable peace by promoting social trust and (re)creating mechanisms for both conflict prevention and conflict management. While peace-building encompasses both bottom-up community efforts and top-down state initiatives, the latter have come to dominate. Since 2000, the international community has increasingly emphasized state-building, which entails strengthening the capacity and legitimacy of state institutions to fulfil core state functions, such as security and the rule of law.[4]

The dominant model of peace-building emphasizes political and economic liberalization to achieve "liberal peace." There are several critiques of this model.[5] One of the most influential was made by Roland Paris in his 2004 book, *At War's End*. There, he argues that liberal peace-building in conflict-affected settings is frequently destabilizing. Democratization and marketization promote social competition, which can fuel new conflicts or re-ignite old ones. He identifies five "pathologies of liberalization":

> (1) the problem of 'bad' [i.e. intolerant and divisive] civil society; (2) the behaviour of opportunistic 'ethnic entrepreneurs'; (3) the risk that elections can serve as focal points for destructive societal competition; (4) the danger posed by local 'saboteurs' who cloak themselves in the mantle of democracy but seek to undermine democracy; and (5) the disruptive and conflict-inducing effects of economic liberalization.[6]

For Paris, these pathologies came together in a toxic mix in Rwanda in the early 1990s.

> Efforts to democratize Rwanda facilitated the rise of political parties that were "masks for ethnic groups that organized murderous militias" and provoked Hutu extremists to plan and launch a genocidal attack on the country's Tutsi population; the liberalization of the media and civil society organizations did not produce political moderation and may have simply offered extremist

[4] See, e.g., UN Secretary-General's High-level Panel Report on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (2004), ¶ 229; *Report of the Secretary-General on Peace-building in the Immediate Aftermath of Conflict*, U.N. Doc. A/63/881-S/2009/304 (2009), ¶ 18; Roland Paris and Timothy D. Sisk, ed. *The Dilemmas of State Building: Confronting the Contradictions of Postwar Peace Operations* (Abingdon: Routledge, 2009).
[5] See Susanna Campbell, David Chandler, and Meera Sabaratnam, ed., *A Liberal Peace? The Problems and Practices of Peace-building* (London: Zed Books, 2011).
[6] Paris, *At War's End*, 159. These pathologies are described in detail at 160-68.

> groups a means of organizing and conveying their inflammatory messages; and market-oriented economic reforms seem to have worsened, not ameliorated, the climate of insecurity in Rwanda that the perpetrators of the genocide were able to exploit.[7]

The view that democratization provoked genocide in the past and might do so again is widely shared by Rwanda's political elites and donors.

Still, Paris does not see any real alternative to liberal peace-building.[8] He rejects illiberal peace-building, arguing that authoritarian regimes are incapable of producing "self-sustaining" peace.[9] Instead, the solution to liberalization's "pathologies" is more careful sequencing: "delay liberalization and limit political and economic freedoms in the short run, in order to create conditions for a smoother and less hazardous transition to market democracy – and durable peace – in the long run."[10] He terms this strategy "Institutionalization Before Liberalization."[11] According to Paris, the international community began adopting just such a strategy in the late 1990s.[12] Given Rwanda's disastrous experience with rushed liberalization, it is hardly surprising that donors followed that strategy after the 1994 genocide.

Oddly, Paris overlooks the danger that this strategy may embed authoritarianism. This is because he treats institutionalization as a neutral, technocratic exercise when, in fact, it is an inherently political act of power-sharing or power-grabbing.[13] The longer the period of illiberal institutionalization, the less likely entrenched elites are to introduce democratization. The lesson from places like Cambodia is that "[u]nless democracy is first promoted to ensure that none of the competing factions is left out to spoil the peace process and that none emerges as the hegemonic power, democratic institution-building is difficult."[14] Post-genocide Rwanda provides yet another example of how institutionalization before liberalization can produce an illiberal peace.

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[7] Paris, *At War's End*, 78.
[8] Roland Paris, "Alternatives to Liberal Peace?" in *A Liberal Peace?* 159-73.
[9] Paris, *At War's End*, 179-81.
[10] Paris, *At War's End*, 187-88. The key elements of this strategy are spelled out at *id*. 188-207.
[11] Paris, *At War's End*, 179.
[12] Paris, *At War's End*, 212-33.
[13] Chandra Lekha Sriram, "Justice as Peace? Liberal Peace-building and Strategies of Transitional Justice," *Global Society* 21, no. 4 (2007), 588.
[14] Sorpong Peou, "Re-Examining Liberal Peace-building in Light of Realism and Pragmatism: The Cambodian Experience," in *New Perspectives on Liberal Peace-building*, ed. Edward Newman, Roland Paris and Oliver P. Richmond (New York: United Nations University Press, 2009), 321. See Thomas Carothers, "The 'sequencing fallacy,'" *Journal of Democracy* 18, no. 1 (2007), 12-27.

A Conflicted Transition: From Genocide to War

Reyntjens provocatively describes post-genocide Rwanda as "an army with a state, rather than a state with an army."[15] The RPF's military leaders (including the now nominally civilian President, Paul Kagame) control the party, which, in turn, controls the state. They have been enormously successful military strategists, first bringing Museveni to power in Uganda, next coming to power themselves in Rwanda, and then installing Laurent Kabila in the Democratic Republic of Congo.

The RPF has not let humanitarian considerations or humanitarian law stand in the way of achieving its military and political goals. During the genocide, the RPF placed military objectives ahead of rescuing Tutsi. When Roméo Dallaire, the head of the UN peace-keeping mission in Rwanda, asked Kagame for more help in saving Tutsi, Kagame responded, "If the [Tutsi] refugees have to be killed for the cause, they will be considered as having been part of the sacrifice."[16] The RPF publicly opposed efforts to send in new UN peacekeeping forces to protect Tutsi civilians. Three weeks into the genocide, the RPF's political bureau stated:

> The time for UN intervention is long past. The genocide is almost completed. . . . Consequently, the [RPF] hereby declares that it is categorically opposed to the proposed UN intervention force and will not under any circumstances cooperate in its setting up and operation.[17]

Des Forges remembers being "shocked by the RPF opposition to a force that could save Tutsi lives" at a time when she and her colleagues at Human Rights Watch and the Federation Internationale des Ligues des Droits de l'Homme were still receiving telephone calls for help from Tutsi in Rwanda. Des Forges blames the RPF for some of the foot-dragging by the UN and US in authorizing a new peacekeeping intervention. She writes, "It is impossible to judge how many lives would have been saved had the RPF welcomed the new force and had the US and other UN member states been in turn galvanized to send military aid rapidly."[18]

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[15] Filip Reyntjens, *The Great African War: Congo and Regional Geopolitics, 1996-2006* (Cambridge: Cambridge University Press, 2009), 4.
[16] Dallaire, *Shake Hands with the Devil*, 358.
[17] Gerald Gahima and Claude Dusaidi, Statement by the Political Bureau of the Rwandese Patriotic Front on the Proposed Deployment of a UN Intervention Force in Rwanda, April 30, 1994, quoted in Des Forges, *Leave None*, 699. Gerald Gahima subsequently became the most powerful figure in the justice sector between 1995 and 2004.
[18] Des Forges, *Leave None*, 699-701.

The RPF also committed serious violations of international humanitarian law during the 1990-1994 civil war and afterwards.[19] Experts working for the UN High Commissioner for Refugees estimated that the RPF killed 25,000 to 45,000 Hutu civilians from April to August 1994.[20] As Des Forges observed:

> These killings were wide-spread, systematic and involved large numbers of participants and victims. They were too many and too much alike to have been unconnected crimes executed by individual soldiers or low-ranking officers. Given the disciplined nature of the RPF forces and the extent of communication up and down the hierarchy, commanders of this army must have known of and at least tolerated these practices.[21]

There are credible reports that Kagame, then the RPF's military commander, knew about some of these killings, but took no action to stop them.[22]

Massacres by the RPF continued even after it had defeated the genocidal forces. The most notorious occurred when the RPF dismantled a camp for internally displaced persons at Kibeho in April 1995, killing some 2,000 to 4,000 Hutu civilians in front of UN peacekeepers and humanitarian aid workers.[23] Seth Sendashonga, a high-ranking RPF official who went into exile in 1995 and denounced Kagame over RPF massacres, estimated that RPF soldiers killed approximately 60,000 civilians between April 1994 and August 1995.[24] The lack of accountability for these massacres may have emboldened the RPF when it subsequently invaded the Congo.

The Congo Wars

After the RPF's military victory in July 1994, the genocidal government, extremist Hutu militia, and defeated army fled to what was then Zaire, taking approximately 1.5 million Hutu refugees with them.[25] Those forces then used the refugee camps in Zaire to launch

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[19] See Final Report of the Commission of Experts, Established Pursuant to Security Council Resolution 935, UN. Doc. S/1994/1405, December 9, 1994, ¶ 95; Des Forges, *Leave None*, 702-26; Amnesty International, *Rwanda: Reports of Killings and Abductions by the Rwandese Patriotic Army, April-August 1994* (London: Amnesty International, 1994).
[20] Des Forges, *Leave None*, 726-31.
[21] Des Forges, *Leave None*, 734-35.
[22] Des Forges, *Leave None*, 735.
[23] Prunier, *From Genocide to Continental War*, 16-23, 37-42, 147-48; Johan Pottier, *Re-Imagining Rwanda: Conflict, Survival and Disinformation in the Late Twentieth Century* (Cambridge: Cambridge University Press, 2002), 160-64.
[24] Human Rights Watch, *Law and Reality: Progress in Judicial Reform in Rwanda* (New York: Human Rights Watch, 2008), 89.
[25] This figure comes from Reyntjens, *The Great African War*, 2.

attacks on Rwanda. The international community failed to purge armed combatants and *génocidaires* from the refugee camps or to move the camps away from the Rwandan border.

Zaire's long-time dictator Mobutu Sese Seko, who had close ties to Habyarimana, supported the Rwandan Hutu rebels. The Zairean government stripped Congolese Rwandophones of their citizenship in 1995 and the governor of South Kivu ordered their expulsion in October 1996. That same month, Rwanda invaded Zaire in coalition with Banyamulenge (Congolese Tutsi in South Kivu), Uganda, and Angola, using Laurent Desire Kabila's rebel *Alliance des Forces Démocratiques pour la Libération du Congo-Zaïre* (AFDL) as a front.[26] Within eight months, Rwandan forces had marched 1,500 miles across Congo to reach Kinshasa, toppled Mobutu's 32-year reign, and installed Laurent Kabila as president. That remarkable feat of arms transformed Rwanda into the regional hegemon, dominating its much larger and richer neighbors. During the first Congo war, the Rwandan army destroyed the refugee camps in eastern Zaire, killing tens of thousands of Rwandan Hutu and Congolese civilians, and forcibly repatriating hundreds of thousands of Hutu refugees back to Rwanda.[27]

Laurent Kabila turned against his Rwandan sponsors in 1998. He ordered all foreign soldiers out of the country and began threatening the Congolese Tutsi community. In response, Rwanda put together an anti-Kabila rebellion in August 1998 headed by the Kigali-created *Rassemblement Congolais pour la Démocratie* (RCD).[28] Once again, Rwanda invaded Congo (along with Uganda and Burundi), but this time Angola, Namibia, and Zimbabwe rallied to the Kinshasa government's defense. Over the next five years, Africa's largest war displaced millions and killed more than five million civilians (with the majority falling victim to war-related disease and malnutrition).

Most Rwandan troops pulled out of eastern Congo in late 2002 following a peace agreement with Kabila's successor and son, Joseph Kabila. That agreement, however, did not end Rwanda's involvement. Rwanda continues to arm and finance local, ethnic militias, which it uses as proxy forces to battle several thousand Hutu rebels fighting under the banner of the *Forces Démocratiques de Libération du Rwanda* (FDLR), some of whose leaders were implicated in the 1994 genocide. Rwanda also uses these militias as part of its illegal exploitation of eastern Congo's immense natural resources. Eventually, in 2009, Rwanda

[26] Reyntjens, *The Great African War*, 45-79.
[27] Reyntjens, *The Great African War*, 80-101, 287-90; Prunier, *The Rwandan Crisis*, 299-321, 373-86.
[28] Reyntjens, *The Great African War*, 8.

arrested its ally General Laurent Nkunda, a Congolese Tutsi rebel leader who had previously fought with the RPF, under pressure from international donors. More surprisingly, Rwanda and the DRC struck a deal that gave the Rwandan army permission to re-enter eastern Congo to help the ineffectual Congolese army defeat the FDLR. The joint Rwandan-Congolese military operation dispersed rather than destroyed the FDLR, while causing the deaths of thousands of civilians and the displacement of tens of thousands.[29]

In June 2012, the UN Group of Experts reported that Rwanda was providing weapons, recruits, and financing to the M23 rebel group in violation of a UN arms embargo. It also stated that the Rwandan military had intervened directly in the DRC in support of those rebels. M23 is led by Bosco Ntaganda, who is subject to an arrest warrant by the International Criminal Court for earlier crimes against humanity and war crimes.[30] Human Rights Watch also documented Rwandan support for M23.[31] Despite Rwandan denials, Stephen Rapp, the top US official charged with global justice and a former ICTR prosecutor, warned Rwanda that its leaders could be prosecuted for aiding and abetting crimes against humanity in the DRC.[32] Germany, Sweden, the Netherlands, the US, and eventually the UK suspended or delayed development assistance.

Since 1996, Rwanda has justified its interventions in Congo as self-defense against genocidal forces. Yet, Rwanda's military actions quickly moved beyond self-defense to regime change, resource exploitation, and the killing of Rwandan refugees and Congolese civilians. Filip Reyntjens summarizes Rwanda's motives in Congo as

> a combination, changing over time, of genuine security concerns, economic interests, ethnic solidarity and even (selective) humanitarian concerns, the need to 'buy' internal elite solidarity, (military) institution building and a

[29] Filip Reyntjens, "Waging (Civil) War Abroad" in *Remaking Rwanda: State building and Human Rights after Mass Violence*, ed. Scott Straus and Lars Waldorf (Madison: University of Wisconsin Press, 2011), 142-45; Human Rights Watch, *Always on the Run: The Vicious Cycle of Displacement in Eastern Congo* (New York: Human Rights Watch, 2010), 6-9.
[30] Addendum to the Interim Report of the Group of Experts on the Democratic Republic of the Congo (S/2012/348) Concerning Violations of the Arms Embargo and Sanctions Regime by the Government of Rwanda, UN Doc. S/2012/348 /Add. 1, June 27, 2012.
[31] Human Rights Watch, "DR Congo: M23 Rebels Kill, Rape Civilians," July 2013; Human Rights Watch, "DR Congo: M23 Rebels Committing War Crimes," September 2012.
[32] Chris McGreal, "Rwanda's Paul Kagame Warned He May Be Charged with Aiding War Crimes," *The Guardian*, July 25, 2012.

feeling of entitlement coupled with a sense of invincibility against the background of the comfort offered by the collapse of its rich neighbor.[33]

In late 2010, the United Nations High Commissioner for Human Rights released the results of a "mapping exercise" into the most serious violations of international human rights and humanitarian law in DRC between March 1993 and June 2003. That report made the highly controversial finding that Rwanda may have committed genocide when it killed tens of thousands of Rwandan Hutu refugees and Congolese Hutu civilians in 1996 and 1997.[34]

Insurgency and Counter-Insurgency in Rwanda

The first Congo war and the accompanying forcible repatriation of Hutu refugees had unanticipated consequences: it re-imported the Rwandan civil war back on to Rwandan soil. From 1997 through 1999, the Rwandan government battled a Hutu insurgency in northwest Rwanda, which had been President Habyarimana's home region and the breeding ground of Hutu extremism. The *abacagenzi* (infiltrators) moved freely back and forth across Rwanda's porous border with Congo attacking mostly civilian targets. Though much of the leadership was heavily implicated in the 1994 genocide, the rank-and-file was a mix of ex-FAR, ex-*Interahamwe*, and new recruits from refugee camps and northwest Rwanda.

The RPF regime's counter-insurgency campaign killed thousands of Hutu civilians and displaced hundreds of thousands more.[35] The Rwandan army had largely defeated the insurgency by 1999, pushing the Hutu rebels back into Congo. The rebels made their last serious attack on Rwandan territory in May 2001, when an estimated 2,000 to 4,000 forces invaded the country. By July, the Rwandan army had decisively defeated the insurgents and captured approximately 1,800 combatants. Rwanda acknowledged that most of those captured had no links to the genocide.[36]

An Authoritarian Transition: From National Unity to RPF Domination

The continuing threat from unrepentant *génocidaires* in Congo and Hutu insurgents in northwest Rwanda from 1994 to 2001 inevitably shaped Rwanda's political transition. For one thing, the insecurity gave the RPF's military leaders the upper hand in dealing with their

[33] Reyntjens, *The Great African War*, 1-2.
[34] UN High Commissioner for Human Rights, Democratic Republic of the Congo, 1993-2003: Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of Congo between March 1993 and June 2003 (2010); Jason Stearns and Federico Borello, "Bad Karma: Accountability for Rwandan Crimes in the Congo" in *Remaking Rwanda*, 152-69.
[35] Reyntjens, *The Great African War*, 175-78.
[36] Human Rights Watch, *Rwanda: Observing the Rules of War?* (2001), 4-6.

political rivals inside and outside the RPF. For another, it seemed to justify repression at home and war abroad. Still, the RPF's increasing authoritarianism cannot be explained as a response to external and internal security threats. For repression of political opponents and independent civil society increased *after* the RPF defeated the insurgency in the northwest and largely neutralized the threat from Hutu rebels in the Congo.

The RPF's military defeat of the genocidal regime in July 1994 owed nothing to the international community, which had failed to prevent or stop the genocide. By coming to power militarily, rather than through political accommodation with the prior regime, the RPF was in a position to impose "victor's justice" on its defeated opponents. At the same time, the Hutu and Tutsi democrats, who had allied with the RPF against the Habyarimana regime, were dead, discredited, or disempowered.

When the RPF installed a "Government of National Unity" in July 1994 that grouped together all the non-extremist political parties, there was some hope it might live up to the promise of power-sharing enshrined in the Arusha Accords. Yet, an initial democratic pluralism quickly gave way to an RPF-dominated democratic centralism. The RPF's monopolization of political power was made possible because it was the only party with an army. Over the years, the RPF infiltrated, coopted, or disbanded the other political parties in the "Government of National Unity." It also created the Forum of Political Parties, which it chairs, to keep other parties toeing the RPF line. In addition, the RPF refused to permit the registration of newly formed opposition parties. During the 2010 presidential elections, the Green Democratic Party, a mostly Tutsi breakaway from the RPF, was prevented from registering and its vice-president was decapitated.[37]

By the 2010 presidential elections, Rwanda was clearly a one-party state operating under the guise of a multi-party system. The election results speak for themselves: Kagame won the presidency with 95 percent in 2003 and with 93 percent in 2010. In the 2008 parliamentary elections, the RPF actually won 96 to 98 percent of the popular vote and then engaged in "reverse-rigging" to lower their vote count to a more credible 78 percent and to give a handful of parliamentary seats to two "competing" parties. The actual results of the 2008 elections demonstrate the RPF's success in bringing most Rwandans into the party – known as the *umuryango* (family lineage) – through recruitment drives, "animation" sessions,

[37] See Joseph Sebarenzi, "Justice and Human Rights for All Rwandans" in *Remaking Rwanda*, 347-51; Reyntjens, "Rwanda, Ten Years On"; Human Rights Watch, *Preparing for Elections: Tightening Control in the Name of Unity* (2003); International Crisis Group, *Rwanda at the End of the Transition: A Necessary Political Liberalisation* (2002).

and the harassment of non-party members.[38] In the 2013 parliamentary elections, the RPF won 76 percent of the vote.

The RPF marginalized its natural political allies: Hutu democrats and Tutsi genocide survivors. Hutu democrats have been killed, disappeared, arrested, exiled, or sidelined, often after being accused as "*génocidaires*," "divisionists," or proponents of "genocide ideology."[39] As Prunier observes, "Whether killed in the genocide by Hutu Power supporters, or later politically marginalized by the RPF, the moderate Hutu have been the great losers of the civil war."[40]

More surprisingly, Tutsi survivors have been killed, exiled, and marginalized, often after being accused of monarchist tendencies or corruption. This seems strange given how much the RPF uses Tutsi suffering to legitimate its rule. However, the RPF's Tutsi leadership, which grew up in exile, has an uneasy relationship with the Tutsi survivor community.[41] For several years after the genocide, Tutsi survivors voiced strong disagreement over the RPF's reintegration of suspected *génocidaires* into the government and army, its manner of commemorating the genocide, and its failure to provide reparations to genocide survivors.[42] By 2000, the RPF had had enough. That year, it accused prominent Tutsi survivors – including Joseph Sebarenzi, the charismatic Speaker of Parliament – of corruption and plotting the return of the Tutsi king from exile.[43] Most of the leadership of the genocide survivors' organizations fled Rwanda, whereupon the RPF installed one of its central committee members as the president of the largest survivors' organization, IBUKA.[44] Since then, IBUKA has been publicly supportive of government policies, like *gacaca* and the

[38] See European Union Electoral Observation Mission, *Rwanda: Election presidentielle 25 Aout 2003; élections législatives 29 et 30 Septembre, 2 Octobre 2003* (2004); European Union Electoral Observer Mission, *Republic of Rwanda: Final Report. Legislative Elections to the Chamber of Deputies 15–18 September 2008* (2004); Filip Reyntjens, "Rwanda: A Fake Report on Fake Elections," available at http://hungryoftruth.blogspot.com/2009/01/rwanda-fake-report-on-fake-elections.html; Timothy Longman, "Limitations to Political Reform: The Undemocratic Nature of Transition in Rwanda" in *Remaking Rwanda*, 38-41.
[39] For a list of 40 political elites, both Hutu and Tutsi, who had fled Rwanda by late 2002, see International Crisis Group, *Rwanda at the End of the Transition*, 28-29.
[40] Prunier, "The Rwandan Patriotic Front," 133 n.46.
[41] Reyntjens, "Rwanda, Ten Years On," 180; Prunier, *The Rwanda Crisis*, 358-59.
[42] Heidi Rombouts, Victim Organisations and the Politics of Reparation: A Case Study on Rwanda (Ph.D. dissertation, University of Antwerp, 2004), 252-56, 302-04.
[43] For a fascinating personal account of how Kagame and the RPF marginalized the Tutsi survivors, see Joseph Sebarenzi, *God Sleeps in Rwanda* (New York: Simon and Schuster, 2009), 137-212.
[44] International Crisis Group, *Rwanda at the End of the Transition*, 13.

mass releases of confessed *génocidaires*. In 2009, the government arrested a new generation of IBUKA's leadership on grounds of corruption.[45]

The RPF has shed high-profile figures over the years. In July 1994, the RPF's three most prominent Hutu members were given highly visible posts: Pasteur Bizimungu as President, Seth Sendashonga as Minister of Interior, and Alexis Kanyarengwe as RPF chairman. Sendashonga was the first to go. He fled Rwanda in 1995, denouncing the RPF for monopolizing power and killing Hutu civilians. He was assassinated in Nairobi in 1998 after trying to create an opposition movement in exile.[46] Kanyarengwe was removed as party chair in 1998 after protesting massacres of Hutu civilians during the counter-insurgency in northwest Rwanda.[47] Bizimungu resigned as president in 2000 and attempted to create a new political party, which was immediately banned. He then publicly accused the RPF of monopolizing political and economic power, and turning Hutu into second class citizens. He was arrested in 2002 and, after a show trial in 2004, sentenced to 15 years for incitement against the state and other crimes.[48] Thus, by the end of 2000, there were no more prominent Hutu in the RPF's ranks.

President Kagame has not just sidelined prominent Hutu within the RPF, he has also turned on high-ranking Tutsi within the inner circle of political and military power. Early departures included an RPF financier turned parliamentarian in 2000.[49] Former Prosecutor General Gerald Gahima and his brother, a former Presidential adviser, left Rwanda in early 2004 after allegations of corruption were leaked to the press. In mid-2010, the former army chief fled to South Africa to join the former head of external intelligence in exile, while another two generals were arrested. After denouncing Kagame from exile in South Africa, the former army chief barely survived an assassination attempt.[50]

The 2010 presidential elections signalled new, and potentially more destabilizing, trends. Major fissures surfaced within the RPF and, more importantly, within the military leadership. In addition, the repression was more directed at the RPF's natural political

[45] Ignatius Ssuuna, "Two More IBUKA Officials Arrested," *The New Times*, April 29, 2010.
[46] Prunier, *From Genocide to Continental War*, 365-68.
[47] Reyntjens, *The Great African War*, 184-85.
[48] Lars Waldorf, "A Justice 'Trickle-Down': Rwanda's First Postgenocide President on Trial" in *Prosecuting Heads of State*, ed. Ellen L. Lutz and Caitlin Reiger (Cambridge: Cambridge University Press, 2009), 151-75. President Kagame pardoned Bizimungu in April 2006 on health grounds.
[49] For a personal account by that former RPF parliamentarian, see Valens Kajeguhakwa, *Rwanda: De la terre de paix à la terre de sang et après?* (Paris: Editions Remi Perrin, 2001).
[50] SAPA-AFP, "Trial Exposes Rwandan Opposition Crackdown," August 28, 2012; Martin Plaut, "South Africa 'Foils Murder Plot' on Rwanda's Nyamwasa," *BBC News*, September 22, 2011.

constituency: members of the Tutsi minority who had returned from exile after the genocide. Furthermore, the circle of power around President Kagame shrank even further. Even after President Kagame's win, political repression continues.[51]

The Politics of National Reconciliation

Rwanda's growing authoritarianism has been accompanied and aided by a discourse of national reconciliation. The RPF first began to talk seriously about national reconciliation during then President Bizimungu's *Urugwiro* meetings in 1998 and 1999. In 2000, the UN Special Representative observed that "after five years of refusing to talk of reconciliation until justice is seen to be done, Rwandans now accept that reconciliation must be a national goal in its own right."[52] That shift can be attributed to three main factors: the defeat of the insurgency in northwest Rwanda, the marginalization of genocide survivors, and President Bizimungu's personal initiative.[53]

Since 1999, the RPF has promoted a discourse of "national unity and reconciliation" ("*ubumwe n'ubwiyunge*") that hearkens back to an invented past of Rwandan unity.[54] President Kagame invokes this "imagined community" repeatedly in his speeches:

> [T]he most characteristic feature of Rwanda and Rwandans is that, before colonialism, we had always been a united people for over five centuries. . . . This harmonious coexistence was disrupted by the advent of the colonialists, who deliberately chose to divide us . . . In Rwanda, this policy had a devastating effect because, for the first time, the notion of one nation was shattered, as the idea of ethnic groups was introduced.[55]

However, the historian Jan Vansina has shown that the Rwandan nation is a twentieth-century creation and that the split between Hutu and Tutsi occurred before the arrival of Europeans.[56] The RPF's revisionist history serves as a foundational myth for a new Rwandan nationalism designed to replace the ethnic divisions of the past.

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[51] See Human Rights Watch, "Rwanda: Country Summary," January 2013.
[52] Michel Moussalli, *Report of the Special Representative of the Commission on Human Rights on the Situation of Human Rights in Rwanda*, U.N. Doc. A/55/269 (August 4, 2000), ¶ 180.
[53] Reyntjens and Vandeginste, "Rwanda: An Atypical Transition," 102-03.
[54] Pottier, *Re-imagining Rwanda*, 110-26.
[55] Paul Kagame, "Speech by His Excellency President Paul Kagame at the University of Washington," April 22, 2004.
[56] Vansina, *Antecedents to Modern Rwanda*, 134-39, 198-99.

The RPF imposes its reconciliation ideology in a top-down and coercive manner that "denies a space for difference and silences criticism and legitimate grievances."[57] Early on, Sibomana expressed concern about enforced reconciliation:

> National reconciliation does not mean forcing people to subscribe to an ideology or to obey a new form of authority unquestioningly. . . . That is extremely dangerous. The country had already seen the results of a cult of authority.[58]

To create "national unity and reconciliation," the RPF is re-educating the population in schools, *ingando* (solidarity camps), and *intorero* (civic education trainings).[59] It also has criminalized most ethnic discourse as "divisionism" and "genocide ideology."[60] Still, the government has not found it easy to legislate away people's perceptions of ethnic differences – perceptions that were inevitably re-inscribed by the genocide itself.

So far, these laws and policies have not eliminated ethnic discourse but rather driven it underground.[61] In her ethnographic fieldwork in 2004-2005, Lyndsay McLean Hilker uncovered pervasive ethnic categorizing and stereotyping among youth in the capital. Her respondents constantly tried to ascertain the ethnicity of others while concealing their own.[62] She also found that "a significant number habitually globalized victimhood to all Tutsi and guilt to all Hutu."[63] Just as ethnicity remains salient, alternative historical narratives continue to exist alongside (or underneath) the RPF's narrative. For example, some Rwandans tell researchers that ethnic relations were harmonious until the RPF set off the civil war in 1990.[64]

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[57] Susanne Buckly-Zistel, "Dividing and Uniting: The Use of Citizenship Discourses in Conflict and Reconciliation in Rwanda," *Global Society* 20, no. 1 (2006), 102.
[58] Sibomana, *Hope for Rwanda*, 139. For a study of how reconciliation and the RPF's reconciliation narrative is perceived at the local level, see Eugenia Zorbas, "What Does Reconciliation After Genocide Mean? Public Transcripts and Hidden Transcripts in Post-Genocide Rwanda," *Journal of Genocide Research* 11, no. 1 (2009), 127-47; Eugenia Zorbas, "Reconciliation in Post-Genocide Rwanda: Discourse and Practice" (Ph.D dissertation, London School of Economics, 2008).
[59] See Sarah Warshauer Freedman et al., "Teaching History in Post-Genocide Rwanda" in *Remaking Rwanda*, 297-315; Suzanne Buckley-Zistel, "Nation, Narration, Unification? The Politics of History Teaching after the Rwandan Genocide," *Journal of Genocide Research* 11, no. 1 (2009), 31-53; Thomson, "Reeducation for Reconciliation," 331-39.
[60] See Waldorf, "Instrumentalizing Genocide."
[61] See Kirrily Pells, "Building a Rwanda 'Fit for Children'" and Lyndsay McLean Hilker, "Young Rwandans' Narratives of the Past (and Present)," in *Remaking Rwanda*, 82-83 and 316-30; Lyndsay McLean Hilker, "Everyday Ethnicities: Identity and Reconciliation among Rwandan Youth," *Journal of Genocide Research* 11, no. 1 (2009), 81–100.
[62] Hilker, "Everyday Ethnicities," 92-96.
[63] Hilker, "Everyday Ethnicities," 96.
[64] Zorbas, "What Does Reconciliation After Genocide Mean?" 134-35.

There has always been an inherent tension between the government's forward-looking reconciliation narrative, which erases ethnicity, and its backward-looking genocide narrative, which inevitably emphasizes ethnicity.[65] As Nigel Eltringham observes, the government risks replacing the old ethnic labels (Hutu-Tutsi) with new, but equally divisive, labels (*génocidaire*-victim) that only re-inscribe ethnic difference.[66] During a brief period, the government made serious efforts to avoid ethnic labelling even when talking about the genocide. For example, President Paul Kagame elided ethnicity in his speech at the 2006 genocide commemoration ceremony, saying that "the citizens of the country" were mobilized "into killing their fellow Rwandans."[67] Since 2007, however, the government has re-emphasized ethnicity. The 2003 Constitution was amended by replacing "genocide" with "the 1994 Tutsi genocide."[68] At a 2008 conference in Kigali, a government representative gently chided an audience member for using the term "Rwandan genocide" and reminded him that the new term was "Tutsi genocide."[69] One long-time Rwanda observer worried that the term "Tutsi genocide" winds up "making ethnicity paramount" again.[70]

A Developmental Transition: From Recovery to Growth

Before 1994, Rwanda was an overwhelmingly rural society dominated by smallholder farming. The RPF leadership has a very different vision that sees Rwanda becoming a lower middle-income country by 2020.[71] To achieve that goal (Vision 2020), the government is replacing small-scale and subsistence agriculture with larger agribusiness and ranching ventures through land consolidation, land tenure reform, regional crop specialization, and mono-cropping.[72] It is also reducing the economy's dependence on agriculture by building up

[65] See Nigel Eltringham, "The Past is Elsewhere: The Paradoxes of Prescribing Ethnicity in Post-Genocide Rwanda" in *Remaking Rwanda*, 269-82.
[66] Nigel Eltringham, *Accounting for Horror: Post-Genocide Debates in Rwanda* (London: Pluto Press, 2004), 75-76.
[67] Paul Kagame, "Address by His Excellency Paul Kagame, President of the Republic of Rwanda, at the Twelfth Commemoration of the Rwandan Genocide," April 7, 2006.
[68] Constitution, arts. 51 & 179.
[69] Remarks at "International Conference on the Tutsi Genocide and Reconstruction of Knowledge," Kigali, July 23, 2008.
[70] Interview, Kigali, July 2008.
[71] Republic of Rwanda, *Rwanda Vision 2020* (2000).
[72] See An Ansoms, "Rwanda's Post-Genocide Economic Reconstruction: The Mismatch between Elite Ambitions and Rural Realities" in *Remaking Rwanda*, 240-51; Chris Huggins, "The Presidential Land Commission: Undermining Land Law Reform" in *Remaking Rwanda*, 252-65. For more detail on Rwanda's land policies, see Herman Musahara and Chris Huggins, "Land Reform, Land Scarcity and Post-Conflict Reconstruction: A Case Study of Rwanda" in *From the Ground Up: Land Rights, Conflict and Peace in Sub-Saharan Africa*, ed. Chris Huggins and Jenny Clover (Pretoria: Institute for Security Studies, 2005); Pottier, *Re-imagining Rwanda*, 179-201; An Ansoms, Faces of Rural Poverty

the service sector, particularly with respect to information technology. Overall, the RPF has adopted a developmental state agenda that envisions Rwanda becoming the Singapore of Central Africa.

Rwanda has made an impressive economic recovery since the genocide. The annual growth rate has averaged six percent. The government has attracted foreign investment, partly through lowered corporate tax rates and a reputation for low corruption. Still, there are real concerns about whether this growth is sustainable. For one thing, Rwanda is highly dependent on overseas development assistance. For another, Rwanda's growth is partly built on illegal resource exploitation from the Congo.[73] Furthermore, the RPF and army's private holding companies engage in anti-competitive behavior.[74]

Rwanda's economic growth has only recently begun reducing poverty and inequality. For the period from 2001 to 2006, poverty increased in absolute terms as the number of people living below the poverty line rose from 4.82 million to 5.38 million.[75] Inequality also increased over the same time period, with the Gini co-efficient going from 0.47 to 0.51. As the United Nations Development Program (UNDP) observed in 2007, "Rwanda's high growth rates are deceptive in that they hide large and growing inequalities between social classes, geographic regions and gender."[76] Sebastian Silva Leander, who drafted the UNDP report, attributes a large part of that "surge in inequality" to resource exploitation in the Congo.[77] There is also enormous rural-urban inequality, with rural poverty at 67 percent.[78] McDoom raises concerns about horizontal inequality (i.e. inequality between social groups):

> In Rwanda, there is a high correlation between spatial and horizontal inequality as Rwanda's poorer rural periphery is comprised overwhelmingly of Hutu smallholders. The existence of horizontal inequality – real or

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in Contemporary Rwanda: Linking Livelihood Profiles and Institutional Processes (Ph.D dissertation, University of Antwerp, 2009).

[73] Omar McDoom, *Rwanda's Exit Pathway from Violence: A Strategic Assessment*, World Development Report: Background Case Study (2011), 16.

[74] For a fascinating, if overly positive, view of the role played by these companies, see David Booth and Frederick Golooba-Mutebi, "Developmental Patrimonialism? The Case of Rwanda," *African Affairs* 111, no. 444 (2012), 379-403.

[75] McDoom, *Rwanda's Exit Pathway from Violence*, 14.

[76] United Nations Development Programme, *Turning Vision 2020 into Reality: From Recovery to Sustainable Human Development. National Human Development Report, Rwanda* (2007), 10, 15.

[77] Sebastian Silva Leander, "Structural Violence and Conflict: Vertical and Horizontal Inequality in Post-Genocide Rwanda" in *Horizontal Inequalities and Post-Conflict Development* ed. Arnim Langer, Frances Stewart, and Rajesh Venugopal (Basingstoke: Palgrave Macmillan, 2012), 236-46.

[78] World Bank, *Country Assistance Strategy for the Republic of Rwanda: FY09-FY12* (2008), 5.

perceived – creates ethnic grievances which may be instrumentalized during periods of political opportunity by elite ethnic entrepreneurs.[79]

This is not helped by increased levels of conspicuous consumption by a growing Tutsi elite connected to the RPF and resource exploitation in the Congo.

Inequality – and particularly horizontal inequality – is a highly sensitive issue for the RPF regime. It destroyed household survey data collected by the World Bank in 2004.[80] It subsequently denounced the UNDP's 2007 report for documenting an increase in inequality.[81] Since then, the regime has insisted that economic data be collected and reported by the government's National Institute of Statistics.[82] According to that Institute, poverty and inequality have sharply declined between 2005/06 and 2010/11: poverty fell from 57 percent to 45 percent and the Gini co-efficient from 0.52 to 0.49. It gives several explanations: decreased household size; increased agricultural productivity; the commercialization of agriculture; increase in wage income; and increase in income from transfers.[83]

Despite impressive economic gains since 1994, Rwanda remains one of the poorest and most densely populated countries in the world. By 2012, per capita GDP had risen to $620, compared with $333 in 1989 (the year before the civil war), $288 in 1995 (the year after the genocide), and $202 in 2003 (the year of the first post-genocide national elections).[84] Approximately 80 percent of the population depends on agriculture for its livelihood.[85] Customary inheritance practices have led to land fragmentation so that the average household has only 0.81 hectares, just less than that needed to feed a household.[86] On top of all that, soil fertility is declining.

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[79] McDoom, *Rwanda's Exit Pathway from Violence*, 15. For more on horizontal inequalities, see Langer, Stewart, and Venugopal, *Horizontal Inequalities and Post-Conflict Development*.
[80] Bert Ingelaere, "Do We Understand Life After Genocide?" 19.
[81] Ministry of Finance and Economic Planning, "Outdated and Misleading Data in HDR 2011" (2011).
[82] See Esther Marijnen and Jaïr van der Lijn, "Rwanda 2025: Scenarios for the Future Political Stability of Rwanda," in *Rwanda Fast Forward*, ed. Maddelena Campioni and Patrick Noak (Basingstoke: Palgrave, 2012), 22.
[83] National Institute of Statistics of Rwanda, *The Evolution of Poverty in Rwanda from 2000 to 2011: Results from the Household Surveys (EICV)* (2012), 14, 23, 28.
[84] World Bank, "GDP per capita" (2013) available at http://data.worldbank.org/indicator/NY.GDP.PCAP.CD?page=2. Rwanda's $620 per capita GDP was higher than Burundi ($251), the Central African Republic ($473), the Democratic Republic of Congo ($272), Ethiopia ($470), Liberia ($422), Tanzania ($609), and Uganda ($547) and just below Sierra Leone ($635). *Id.*
[85] United Nations Development Programme, *Turning Vision 2020 into Reality*, 15.
[86] United Nations Development Programme, *Turning Vision 2020 into Reality*, 14-15.

Donor assistance, particularly in the form of budgetary support, has made Rwanda's post-conflict recovery possible. Such assistance constitutes approximately 20 percent of gross national income. Much of that comes from the United Kingdom, United States, European Union, and World Bank. Donors have been motivated by several factors, including guilt and shame over the genocide, admiration for the RPF's leadership, and eagerness for African success stories. Rwanda's donors have largely avoided confrontation with the regime over domestic repression, exclusion, and inequality. The only (limited) exception to this pattern is when Rwanda has overreached in the DRC, either by threatening to reinvade or by too blatantly supporting rebel warlords.[87]

State-Building and Social Engineering

Since the genocide, the RPF has pursued a highly ambitious policy of state-building and social engineering to remake Rwanda. It not only aims to alter Rwanda's governance and economic structures, it also seeks to change social identities, cultural norms, and individual behavior. Consequently, the RPF has undertaken a series of dramatic political, economic, and social projects, including the world's boldest experiment in transitional justice, comprehensive land tenure and agricultural reform, forced villagization, a de facto ban on ethnic identity, re-education of the population, and the systematic redrawing and renaming of Rwanda's territory.

The RPF justifies this radical restructuring as necessary to prevent another genocide. This view is predicated on a specific, intentionalist interpretation of the genocide that sees it rooted in a racist culture and eliminationist ideology that consistently promoted violence and discrimination against Tutsi. That is, Rwanda's new leaders have a fairly one-dimensional and sharply negative view of past Rwandan society and culture. This is understandable as most of these leaders grew up in exile because their parents had fled identity-based violence and discrimination. Yet, it is also self-serving in that it significantly downplays the effect of the RPF-initiated civil war. And, as discussed in the previous chapter, recent scholarship challenges the RPF's view that ethnic hatred, genocide ideology, and hate media motivated most ordinary *génocidaires*.

The RPF's social engineering also conforms to a political logic of survival given its narrow base of support: mostly Anglophone Tutsi who grew up in exile in Uganda – that is, a

[87] See Zorbas, "Aid Dependence and Policy Independence" and Rachel Hayman, "Funding Fraud? Donors and Democracy in Rwanda" in *Remaking Rwanda*, 103-17 and 118-31; Liz Ford, "UK Withholds Aid to Rwanda in Light of DRC Congo Allegations," *The Guardian*, Nov. 30, 2012.

minority of the Tutsi minority. Over the years, the RPF has lost support among its base (due to internal purges), as well as among its natural allies, Tutsi survivors and Hutu democrats (due to repressive policies). The RPF also alienated many would-be Hutu supporters during the 1990-1994 civil war, the massacre at Kibeho in 1995, the brutal counter-insurgency in the northwest in the late 1990s, the massacres of Rwandan Hutu in the DRC, and through mass arrests and accusations against Hutu. With this narrow – and narrowing – base of support, the RPF's paramount concern is to retain tight control of the political arena and populace in the short-term. This gives the RPF time to mold the culture, norms and behavior of the Hutu majority through social engineering over the long term.

The RPF has had a relatively free hand in pursuing its state building and social engineering. By ending the genocide, it earned the moral and political legitimacy to reshape Rwanda. The RPF's military victory also meant it did not have to make any significant political concessions to its adversaries (the defeated *génocidaires*) or its political allies (the Hutu and Tutsi democrats and the genocide survivors). Finally, the international community has largely subsidized the RPF's agenda out of both genocide guilt and genuine admiration for the RPF.

Seeing Like A State

In *Seeing Like a State*, James Scott describes the four factors that lie behind major episodes of state-led social engineering. He writes:

> The first element is the administrative ordering of nature and society. . . .
> The second element is what I call a high-modernist ideology. . . . It was, accordingly, uncritical, unskeptical, and thus unscientifically optimistic about the possibilities for the comprehensive planning of human settlement and production. . . .
> The third element is an authoritarian state that is willing and able to use the full weight of its coercive power to bring these high-modernist designs into being. The most fertile soil for this element has typically been times of war, revolution, depression, and struggle for national liberation. In such situations, emergency conditions foster the seizure of emergency powers and frequently delegitimize the previous regime. They also tend to give rise to elites who repudiate the past and who have revolutionary designs for their people.
> A fourth element is closely linked to the third: a prostrate civil society that lacks the capacity to resist these plans. War, revolution, and economic collapse

> often radically weaken civil society as well as make the population more receptive to a new dispensation.[88]

All four elements are present in post-genocide Rwanda.

Administrative Ordering

The RPF is administratively re-ordering Rwandan society through decrees, re-education, and propaganda. It regulates everything from ethnic discourse to personal hygiene. The RPF has spatially re-ordered Rwanda, re-drawing and re-labeling the country's map in an attempt to eradicate the regionalist loyalties and divisions that played a significant role in Rwanda's previous violence. The country's ten provinces (with their historically evocative names) were reduced to four (with the rationalistic, legible names of Northern, Southern, Eastern, and Western). In addition, most cities, towns, and other places had their names and shapes changed practically overnight. The RPF has reconfigured Rwanda's administrative hierarchy into a notional decentralization that often reinforces the state's central power.[89] Furthermore, the RPF is re-ordering and rationalizing the rural landscape of traditionally scattered homesteads, small shareholder plots, and inter-cropping through forcible villagization (*imidugudu*), land consolidation, and mono-cropping.[90]

High-Modernist Ideology

The RPF exhibits a high-modernist ideology – a mix of Leninist vanguardism and rationalistic triumphalism influenced by Uganda's National Resistance Movement. Some of the ambitions and methods of the RPF's social engineering are borrowed from the National Resistance Movement: the notion of the RPF as an all-embracing family resembles the "no-party" Movement system, *ingando* solidarity camps are lifted from Uganda's *chaka-mchaka* camps (right down to the weapons training for students), and *gacaca* has some features of the NRM's revolutionary courts.

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[88] James Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven, CT: Yale University Press, 1998), 4-5.

[89] See Bert Ingelaere, "The Ruler's Drum and the People's Shout: Accountability and Representation on Rwanda's Hills" in *Re-making Rwanda*, 67-78. For more positive views of Rwanda's decentralization, see Victoria Chambers and Frederick Golooba-Mutebi, *Is the Bride Too Beautiful? Safe Motherhood in Rural Rwanda* (London: Overseas Development Institute, 2012), 25-28 & n. 53; Kristin C. Doughty, Contesting Community: Legalized Reconciliation Efforts in the Aftermath of Genocide in Rwanda, Publicly Accessible Penn Dissertations, Paper 333 (2011), 7-8.

[90] See An Ansoms, "Rwanda's Post-Genocide Economic Reconstruction: The Mismatch between Elite Ambitions and Rural Realities" in *Remaking Rwanda*, 240-51; Catherine Newbury, "High Modernism at the Ground Level: The *Imidugudu* Policy in Rwanda" in *Remaking Rwanda*, 223-39.

The RPF's high modernism is most apparent in its efforts to erase ethnicity and rewrite history.[91] It compels large segments of the population (including university-bound youth, civil servants, demobilized soldiers, former insurgents, and released *génocidaires*) to undergo re-education in *ingando* (solidarity camps) and *intorero* (civic education trainings).[92] There, they are taught the RPF's ideology of "national unity and reconciliation." As President Kagame declares, "We are inculcating a new outlook that is Rwandan, and not ethnic."[93] In part, this policy reflects the legitimating needs of a minority (Anglophone Tutsi) regime to cast itself as representing the Rwandan people.

Authoritarian State

There is an understandable tendency to see 1994 as Rwanda's Year Zero. Yet, the genocide did not wipe the past and the RPF did not re-boot the future. There are important historical continuities between pre- and post-genocide Rwanda that are all too easily obscured by the rupture of 1994, particularly, the strong authoritarian state. Rwanda has had a strong centralizing state since the nineteenth century.[94] Historically, the state has practiced high levels of social control over the largely rural population – and that is no different today. Furthermore, the RPF has a strong authoritarian tradition. This is rooted in its origins as an armed group and vanguard party, but also reflects its fear of majoritarian democracy in a country where Hutu constitute an overwhelming majority.[95] As described earlier in this chapter, the RPF has grown increasingly authoritarian and intolerant of dissent. The inner circle of power around President Kagame continues to shrink through arrests, expulsions, and defections. At the same time, the RPF has augmented its political control over the countryside by replacing elected local officials (even RPF party members) with appointed, non-local loyalists.[96] Local officials then use a mix of coercion and re-education to meet policy targets

[91] See Eltringham, "The Past is Elsewhere"; Pottier, *Re-Imagining Rwanda*, 109-26.
[92] The length and substance of *ingando* trainings vary depending on the targeted population, but all participants are taught Rwandan history, civic education, and national unity and reconciliation. See Susan Thomson, "Reeducation for Reconciliation: Participant Observations on *Ingando*" in *Remaking Rwanda*, 331-39; Chi Mgbako, "*Ingando* Solidarity Camps: Reconciliation and Political Indoctrination in Post-Genocide Rwanda," *Harvard Human Rights Journal* 18 (2005), 201–24; Penal Reform International, *From Camp to Hill, the Reintegration of Released Prisoners: Gacaca Research Report No. 6* (2004), 16-41, 90-103, 110-11.
[93] Paul Kagame, "Speech by His Excellency President Paul Kagame at the University of Washington," April 22, 2004.
[94] See Lemarchand, *Rwanda and Burundi*.
[95] See Prunier, "The Rwandan Patriotic Front," 123-33; Human Rights Watch, *Preparing for Elections,* 4; International Crisis Group, *Rwanda at the End of the Transition*, 10-11; Timothy Longman et al., *Rwandan Democracy and Governance Assessment* (2002), 24.
[96] Bert Ingelaere, "The Ruler's Drum and the People's Shout," 71-73.

set by the RPF. In a recent study of improvements to maternal health service delivery, the researchers attended a local "Information, Education and Communication session" where

> participants were informed that women who gave birth at home were considered 'enemies of the country.' They were informed that the district council had sanctioned fines for such behavior and warned that the local authorities fully intended to implement the measures.[97]

Coercion has proven effective: "Women repeatedly cited fines as the main reason for choosing to give birth at the health centre."[98]

Today, Rwanda is a highly authoritarian, hybrid regime. Larry Diamond classified it as "politically closed authoritarian" in 2001,[99] but, since the advent of national elections in 2003, it has moved into the "hegemonic electoral authoritarian" category. Rwanda performs poorly on democracy indictors. Freedom House rates Rwanda as "Not Free." From 2004 to 2011, Rwanda had a Political Rights Score of 6 and a Civil Liberties Score of 5 (where 7 is the lowest). In 2012, Rwanda's Civil Liberty Score declined to 6.[100] Rwanda's Polity IV ranking dropped from -3 in 2009 to -4 in 2010 (where -10 is fully authoritarian and +10 is fully democratic). That score places it just above the early years under President Kayibanda.[101] According to the Worldwide Governance Indicators, Rwanda is in the 12th lowest percentile on voice and accountability and 48th lowest percentile on rule of law in 2011.[102]

Prostrate Civil Society

Rwanda's civil society was both devastated and delegitimized by the genocide.[103] Many progressive civil society activists, both Hutu and Tutsi, were either killed or marginalized. Other activists and organizations became complicit in the violence. The RPF limits civil society, insisting that it focus on apolitical service delivery which accords with development priorities and policies. As the Minister of State for Good Governance made clear:

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[97] Chambers and Golooba-Mutebi, *Safe Motherhood in Rwanda*, 41.
[98] Chambers and Golooba-Mutebi, *Safe Motherhood in Rwanda*, 39.
[99] Larry Diamond, "Thinking About Hybrid Regimes," *Journal of Democracy* 13, no. 2 (2002), 31.
[100] Freedom House, *Freedom in the World 2013* (2013), 17, 22.
[101] "Authority Trends, 1961-2010: Rwanda," *Polity IV Project: Political Regime Characteristics and Transitions, 1800-2012*, (2011), available at http://www.systemicpeace.org/polity/rwa2.htm.
[102] Worldwide Governance Indicators, "Country Data Report for Rwanda, 1996-2011" (Washington, DC: World Bank Institute, 2012).
[103] For an overview of civil society before the genocide, see Uvin, *Aiding Violence*, 161-79.

> There are two debates on the role of civil society organizations in developing countries . . . On one side, civil society is a counter to government, and on the other civil society is seen as an effective partner in service delivery and the development process. Rwanda favors the latter approach.[104]

Despite a stated commitment to participation and consultation, the government mostly engages in top-down (and limited) information sharing and instruction.[105]

The RPF controls civil society using three key methods. It enforces restrictive laws on nongovernmental organizations. It has pressured most civil society organizations into joining an umbrella group, the Civil Society Platform, which is largely controlled by the RPF. Finally, it periodically accuses civil society organizations of "genocide ideology." A 2004 parliamentary report charged a wide range of Rwandan and international organizations – including CARE International, Norwegian People's Aid and Trócaire – with promoting genocide ideology. That report equates human rights monitoring, civic education, rights-based development, and any criticism of government policy with "genocidal ideology."[106] As a result of these restrictions, Rwandan civil society today is weak, fragmented, and self-censoring.[107] Most civil society actors practice self-censorship to avoid offending the RPF.

Since July 1994, many of Rwanda's independent journalists have been killed, arrested, intimidated, driven into exile, and fined, and their newspapers shut down, suspended, or starved of advertising revenue.[108] Attacks on journalists reached a new crescendo in the period leading up to the 2010 presidential elections.[109] The RPF has also censored and harassed international media and foreign journalists. The 2004 parliamentary report criticized international radio stations for "becom[ing] a network of genocidal

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[104] Quoted in Kerstin McCourt, "Judicial Defenders: Their Role in Postgenocide Justice and Sustained Legal Development," *International Journal of Transitional Justice* 3, no. 2 (2009), 281 n. 28.
[105] See Paul Gready, "'You're Either With Us or Against Us': Civil Society and Policy Making in Post-Genocide Rwanda," *African Affairs* 109, no. 437 (2010), 637-57.
[106] Front Line, *Rwanda: Disappearances, Arrests, Threats, Intimidation and Co-option of Human Rights Defenders, 2001–2004* (Dublin: Front Line, 2005).
[107] Longman, "Limitations to Political Reform," 27-31; Paul Gready, "Beyond 'You're with Us or against Us': Civil Society and Policymaking in Post-Genocide Rwanda" in *Remaking Rwanda*, 87-100; Jean-Paul Kimonyo, Noel Twagiramungu, and Christopher Kayumba, "Supporting the Post-Genocide Transition in Rwanda: The Role of the International Community," Democratic Transition in Post-Conflict Societies Project, Working Paper 32 (The Hague: Netherlands Institute of International Relations 'Clingendael,' 2004), 34-63.
[108] Lars Waldorf, "Censorship and Propaganda in Post-Genocide Rwanda" in *The Media and the Rwanda Genocide*, ed. Allan Thompson (London: Pluto Press, 2007).
[109] Lars Waldorf, "Rwanda: UK-Subsidised Media Repression," *Index on Censorship*, August 12, 2010.

ideology," and singled out the British Broadcasting Corporation (BBC) and Voice of America (VOA).[110] In April 2009, the Minister of Information suspended the BBC's Kinyarwanda radio service, claiming that it was promoting "genocide ideology."[111]

The RPF justifies heavy-handed restrictions on media freedom as needed to prevent any recurrence of "hate media" inciting genocide. In an aggressive speech at the April 2010 genocide commemoration, President Kagame attacked Rwandan journalists for complaining about restrictions on their freedom of expression: "What freedoms are you teaching me? If you can't take full responsibility for what you did . . . in the politics that killed 1 million people."[112] In reality, many of the editors and journalists targeted by the RPF are Tutsi who returned to Rwanda after the genocide and subsequently became disillusioned with the RPF.

Conclusion

This chapter set out the larger security, political, and economic context for Rwanda's transitional justice efforts. *Gacaca* needs to be seen as part of the ruling party's larger project of state building and social engineering rather than as a stand-alone initiative. Post-genocide Rwanda problematizes the notion of "transitional justice" when the successor regime is not transitioning towards a liberal peace.

[110] Front Line, *Rwanda*, 79-80.
[111] Human Rights Watch, "Rwanda: Restore BBC to the Air," April 27, 2009. The ban on the BBC local service was lifted two months later apparently after pressure from the UK government.
[112] Speech by H.E Paul Kagame, President of The Republic Of Rwanda at the 16th Commemoration of the Genocide, April 7, 2010.

CHAPTER 5: RWANDA'S JUSTICE

"For a house, for a field or a tool, people are denounced without evidence, and awkward neighbors are arrested."
– André Sibomana[1]

"All Rwandans are afraid of being arrested one day. . . . Innocent people are no longer even sure they are innocent."
– Rwandan prisoner[2]

Introduction

It is often assumed that Rwanda had no choice but to arrest and try large numbers of suspected *génocidaires* given the need for accountability and the participatory nature of the 1994 genocide. Yet, that overlooks the RPF's decision to select trials over an amnesty or truth commission. This chapter examines that choice and then tries to explain why the RPF opted for maximal accountability rather than the Nuremberg model of exemplary prosecutions. The chapter opens by identifying the factors commonly associated with a successor regime's selection of accountability justice mechanisms. It then moves on to consider the international and domestic factors that influenced the RPF's policymaking on accountability. The chapter next describes in detail the RPF's maximal accountability for genocide and minimal accountability for its own crimes against humanity and war crimes.

Choosing Accountability

Successor regimes face an array of options when it comes to dealing with atrocities, ranging from amnesties to trials and from lustration to memorials. These options are not zero-sum and regimes can sequence seemingly incompatible options. For example, several Latin American states granted amnesties and only later conducted trials. When regimes do choose accountability, it is not always clear whether that reflects a normative or instrumental decision.[3] Subotić points out that a growing number of successor regimes are cynically "hijacking" transitional justice norms and mechanisms to further their own interests – namely, to go after political opponents, attract international legitimacy (and funding), and avoid making more fundamental political changes.[4] She rightly observes that "As

[1] Sibomana, *Hope for Rwanda*, 107.
[2] Carina Tertsakian, *Le Château: The Lives of Prisoners in Rwanda* (London: Arves Books, 2008), 451.
[3] See Mendeloff, "Deterrence, Norm Socialization," 290.
[4] Subotić, *Hijacked Justice*, 6.

[international] norms travel through the domestic political space, they get strategically appropriated and utilized by different local actors for a variety of motives."[5]

Several factors shape a successor regime's decision whether to pursue accountability and its choice of mechanisms. International factors include the availability of donor funding, the degree of international pressure to comply with the norm of accountability, and the practices of neighboring states. On the domestic front there are additional factors. For post-authoritarian transitions, these include: the character of human rights abuses (nature, extent, and age), the type and duration of the old regime, the type of transition (whether negotiated or not), the presence of spoilers, the balance of power (between military and civilians or between a new regime and its opponents), the strength of civil society (particularly victims and survivors' organizations), institutional legacies of the old regime, and the background of the new leaders. The factors relevant to post-conflict transitions include: conflict duration, conflict intensity, conflict incompatibility (i.e. whether the conflict was fought over control of government or over territory), degree of international intervention, type of termination, and post-conflict regime type. In their large comparative study, Lie, Binningsbø, and Gates find that "[t]rial processes more often take place after conflicts that end in decisive victories."[6] In addition, trials are less frequent after high-intensity civil wars.[7] Olsen, Payne and Reiter arrive at somewhat different results in their comparative study. They discover that "those conflicts that end in victory are highly correlated with amnesties" for rebels.[8] Conflicts of greater severity and longer duration also lead to trials. Elsewhere, they find trials more likely following an authoritarian regime and when the successor regime's economy improves.[9]

Explaining Rwanda's Choice

International Factors

The RPF has displayed deep skepticism towards the norm and mechanisms of accountability. This is partly due to the low regard in which it holds the international community, particularly the United Nations, for failing to prevent or halt the 1994 genocide. In addition, the RPF does not share the liberal legalism underpinning international justice. Perhaps most importantly, the regime is committed to ensuring there is no international

[5] Subotić, *Hijacked Justice*, 29. Subotić helpfully distinguishes three groups within domestic politics: "norm promoters," "instrumental adopters," and "norm resisters." *Id.* at 7, 34-36.
[6] Lie, Binningsbø, and Gates, "Post-Conflict Justice and Sustainable Peace," 738.
[7] Lie, Binningsbø, and Gates, "Post-Conflict Justice and Sustainable Peace," 737.
[8] Olsen, Payne and Reiter, "Transitional Justice and Civil War," 164.
[9] Olsen, Payne and Reiter, *Transitional Justice in Balance*, 53-59, 77. Their findings are somewhat limited by the assumption that the successor regime is transitioning towards democracy.

justice for its crimes against humanity and war crimes in Rwanda and the Democratic Republic of Congo.

Although Rwanda initially called for an international court, it was the only state to vote against the creation of the International Criminal Tribunal for Rwanda (ICTR). Rwanda raised several objections, including the Tribunal's location (outside Rwanda), its temporal jurisdiction (1994 rather than the period of the civil war from October 1990 to July 1994), and its decision not to impose death sentences.[10] Rwanda has not signed the treaty establishing the International Criminal Court though it recently facilitated the transfer of its former ally, Congolese warlord Bosco Ntaganda, to the Court.[11] In the past several years, Rwanda has spearheaded African opposition to European courts exercising universal jurisdiction.[12] That was spurred by French and Spanish arrest warrants for high-ranking RPF officers for the alleged shooting down of President Habyarimana's plane and for various crimes committed in Rwanda and the Congo.[13] When the Democratic Republic of Congo brought a genocide claim against Rwanda at the International Court of Justice, Rwanda invoked its reservation to the article of the Genocide Convention giving jurisdiction to the Court. That prompted Judge Rosalyn Higgins and four of her colleagues to write that "It must be regarded as a very grave matter that a state should be in a position to shield from international judicial scrutiny any claim that might be made against it concerning genocide. A State so doing shows the world scant confidence that it would never, ever, commit genocide."[14] Subsequently, a UN High Commissioner for Human Rights report concluded that Rwanda may have committed atrocities in the DRC in 1996 and 1997.[15]

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[10] United Nations Security Council, "The Situation Concerning Rwanda," S/PV 3453, 3453rd meeting, November 8, 1994, 12-15 (Remarks of Mr. Bakuramutsa). For discussion of the reasons behind Rwanda's opposition, see Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press, 2008), 161-63.

[11] See BBC News, "ICC Welcomes Bosco 'Terminator' Ntaganda's Surrender," Mar. 19, 2013. Like many other states, Rwanda has entered an Article 98 agreement with the United States not to hand over any American indictees to the Court. See Agreement Between the Government of the United States of America and the Government of the Republic of Rwanda Regarding the Surrender of Persons to International Tribunals, Temp. State Dep't No. 03-104, March 4, 2003.

[12] See for example, *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*, OAU Doc. Assembly/AU/Dec. 199(XI) (July 1, 2008), ¶ 5. Rwanda does not object to African courts exercising universal jurisdiction as it made clear with its offer to prosecute Hissan Habré, the former Chadian dictator.

[13] See Jean-Louis Bruguière, "Delivrance de mandates d'arret internationaux," November 17, 2006 ; Note, "The Spanish Indictment of High-Ranking Rwandan Officials," *Journal of International Criminal Justice* 6, no. 5 (2008), 1003-11.

[14] *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)*, 2006 I.C.J. 71

Just as Serbian and Croatian nationalists did with the International Criminal Tribunal for the Former Yugoslavia, the RPF used the ICTR to its political advantage. First, the RPF had the Rwanda Tribunal "seal its military victory over the forces of genocide."[16] The ICTR continued the Rwandan civil war by judicial means with its arrests and convictions of several commanders of the Hutu rebel forces in Congo. Second, the RPF used the ICTR to discredit and marginalize Hutu democrats not tainted by the genocide.[17] Third, the RPF manipulated the Tribunal to maintain impunity for crimes against humanity and war crimes committed by its soldiers in 1994. When the ICTR Prosecutor reported Rwanda to the Security Council in 2002 for hindering investigations into RPF crimes, Rwanda retaliated by cutting off the flow of genocide survivors and witnesses to the Tribunal, causing the suspension of three genocide trials. The Prosecutor was subsequently removed, partly due to maneuvering by the RPF.[18] Finally, the RPF repeatedly used the ICTR's failings to shame the international community for its failure to stop the genocide.[19]

Though initially slow to help, international donors have been supportive of Rwanda's justice sector and accountability mechanisms. From 1995 to 2005, donors gave $111 million to Rwanda for transitional justice (out of a total of $2.7 billion in aid overall).[20] The key donors were the Netherlands, European Community, Belgium, World Bank, and US (in that descending order).

Domestic Factors

Domestically, the RPF largely had a free hand when it came to transitional justice. The transition was defined by the RPF's unconditional victory over the genocidal forces: military leaders dominated the RPF, political opponents were thoroughly delegitimized, potential spoilers were mostly in exile, the political allies who had not been killed were

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(February 3, 2006) (joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma).

[15] UN High Commissioner for Human Rights, Report of the Mapping Exercise.

[16] Kingsley Chiedu Moghalu, *Rwanda's Genocide: The Politics of Global Justice* (Basingstoke: Palgrave Macmillan, 2005), 137.

[17] Thierry Cruvellier, *Court of Remorse: Inside the International Criminal Tribunal for Rwanda*, trans. Cheri Voss (Madison: University of Wisconsin Press, 2010), 136-53.

[18] Peskin, *International Justice*, 207–31; Cruvellier, *Court of Remorse*, 161–78.

[19] Peskin, *International Justice*, 152.

[20] Ingrid Samset, Stina Petersen and Vibeke Wang, "Maintaining the Process? Aid to Transitional Justice in Rwanda and Guatemala, 1995-2005" (Bonn: Working Group on Development and Peace (FriEnt), 2007). Unfortunately, the report includes security sector reform as part of transitional justice and mistakenly characterizes the government's National Unity and Reconciliation Commission as a truth commission.

severely weakened, and civil society was devastated and discredited. The extraordinary violence made peace negotiations or political deals with the genocidal forces unthinkable. The once-powerful Catholic Church was fatefully compromised as prominent clergy had sided with the *génocidaires* and churches had become charnel houses. The Church leadership was massacred by RPF soldiers in July 1994 and its few human rights figures were marginalized by the Church and RPF alike.[21] The 300,000 Tutsi genocide survivors were a small, powerless minority soon swamped by some 700,000 better educated and more prosperous Tutsi returning from exile.

The institutional legacies of the old regime and background of the new leaders meant that post-genocide Rwanda would mostly experience "rule by law" rather than the rule of law.[22] Before 1994, law served the powerful and courts were a "corrupt caricature of justice."[23] Furthermore, the RPF does not subscribe to liberal legalism. In post-genocide Rwanda, as in other authoritarian regimes, courts

> are used to (1) establish social control and sideline political opponents, (2) bolster a regime's claim to "legal" legitimacy, (3) strengthen administrative compliance within the states own bureaucratic machinery and solve coordination problems among competing factions within the regime, (4) facilitate trade and investment, and (5) implement controversial policies so as to allow political distance from core elements of the regime.[24]

Somewhat paradoxically, these regimes have to provide a modicum of judicial autonomy if courts are to accomplish these functions. Hence, regimes seek to "contain judicial activism without infringing on judicial autonomy" through:

> (1) providing institutional incentives that promote judicial self-restraint, (2) engineering fragmented judicial systems, (3) constraining the access to justice, and (4) incapacitating judicial support networks [i.e. human rights advocates].[25]

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[21] See Timothy Longman, *Christianity and Genocide in Rwanda* (Cambridge: Cambridge University Press, 2010).
[22] Ginsburg and Moustafa, *Rule by Law*.
[23] William A. Schabas, "Justice, Democracy, and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems," *Criminal Law Forum* 7, no. 3 (1996), 531.
[24] Tamir Moustafa and Tom Ginsburg, "Introduction: The Functions of Courts in Authoritarian Politics" in *Rule by Law*, 4.
[25] Moustafa and Ginsburg, "Introduction," 14.

Although the RPF has employed all four strategies at various times, it set up a highly fragmented judicial system from 2002 to 2010. That system created exceptional courts, alongside the regular courts, to deal with the genocide: specialized genocide chambers, military courts, and most notably *gacaca* courts.

Maximal Accountability for Genocide

Rwanda could have chosen several accountability options in the wake of genocide. At an international justice conference in late 1995, then President Bizimungu ruled out an amnesty.[26] The RPF argued that amnesty would only reinforce the culture of impunity that it blamed for the 1994 genocide. In a visit to Rwanda in 1995, Archbishop Desmond Tutu encouraged Rwanda to set up a South African-style truth and reconciliation commission. Instead, the RPF opted for a strategy of maximal accountability, contending that only retributive justice could lead to positive peace. In late 1994, Kagame, then Vice President, declared, "There can be no durable reconciliation as long as those who are responsible for the massacres are not properly tried."[27] Four years later, Kagame voiced second thoughts: "Presently, the maintenance of 120,000 [genocide] prisoners costs US$20 million per year . . . This cannot continue in the long-term: we have to find other solutions."[28] Yet, the solution that was eventually found, *gacaca*, reaffirmed the preferred strategy of maximal prosecutions.

In 2000, a panel of experts commissioned by the Organization of African Unity proposed a truth and reconciliation commission for Rwanda. The experts reminded the RPF that, in the 1993 Arusha Accords, it had agreed "to establish an International Commission of Inquiry to investigate human rights violations committed during the war."[29] They recommended that a Rwandan truth commission should follow the South African model of swapping truth for amnesty for rank-and-file *génocidaires*.

> There is also, however, a practical case to make for amnesty. First, what incentive is there for ex-FAR soldiers and *Interahamwe* to give up the fighting, unless it is the chance to begin normal life afresh? . . . Secondly,

[26] William A. Schabas, "Genocide Trials and *Gacaca* Courts," *Journal of International Criminal Justice* 3, no. 4 (2005), 884.
[27] Organization of African Unity, *Rwanda: The Preventable Genocide*. *The Report of the International Panel of Eminent Personalities to Investigate the 1994 Rwanda Genocide and the Surrounding Events* (2000), ¶ 18.3.
[28] Stef Vandeginste, "A Truth and Reconciliation Approach to the Genocide and Crimes Against Humanity in Rwanda" (Antwerp: Center for the Study of the Great Lakes Region of Africa, 1998), 45.
[29] Organization of African Unity, *Rwanda*, para. 18.53.

> there is the more practical question of the capacity of the justice system ever to try all present suspects, even with the new *gacaca* tribunals.[30]

Yet, at a conference in South Africa that year, high-ranking RPF ministers rejected both amnesty and a truth commission. The Minister of Justice insisted on "the systematic capture, trial and sentencing of all those involved . . . without considering either their large number or the limited capacity of the country's justice system."[31]

Why did the RPF adopt this maximalist strategy and then stick with it despite mounting costs? The answers are not clear as little is known about policy-making within the RPF. There appear to have been several, possibly competing rationales. The first was that maximal accountability was necessary to prevent future genocidal violence. Proponents of this view argued that the 1994 genocide was the product of a "culture of impunity" stretching back to the first massacres of Tutsi in 1959. The second rationale was the need to maintain law and order. Former Prosecutor General Gahima justified the mass arrests in these terms:

> In 1994, we wanted to stabilize the country and that was the most important thing. We couldn't have just decided to do amnesties [through truth commissions] because the victims wouldn't have accepted it . . . It was the right thing to do at the time because it helped to cool the environment. It gave victims the prospect of justice and maybe saved the lives of some people.[32]

In other words, the arrests prevented vigilantism and revenge killings by Tutsi survivors. A third rationale was that large-scale arrests prevented genocide suspects from joining the Hutu rebels in Congo or the Hutu insurgency in the northwest.[33] The final justification was the need to exert social control over the defeated and distrusted Hutu population, many of whom had participated in the genocide.

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[30] Organization of African Unity, *Rwanda*, para. 18.58. For a similar cautionary note, see Jeremy Sarkin, "The Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the *Gacaca* Courts Dealing with the Genocide," *Journal of African Law* 45, no. 2 (2001), 144.

[31] Jean de Dieu Mucyo, "Genocide and *Gacaca* Courts" in *Rwanda and South Africa in Dialogue: Addressing the Legacies of Genocide and a Crime Against Humanity*, ed. Charles Villa-Vicencio and Tyrone Savage (Cape Town: Institute for Justice and Reconciliation, 2001), 49.

[32] Interview with Gerald Gahima, Former Prosecutor General of Rwanda, New York City, January 28, 2005.

[33] Remarks of Gerald Gahima in *Rwanda and South Africa in Dialogue*, 109. For an analogy with the detention of prisoners of war for the duration of an armed conflict, see Schabas, "Justice, Democracy, and Impunity in Post-Genocide Rwanda," 548.

While the RPF rarely deviated from this maximalist strategy, it engaged in considerable variation and improvisation when it came to implementation. Since the genocide, the RPF has tried different, sometimes overlapping, measures: mass arrests (1994-1998), national genocide trials (1996-2002), mass releases (2003-2005), and mass trials through *gacaca* (2005-2012). The changes in implementation were partly shaped by political factors, including international pressure to improve prison conditions, the cooption of the survivors' organizations, and increased security. They were also influenced by international funding and domestic budgetary concerns.

The RPF made dramatic exceptions in applying its maximalist strategy. It reintegrated prominent FAR officers and Habyarimana regime officials into the military and government over the objections of the survivors' organizations. When those individuals ceased to be useful or compliant, they often found themselves facing genocide prosecutions. For example, the Rwandan government accused former Prime Minister Celestin Rwigema of genocide and unsuccessfully sought his extradition after he had fled to the United States in 2000. In early September 2005, a *gacaca* court ordered the arrest of Major General Laurent Munyakazi, one of the most high-ranking Hutu military officers. He was eventually tried and convicted of genocide by a military court.

Expanding the Definition of Genocide in Rwandan Law

As part of its maximalist prosecution strategy, Rwanda broadened the definition of genocide crimes. The 1948 Genocide Convention requires state parties to incorporate the Convention's obligations into domestic law. More specifically, states must pass legislation "to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide."[34] However, the Convention is not self-executing; that is, it cannot be applied directly in domestic law because it is insufficiently precise (in particular, it does not specify criminal penalties).[35] In creating a domestic crime of genocide, some states have departed from the Convention's definition by adding or removing protected groups, or by adding new elements to the crime. If a state defines genocide more narrowly than the Convention, it breaches its treaty obligations. While there is no legal obstacle to states defining genocide more broadly, that "may inappropriately stigmatize lesser

[34] Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, 78 UNTS 277, Article V.
[35] William A. Schabas, *Genocide in International Law: The Crime of Crimes* 2d ed. (Cambridge: Cambridge University Press, 2009), 405.

conduct as genocide and go beyond the international community's core policy agreement on what is wrongful about genocide."[36]

Rwanda ratified the Genocide Convention in 1975. However, it only passed a domestic law criminalizing genocide in 1996, two years after the genocide. Even then, that law only dealt with genocide committed between October 1, 1990 and December 31, 1994. Not until 2003 did Rwanda fully prohibit genocide. Some of Rwanda's laws on genocide depart from the Genocide Convention in two key ways: they eliminate the special intent requirement and cover a broader range of acts. This can be viewed positively as a creative adaptation to Rwanda's particular context; that is, the need to prosecute large numbers of low-level genocide suspects. Or it can be viewed more darkly as the RPF's efforts to impose guilt on a larger segment of the Hutu population.

Rwanda's 1996 organic law, drafted with the help of Western jurists, made several innovations to the Rwandan justice system and to the prosecution of genocide. The law created specialized chambers within the existing civilian and military courts to handle the growing backlog of genocide-related cases. It then gave those specialized chambers subject-matter jurisdiction over:

> acts *set out and sanctioned under the Penal Code* and which constitute:
>
> (a) either the crime of genocide or crimes against humanity as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, in the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and its additional protocols, as well as in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968, the three of which were ratified by Rwanda; *or*
>
> (b) offences set out in the Penal Code which . . . were committed in connection with the events surrounding the genocide and crimes against humanity.[37]

The law did not create new crimes or new punishments for acts committed between 1990 and 1994 as that would have violated the principles of legality and non-retroactivity. As the

[36] Ben Saul, "The Implementation of the Genocide Convention at the National Level" in *The UN Genocide Convention: A Commentary*, ed. Paola Gaeta (Oxford: Oxford University Press, 2009), 64. On the variability of state definitions of genocide, see *id*., 64-66; Schabas, *Genocide in International Law*, 405-07.

[37] Organic Law No. 08/96 of 30/8/1996 Establishing the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990, art. 1, in *Journal Officiel*, Sep. 1, 1996 [hereinafter 1996 Genocide Law] (emphasis added).

Preamble explained, "Given that Rwanda has ratified these three Conventions . . . but without having provided penalties for these crimes . . . the prosecutions must be based on the Penal Code."[38] In other words, the punishments for acts of genocide (e.g. "killing members of the group," "causing serious bodily or mental harm to members of the group," etc.) could not be harsher than those provided in the Rwandan Penal Code for the underlying acts (murder, assault, rape, etc.).

The 1996 law encompassed more than the international crimes of genocide and crimes against humanity: it covered all domestic offenses – including property crimes like theft – that were "committed in connection with the events surrounding" those international crimes. That was underscored by the categorization of suspects into four categories:

> Category 1: a) persons whose criminal acts or whose acts of criminal participation place them among the planners, organizers, instigators, supervisors and leaders of *the crime of genocide or of a crime against humanity*;
>
> b) persons who acted in positions of authority at the national, prefectoral, communal, sector, or cell level, or in a political party, the army, religious organizations or in a militia and who perpetrated or fostered *such crimes*;
>
> c) notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities . . .
>
> d) persons who committed acts of sexual torture;
>
> Category 2: persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death;
>
> Category 3: persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person;
>
> Category 4: persons who committed offences against property.[39]

Notably, only Categories 1(a) and 1(b) involve genocide and crimes against humanity; all the rest relate to ordinary criminal offenses. That was an innovative solution to the difficulty of trying so many participants in the 1994 genocide: the vast majority would be tried for ordinary criminal offenses, which, not coincidentally, are far easier to prove than genocide (with its special intent to destroy the group in whole or in part).

[38] 1996 Genocide Law, Preamble.
[39] 1996 Genocide Law, art. 2 (emphasis added).

So, most of Rwanda's so-called "genocide trials" since 1996 have not been about genocide at all. This subtle, but crucial, distinction between genocide crimes and ordinary crimes committed during the genocide has been largely obscured in most government pronouncements, media reports, NGO documents, and scholarly literature.[40]

The four categories provided a simple way to differentiate among degrees of criminal involvement in the 1994 genocide and to link those with punishments.[41] The categories also served as sentencing guidelines that ranged from possible death sentences for Category 1 crimes to civil damages for Category 4 (property) crimes. The 1996 law promoted plea-bargaining for Category 2 and 3 crimes: accused persons could significantly reduce their sentences by naming their accomplices.[42] For example, someone who pleaded guilty to a Category 2 crime received a 12 to 15 year sentence (or a seven to 11 year sentence if the plea was made before prosecution).[43]

Finally, the 1996 law recognized a limited degree of collective responsibility. Those convicted of Category 1 crimes "shall be held jointly and severally liable for all damages caused in the country by their acts of criminal participation, regardless of where the offences were committed."[44] This allows all victims of the genocide to be civil parties against those convicted of Category 1 crimes: "They will not have to prove the link between the crimes committed and the harm they suffered."[45] The Rwandan legislature had rejected a more radical proposal to impose collective criminal responsibility on members of the Hutu extremist parties and militias:

> Certain deputies wished to establish a presumption of guilt and a reversal of the burden of proof, by demanding proof from members of these militias that

[40] For example, De Beer reads the Organic Law as punishing "acts for which the penal code gives definitions and attaches penalties ***and*** which at the same time constitute crimes of genocide and crimes against humanity (art. 1)." Daniel de Beer, *The Organic Law of 30 August 1996 on the Organization of the Prosecution of Offences Constituting the Crime of Genocide or Crimes Against Humanity: Commentary* (Kigali: Alter Egaux Editions, 2007), 31 (emphasis in the original). Saul gives a similar interpretation. Saul, "The Implementation of the Genocide Convention," 66-67. In fact, Article 1 (quoted in the text above) is phrased disjunctively – "or" not "and." As De Beer recognizes elsewhere, the 1996 Law was designed to cover property crimes that do not rise to the level of genocide and crimes against humanity. De Beer, *The Organic Law*, 9 and n. 7.

[41] De Beer correctly cautions that the legal definition of and maximum penalty for the crime are determined by the Penal Code, not the categorization. De Beer, *The Organic Law*, 46 and 62.

[42] For a review of the literature on plea-bargaining and its use in international criminal law, see Nancy Amoury Combs, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach* (Palo Alto: Stanford University Press, 2006).

[43] 1996 Genocide Law, arts. 14-17.

[44] 1996 Genocide Law, art. 30.

[45] De Beer, *The Organic Law*, 88.

> they were not criminals; the [legislature] turned down this proposal as the associations were legal at the time, and the fact of having been a member is not in itself criminal.[46]

Thus, Rwanda rejected the doctrine of criminal organizations which had been authorized, but never fully used, by the Nuremburg Tribunal.[47]

Starting in 2001, the government passed a series of laws for *gacaca*. Those laws restored the Genocide Convention's requirement of special intent: the ordinary penal code offenses had to have been committed "with the intention of perpetrating genocide."[48] However, genocide was nowhere defined in those laws and, in practice, gacaca courts rarely examined the accused's intent. Rwanda finally incorporated the Genocide Convention into domestic law in 2003.[49]

Mass Arrests

In the aftermath of the genocide, tens of thousands were arrested, often on the basis of unsubstantiated accusations of participation.

> In too many cases, false accusations were made against those whose only "crime" was inhabiting land or property or working in a post that returning Tutsi refugees coveted. In other instances, accusers were known to be seeking retribution for some current or past wrong, real or imagined, but unconnected to the genocide.[50]

Those arrests encouraged a culture of "accusatory practices."[51] False denunciations multiplied as people realized the judicial system was too overwhelmed to detect and punish such denunciations.[52]

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[46] De Beer, *The Organic Law*, 27.
[47] See Darcy, *Collective Responsibility*, 271-91.
[48] Organic Law No. 40/2000 of 26/01/2000 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, art. 1 [hereinafter 2001 *Gacaca* Law]. The *gacaca* laws are discussed in detail in the next chapter.
[49] Law No. 33 bis/2003 of 6/9/2003 Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes, *in Journal Officiel* No. 21, Nov. 1, 2003. The definition of genocide was virtually identical to that in the Convention, except for one curious addition: it added a fifth protected category, "regional," to "national, ethnical, racial, and religious."
[50] Organization of African Unity, *Rwanda, The Preventable Genocide*, ¶ 18.39.
[51] See Sheila Fitzpatrick & Robert Gellately, ed. *Accusatory Practices: Denunciation in Modern European History, 1789-1989* 2d ed. (Chicago: University of Chicago Press, 1997).
[52] Des Forges, *Leave None*, 754.

As a result of those mass arrests, the prison population grew exponentially. By 1998, approximately 119,000 genocide suspects (as well as several thousand common criminals) were crammed into Rwanda's prisons and *cachots* (communal lock-ups): 85,319 (including 3072 women) in 19 central prisons and 33,327 (including 4104 women) in *cachots*.[53] Sibomana, the priest and human rights activist, described the horrific prison conditions as a deliberate form of extra-judicial killings:

> our prisons are inhuman death-traps in which death sentences are executed without trial. The living conditions are such that if you let enough time go by, the suspected killers or accomplices of the genocide will just die one by one. Whether innocent or guilty, these prisoners are gradually rotting away
> When I say 'rotting away,' I mean it literally. . . . After weeks of standing upright, day and night, in the mud, the prisoners' feet had started decomposing . . .
> Some people . . . tried to justify this unjustifiable situation and to find excuses for the government: lack of space, shortage of means, scarcity of food in the aftermath of the war . . . All lies! As soon as the bishopric of Kabgayi was allowed to intervene in the prison, mortality dropped from 168 deaths in April 1995 to . . . 2 in October.[54]

Prison conditions improved over the years, mostly due to interventions by the International Committee for the Red Cross and Penal Reform International.[55] Still, tens of thousands suffered from over-crowding, disease, and maltreatment year after year as they waited to be tried or released.

The mass arrests created enormous, long-term problems for post-genocide Rwanda. As discussed below, they overwhelmed efforts to rebuild the judicial system. They also undermined efforts to (re)establish the rule of law. For example, the government passed a law in September 1996 that retroactively legalized arrests and pre-trial detentions back to April 6, 1994.[56] Finally, mass arrests bred resentment among a large segment of the population: the detainees and their extended families. As one prisoner told Tertsakian, "They have created a

[53]Avocats sans frontières, *Justice pour tous au Rwanda: Rapports 01/01 du 30/06/1999* (1999), 13.
[54] Sibomana, *Hope for Rwanda*, 108-09.
[55] Tertsakian, *Le Château*, 34-79, 238-48.
[56] Law No. 9/96 of 8th September 1996 Relating to Provisional Modifications to the Criminal Procedure Code, *in* Journal Officiel No. 18, Sept. 15, 1996, 8-10. That law gave prosecutors more time to issue arrest warrants and suspended the right of detainees to appeal their pre-trial detention.

system of vindictiveness in people's hearts."[57] The RPF has struggled to manage those three problems over the past decade.

National Trials

The 1994 genocide devastated the judicial infrastructure and left the country with very few judges and lawyers. Rwanda has rebuilt, expanded, streamlined, and professionalized the judicial sector through new laws, institutional reforms, and increased training, particularly since 2004.[58] The judicial sector has changed in four fundamental ways. It appears to have been "Tutsified," partly due to the discriminatory effect of certain reforms (e.g. educational and training requirements disadvantaged older, experienced Hutu judges). It has gained more formal administrative and financial autonomy. It has become more professional and less corrupt. Finally, it has incorporated elements of the common law system familiar to Anglophone Tutsi returnees.

Despite all these changes, the judicial sector still remains subject to executive interference. This is in keeping with Carothers' general observation that "the judiciary in dominant-power countries is typically cowed, as part of the [ruling party's] one-sided grip on power."[59] A former judge told Human Rights Watch that he advised colleagues to turn off their phones to avoid being pressured.[60] The lack of independence is particularly pronounced in political cases.[61] A former high-ranking justice official stated that President Kagame had pressured state prosecutors to arrest former President Bizimungu in 2002 after Bizimungu tried to organize a new political party.[62] Bizimungu's 2004 trial had all the drama of a badly-staged show trial: political machinations, ludicrous accusations, recanted confessions, and a predictable ending (with Bizimungu sentenced to 15 years).[63] In 2011, the courts sentenced

[57] Tertsakian, *Le Château*, 300.
[58] For good overviews, see Human Rights Watch, *Law and Reality*; International Legal Assistance Consortium, *Justice in Rwanda: An Assessment* (Stockholm: International Legal Assistance Consortium, 2007). A more recent, if deliberately non-committal, overview is provided in Roelof H. Haveman, *The Rule of Law in Rwanda: Prospects and Challenges* (The Hague: Hague Institute for the Internationalization of Law, 2012).
[59] Carothers, "End of the Transition Paradigm," 12.
[60] Human Rights Watch, *Law and Reality*, 66.
[61] Human Rights Watch, *Law and Reality*, 2, 51-69; International Legal Assistance Consortium, *Justice in Rwanda*, 20. For a contrasting perspective from a Rwandan Supreme Court judge, see Sam Rugege, "Judicial Independence in Rwanda," *Pacific McGeorge Global Business & Development Law Journal* 19 (2006), 423
[62] Interview with former Rwandan justice official, Washington, D.C., 2006.
[63] Waldorf, "Rwanda's First Postgenocide President on Trial."

several of President Kagame's would-be challengers for the presidency to lengthy jail terms.[64]

The biggest obstacle to justice sector reform was the crushing burden of genocide cases. The RPF was slow to start genocide trials in national courts. It also rebuffed offers to have American and European lawyers help prosecute and judge genocide suspects.[65] The first genocide trials finally began in December 1996 after "two years of prodding by international donors and NGOs."[66] The RPF's slowness may be explained in several ways. Sibomana suggests that some within the RPF were only too happy to let large numbers of genocide suspects die off in prison.[67] The RPF was probably unwilling to use limited financial and human resources on trying people they largely considered guilty. Prunier points out that "generalized arbitrary detentions are a powerful tool of political and social control." He also observes that "the non-judgment of prisoners is also a way of keeping open the sore of collective Hutu guilt."[68] Finally, the RPF leadership was largely preoccupied with stabilizing the country and neutralizing the rump genocidal forces in Congo.

Over a seven-year period, from December 1996 to December 2003, Rwanda's national courts tried about 9,700 genocide suspects. The numbers rose steadily, reaching a high point of 2,458 in 2000 before falling off.[69] Few genocide cases were heard in national courts after 2003 as *gacaca* began and judicial reforms got underway. Between January 2005 and March 2008, just 222 trials were completed.[70] "It appears one unintended result of a new reform requiring judges to provide monthly progress reports is that judges may now avoid complex, time-consuming cases in an effort to bolster their monthly numbers."[71] In September 2007, approximately 17,000 genocide cases were still pending in the national courts.[72] Most of those (including 8,000 sexual violence cases) were transferred to *gacaca*

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[64] See Human Rights Watch, *Rwanda: Country Summary* (2013).
[65] Schabas, "Justice, Democracy, and Impunity in Post-Genocide Rwanda," 528.
[66] Schabas, "Justice, Democracy, and Impunity in Post-Genocide Rwanda," 559.
[67] Sibomana, *Hope for Rwanda*, 106.
[68] Prunier, *The Rwanda Crisis*, 366.
[69] Human Rights Watch, *Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda* (New York: Human Rights Watch, 2004), 18; LIPRODHOR, "Tableau No. 2: Decisions judiciaries par Annees (1996-2002)" (n.d.); LIPRODHOR, *Situation des droits de la personne au Rwanda: Rapport 2003-2004*, 29 (2005). LIPRODHOR is the most reliable source as it was the only independent, Rwandan human rights organization doing systematic monitoring of the national trials from 1996 to 2004.
[70] Human Rights Watch, *Law and Reality*, annex 2.
[71] Human Rights Watch, *Law and Reality*, 30.
[72] International Legal Assistance Consortium, *Justice in Rwanda*, 6 and n. 5.

jurisdictions in June 2008.

The quality of genocide justice in national courts was initially poor due to lack of resources, inadequate defense representation, and political interference.[73] Most trials were group trials that lumped as many as 50 defendants together. Only half the defendants had legal representation partly because of the RPF's hostility to providers such as Avocats sans frontiéres.[74] There was also political interference in genocide cases. Hutu prosecutors and judges who refused to arrest or convict individuals in the absence of credible evidence were sometimes killed or detained on genocide charges.[75] In addition, prosecutors and police occasionally rearrested suspects who had been acquitted by the courts.[76]

In an influential law review article, José Alvarez blames the problems with Rwanda's national genocide trials largely on the ICTR. He argues that "each dollar spent by the international community on the ICTR is one less dollar available for assistance to Rwandan courts."[77] That simplistically assumed a zero-sum game between the ICTR and the Rwandan judiciary, whereas, in fact, donors would never have been willing to finance Rwandan courts at anywhere near the levels of financing for the ICTR. In addition, the Rwandan judicial sector simply did not have the capacity to absorb the amount of money spent on the ICTR. Furthermore, as Des Forges and Longman note, "Given [Rwanda's] politicization of the judiciary, it is not at all clear that investing more in the Rwandan justice system would have promoted the rule of law and encouraged reconciliation in the country."[78] Alvarez also contends that the ICTR's assertion of jurisdictional primacy in prosecuting Colonel Bagasora deprived Rwanda's government of much-needed legitimacy and "undermined its claim that it was, unlike the former regime, committed to the rule of law in a multiparty, pluralistic state."[79] That ignores the RPF's authoritarianism.

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[73] Martien Schotsmans, "Rapport D'Evaluation à Mi-Parcours du Projet Appui au Renforcement de l'Etat de Droit et de la Justice au Rwanda" (Kigali: Belgian Technical Cooperation, 2004). For a more positive appraisal, see Schabas, "Genocide Trials and *Gacaca* Courts," 894.
[74] Danish Institute for Human Rights, *Legal Aid in Rwanda* (2004), 9, 83.
[75] United Nations Economic and Social Council, Report on the Situation of Human Rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under Paragraph 20 of Resolution S-3/1 of 25 May 1994, U.N. Doc. E/CN.4/1997/61, 20 January 1997, ¶¶ 95-98.
[76] Sibomana, *Hope for Rwanda*, 106-07; Human Rights Watch, *World Report: Rwanda* (2002); Eugene Habiyambere, "Rearrestation à la porte du penitencier," *Le Verdict*, July 2002, 16-17; Eugene Habiyambere, "Le Tournant Critique du Process Anaclet Nkundimfura et ses Coaccuses," *Le Verdict*, Jan. 2003, 3-4.
[77] Alvarez, "Crimes of States," 466.
[78] Des Forges and Longman, "Legal Responses to Genocide," 62.
[79] Alvarez, "Crimes of States," 402.

Over the years, the fairness of genocide trials in national courts has improved. In recent years, the RPF improved genocide justice in an effort to convince the International Criminal Tribunal for Rwanda and foreign jurisdictions to transfer genocide suspects to Rwanda for trial. Most notably, it abolished the death penalty and commuted 1,365 death sentences to life imprisonment.[80] Although the ICTR judges acknowledged significant improvements in Rwanda's justice sector, they held that transferred suspects could not be guaranteed a fair trial, largely because defense witnesses might be too fearful to testify.[81] They also found that transferred suspects were at risk of prolonged solitary confinement if convicted and sentenced to life imprisonment. In response to those 2008 rulings, Rwanda carved out an exemption to the "genocide ideology" law for trial testimony, clarified its sentencing law, and made some improvements to witness protection for defense witnesses.[82] Those further reforms convinced an ICTR Trial Chamber to rule in favour of transfer in 2011.[83] While Rwanda failed to persuade courts in England, France, Germany, and Finland to extradite genocide suspects to Rwanda for trial, it did convince those in Sweden and Norway.[84] So far, at least, Rwanda's embrace of legalism appears to reflect an instrumental calculation rather than a normative shift.

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[80] Human Rights Watch, *Law and Reality*, 31.

[81] *Prosecutor v. Kayishema*, ICTR Case No. ICTR 01-67-R11*bis*, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda (Dec. 16, 2008); *Prosecutor v. Hategekimana*, Case No. ICTR 00-55B-R11*bis*, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11*bis* (Dec. 4, 2008); *Prosecutor v. Gatete*, Case No. ICTR 2000-61-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (Nov. 17, 2008); *Prosecutor v. Kanyarukiga*, Case No. ICTR 2002-78-R11*bis*, Decision on Prosecutor's Appeal against Decision on Referral under Rule 11*bis* (Oct. 30, 2008); *Prosecutor v. Munyakazi*, Case No. ICTR 97-36-R11*bis*, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11*bis* (Oct. 8, 2008). For a critical overview, see Human Rights Watch, *Law and Reality*, 70-88. For a discussion of how Rwanda's overly broad and vague law on "genocide ideology" hampered efforts to have genocide suspects transferred and extradited to Rwanda, see Lars Waldorf, "Revisiting Hotel Rwanda: Genocide Ideology, Reconciliation, and Rescuers," *Journal of Genocide Research* 11, no. 1 (2009), 101–25.

[82] Organic Law Modifying and Complementing the Organic Law No. 11/2007 of 16/03/2007 Concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States, May 26, 2009.

[83] *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, Decision on the Prosecutor's Request for Referral to the Republic of Rwanda, Jun. 28, 2011; *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-AR11bis, Decision of Uwikindi's Appeal against the Referral of his Case to Rwanda and Related Motions, Dec. 16, 2011.

[84] For a general overview of the extradition issue, see REDRESS and African Rights, *Extraditing Genocide Suspects from Europe to Rwanda: Issues and Challenges* (2008). For a good discussion of the extradition case in the United Kingdom, see Mark A. Drumbl, "Prosecution of Genocide v. The Fair Trial Principle: Comments on *Brown and Others v. The Government of Rwanda and the UK Secretary of State for the Home Department*," *Journal of International Criminal Justice* 8, no. 1

Mass Releases

To make the genocide caseload more manageable, the RPF periodically granted provisional release to certain categories of genocide suspects: the elderly, the sick, those under fourteen years of age in 1994, and those without case files. In mid-1995, the government created screening commissions (*Commissions de Triage*) for each prefecture. Those extra-legal commissions, comprised of representatives from the prosecution, military, police, and intelligence service, were supposed to identify detainees eligible for provisional release (particularly the elderly, women and minors) based on a review of case files. In practice, the screening commissions barely functioned and, after three years, were abolished. In early 1997, the government established mobile teams (*Groupes mobiles*), consisting of judicial inspectors and prosecutors, to open case files and conduct preliminary investigations. By the time they were disbanded in 1999, the mobile teams had reviewed 60,000 case files and released 1,000 detainees.[85]

In late 1998, the RPF announced it would release 10,000 detainees. That provoked an outcry from survivors' organizations, which, at the time, were still independent. As a result, only about 3,365 detainees were released.[86] Following the RPF's take-over of the survivors' organizations in 2000, prosecutors in several provinces began presenting detainees without case files before local communities to gather witness testimonies. When there was insufficient evidence to warrant continued detention, prosecutors granted provisional releases (sometimes on the spot).[87] During presentations, government officials justified releasing detainees without dossiers. As one prosecutor stated, "We are not God. It is not good to keep somebody who has no files in prison for eight years and, before God, it is not good also."[88] Before a crowded stadium, the Minister of Justice offered an economic rationale: "All the prisoners we see here are on our hands. We pay taxes so that these people survive in prison. Instead of letting them stay in prison while you pay heavy taxes, it's better to let them come and help build our schools, hospitals, etc."[89] Prosecutors sometimes used presentations to

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(2010), 289-309. The defendant in the Swedish case lost his appeal to the European Court of Human Rights. European Court of Human Rights, *Ahorugeze v. Sweden*, Application No. 37075/09, Judgment of 27 October 2011.

[85] Amnesty International, *Gacaca: A Question of Justice* (2002), 19.

[86] Amnesty International, *Gacaca: A Question of Justice*, 19-20.

[87] For a depiction of these presentations, see Anne Aghion's film, "*Gacaca*: Living Together in Rwanda" (2002).

[88] Remarks of Prosecutor Jean-Marie Mbarushimana, Butare Stadium presentation, September 27, 2002.

[89] Remarks of the Minister of Justice, Butare Stadium presentation, September 27, 2002.

release the sick, the elderly, and those who should never have been imprisoned to begin with (e.g. those who were minors during the genocide and those who had committed property crimes). By the end of 2002, prosecutors had presented 11,659 detainees, which resulted in 2,721 (23 percent) being provisionally released.[90]

On New Year's Day in 2003, President Kagame made a surprise announcement calling for the provisional release of confessed *génocidaires* who had already served their sentences in detention (except those who had confessed to the worst crimes). In his communiqué, the President acknowledged "concerns that certain detainees risk being incarcerated beyond the duration of the penalty provided by the law, seeing that they have not been judged within a reasonable delay because of the large number of cases in the jurisdictions of our country."[91]

The President's announcement was also designed to encourage more guilty pleas from detainees. Indeed, some 5,000 detainees made new confessions in the hopes of benefiting from the provisional release.[92] Finally, the mass releases may have been a bid to woo Hutu voters in advance of the first post-genocide presidential and parliamentary elections later that year.

By March 2003, 24,873 persons had been released, including 14,636 confessed detainees, 5,655 detainees without dossiers, and 1,123 who were minors at the time of the genocide (and so should never have been detained in the first place).[93] A few hundred were subsequently rearrested on new charges of involvement in the genocide.[94] Released detainees were sent to 22 purpose-built *ingando* (solidarity camps) for two months of re-education before being reintegrated into their communities.

The government did two subsequent mass releases. In July 2005, it provisionally

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[90] Communication to author from RCN Démocratie et Justice, 2003.

[91] Presidential communiqué, January 1, 2003. See Parquet General, "Instruction concernant L'execution du communiqué presidential du 01 janvier 2003 venant de la presidence de la republique qui concerne la liberation provisoire des detenus des differentes categories," January 9, 2003. The President's communiqué made clear that released detainees would still stand trial in *gacaca*. For a discussion of the communiqué, see Penal Reform International, *Report IV: The Guilty Plea Procedure: Cornerstone of the Rwandan Justice System* (London: Penal Reform International, 2003), 10-17.

[92] Interview with Ministry of Justice official, Kigali, March 7, 2003.

[93] Ministry of Justice, "Imbonerahamwe Igaragaza Ibisabwa n'intangazo Ryaturutse Muri Perezidansi ya Repubulika [Chart Showing What Was Required by the Communique of the President of the Republic]," March 7, 2003. For a fascinating look at the return of one confessed killer to his community, see Anne Aghion's film, "In Rwanda We Say . . . The Family That Doesn't Speak Dies" (2004).

[94] Tertsakian, *Le Château*, 428-32. Clark puts the number at 5770. Clark, *The Gacaca Courts*, 107.

released approximately 19,155 genocide suspects, 16,470 of whom had confessed. Those releases may have been partly motivated by the International Committee of the Red Cross's announcement in early 2005 that it would stop providing food, medicine, and sanitary supplies to the central prisons (thus shifting the financial and logistical burden to the government). By mid-September, 1,865 detainees had been returned to prison.[95] A final mass release of some 6,700 detainees took place in early 2007.[96]

The provisional releases were a welcome effort to address lengthy pre-trial detention and prison overcrowding. Yet, the way the releases were carried out was problematic. The government did not bother to consult the genocide survivors' organizations in advance, underscoring just how powerless they had become. The releases generated fear, anxiety, and resentment among survivors. After the President's announcement, one Tutsi survivor commented: "I don't see any security. They will come during the night and then afterwards [the police] will do an investigation? A person only dies once."[97] In addition, the re-arrests of released detainees created fear and insecurity among other released suspects and their families.[98] Finally, some criticized the releases because they only benefited the guilty, while those who insisted on their innocence remained in prison.[99]

Minimal Accountability for RPF Crimes

While the RPF has sought maximal accountability for the genocide, it has made little effort at holding its own soldiers accountable for crimes against humanity and war crimes committed in Rwanda and the Congo. With one exception, the RPF refused to allow civilian courts (including *gacaca* courts) to prosecute war crimes committed by RPF soldiers. It blocked efforts by the International Criminal Tribunal for Rwanda to prosecute such crimes. The RPF also refused to consider non-prosecutorial mechanisms, such as a truth commission or commission of inquiry, for those crimes. Finally, the government made few, if any, efforts to vet human rights abusers from the military.

Over the years, President Kagame has consistently responded to such crimes in three ways. First, he minimizes both the nature and extent of RPF crimes, acknowledging only "revenge killings" by a small number of rogue soldiers. Second, he claims the Rwandan government has brought those soldiers to justice. Finally, he equates calls for accountability

[95] Interview with official in the Prosecutor General's Office, Kigali, September 12, 2005.
[96] Tertsakian, *Le Château*, 428.
[97] Interview, Kigali, January 2003.
[98] Tertsakian, *Le Château*, 428-32, 440-48.
[99] African Rights, "Prisoner Releases: A Risk for the *Gacaca* System," January 16, 2003.

for RPF crimes with genocide denial. As he writes:

> While some rogue RPF elements committed crimes against civilians during the civil war after 1990, and during the anti-genocidal campaign, individuals were punished severely. . . . To try to construct a case of moral equivalency between genocide crimes and isolated crimes committed by rogue RPF members is morally bankrupt and an insult to all Rwandans, especially survivors of the genocide. Objective history illustrates the degeneracy of this emerging revisionism.[100]

By the end of 1998, military courts had prosecuted only 32 soldiers for 21 crimes (involving 92 civilian victims) committed in 1994. All were prosecuted for ordinary murder, not crimes against humanity or war crimes, even in an infamous case involving the massacre of 30 civilians. Only two were higher-ranking officers: a lieutenant, who was acquitted, and a major, whose original life sentence was reduced to six years on appeal. The longest sentence imposed was six years and the typical sentence ranged from two to four years.[101]

There appear to have been no prosecutions of 1994 RPF crimes from late 1998 until mid-2008, when Rwanda put four soldiers on trial for the infamous massacre at Gakurazo of the Catholic Archbishop, three bishops, nine clergy, and two civilians. Rwanda held that trial under an agreement with the ICTR. The military court proceedings opened with guilty pleas from the two lower-ranking officers and ended with acquittals of the two higher-ranking officers. In 2009, a military appeals court upheld the acquittals and reduced the sentences against both confessed soldiers from eight to five years.[102]

Conclusion

This chapter examined the RPF's choice to pursue maximal accountability for the 1994 genocide through trials despite mounting financial, administrative, and political costs. The key factors that shaped that choice were the scale of genocide crimes, the RPF's military

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[100] President Paul Kagame, "Preface" in *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, ed. Phil Clark and Zachary D. Kaufman (London: Hurst and Co., 2008), xxiii.

[101] Human Rights Watch, *Law and Reality*, 103-07; Federation internationale des ligues des droits de l'homme, *Victims in the Balance: Challenges Ahead for the International Criminal Tribunal for Rwanda* (2002), 64.

[102] *Prosecutor v. Gumisiriza et al.*, Case No. RPA 0062/08/HCM, Appeals Judgment (Military High Court, February 25, 2009). For critical discussions of this case, see Leslie Haskell and Lars Waldorf, "The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences," *Hastings International and Comparative Law Review* 34, no.1 (2011), 49-85; Lars Waldorf, "'A Mere Pretense of Justice': Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal," *Fordham International Law Journal* 33, no. 4 (2010), 1221-77.

victory (and resulting balance of power), and the international community's willingness to fund prisons and trials. That underscores Chandra Lekha Sriram's observation that the choice of transitional justice mechanisms is largely determined by international involvement and the balance of power.[103] Nevertheless, those increasing costs prompted the RPF to find a radical solution to overflowing prisons and clogged courts. The next chapter looks at *gacaca*'s creation and inception.

[103] Chandra Lekha Sriram, *Confronting Past Human Rights Violations: Justice vs Peace in Times of Transition* (London: Frank Cass, 2004), 212.

CHAPTER 6: *GACACA'S* INVENTION

"For the crime of genocide . . . giving usual punishments (sanctions) is not enough."
– Office of the President of the Republic[1]

Introduction

Gacaca is sometimes portrayed as if it was the only solution to reduce the huge numbers of genocide detainees. This is mistaken on three counts. There were several other ways to alleviate the problem. The government could have stopped arresting genocide suspects on the basis of flimsy evidence, provisionally released more detainees without case files or with weak evidence, speeded up trials by using the canton-level courts to hear genocide cases, and accepted offers of assistance from foreign lawyers and judges.[2] RPF policymakers also could have chosen other accountability options, such as exemplary prosecutions, amnesties, or a truth commission. Finally, it was far from clear at the time that *gacaca* would actually reduce the numbers of detainees. As early as 2000, Peter Uvin warned *gacaca*'s main donor (the Belgian government) that the "*gacaca* system risks creating one giant new problem . . . while it may end up freeing most current detainees, it may also at the same time fill the prisons up with new people not currently detained."[3] As it turned out, that is exactly what started to happen.

This chapter starts off with a quick overview of pre-genocide *gacaca* before moving on to show how the government reinvented *gacaca* to deal with the backlog of genocide cases. *Gacaca* enabled the RPF to pursue its strategy of maximal prosecutions by adding two new elements: participatory justice and community service. The chapter then looks at the preparations for rolling out *gacaca*.

Reinventing Tradition

Customary and Neo-Traditional *Gacaca*

Very little is known about customary *gacaca*. The first scholarly mention of *gacaca* appears to be an article by Filip Reyntjens describing a neo-traditional, state-run, dispute

[1] Office of the President of the Republic, *Report of the Reflection Meetings Held in the Office of the President of the Republic from May 1998 to March 1999* (1999), 57.
[2] Des Forges, *Leave None to Tell the Story*, 756 n.47; Schabas, "Justice, Democracy, and Impunity in Post-Genocide Rwanda," 528; Interview with Augustin Cyiza, former Vice-President of the Supreme Court, Kigali, Rwanda, September 2002.
[3] Peter Uvin, "The Introduction of a Modernized Gacaca for Judging Suspects of Participation in the Genocide and Massacres of 1994 in Rwanda" (2000), 9.

resolution mechanism in Butare commune in 1987.[4] Reyntjens has since wondered whether he might have inadvertently coined the term *gacaca* based on what local informants told him.[5] Most accounts of customary *gacaca* were written after 1994 and thus were shaped by the politics of post-genocide justice.[6] Still, it is clear that Rwanda had some form of customary dispute resolution mechanism, whether popularly known as *gacaca* or not.

Customary *gacaca* seems to have been an ad hoc mechanism named for the "lawn" or "small grass" inside a homestead where dispute resolution usually took place.[7] As that signifies, *gacaca* generally did not involve the entire community. Rather, community elders (*inyangamugayo*, literally "those who detest disgrace") resolved disputes within and between families over property, inheritance, personal injury, and marital relations. Customary *gacaca* probably imposed a range of sanctions designed to achieve restitution. Such sanctions would have been the responsibility of family (or clan) members rather than individuals. The losing party also may have been required to provide beer to the winning party and the *inyangamugayo* as a gesture of reconciliation. In sum, the purpose of customary *gacaca* was "not to determine individualized guilt or to apply state law in a coherent and consistent manner . . . but to restore harmony and social order in a given society and to reintegrate the person who was the source of the disorder."[8]

What Reyntjens encountered in 1987 was not customary *gacaca* but rather a "semi-official and 'neo-traditional'" institution used by local authorities to resolve minor conflicts outside the formal justice system.[9] The sector *conseiller*, assisted by the cell committee, presided over weekly *gacaca* sessions, hearing approximately four to five cases in public hearings before the assembled community. Examining a sample of 112 cases, Reyntjens found that 60 percent were between family members or immediate neighbors while 40

[4] Filip Reyntjens, "Le *gacaca* ou la justice du gazon au Rwanda," *Politique Africaine* 40 (1990), 31-41. Danielle de Lame, a Belgian anthropologist who conducted fieldwork in rural Rwanda in the late 1980s, briefly mentions "being a party to a *gacaca* (local trial) for injury to a dog." Danielle de Lame, *A Hill among a Thousand: Transformations and Ruptures in Rural Rwanda* (Madison: University of Wisconsin Press, 2005), 38.
[5] Remark by Filip Reyntjens, Harvard University workshop, September 2009. There is no mention of *gacaca* in Filip Reyntjens, *Pouvoir et droit au Rwanda: Droit public et evolution politique, 1916-1973* (Tervuren, Belgium: Musée Royale de l'Afrique Centrale, 1985).
[6] See, e.g., Alice Karekezi, "Juridictions *gacaca*: Lutte contre l'impunitie et promotion de la reconciliation nationale," *Cahiers du Centre de Gestion des Conflits* (2000); Charles Ntampaka, "Le retour à la tradition dans le réglement des differènds: le *gacaca* du Rwanda," *Dialogue* 186 (1995), 95-104.
[7] See Burnet, *Genocide Lives in Us*, 196.
[8] Reyntjens and Vandeginste, "Rwanda: An Atypical Transition," 118.
[9] Reyntjens, "Le *gacaca*," 41.

percent were quarrels, brawls, and public insults (some involving personal injuries). Commune residents rarely appealed *gacaca* decisions to the canton courts (the lowest-level courts), but when they did, the courts took note of *gacaca* decisions. Reyntjens concluded that *gacaca* was "quick justice, a good bargain (for the public authorities as well as for those being judged), extremely accessible, understood and accepted by all, and involving a large popular participation."[10]

Although a UN report found *gacaca* practically non-existent after the genocide, an anthropologist discovered *gacaca* functioning or being reorganized in several communities by mid-1995.[11] Some local officials, particularly in the eastern part of the country, revived *gacaca* to deal with property disputes as refugees returned to the country and found their houses and lands occupied.[12] With the encouragement of prison officials, some genocide detainees started their own *gacaca* in 1998 to hear confessions from fellow inmates. For example, the *gacaca* committee in Kigali Central Prison heard 1,127 confessions from approximately 8,000 inmates from late 1998 to late 2001.[13]

Reinventing *Gacaca*

In the immediate aftermath of the genocide, *gacaca* was rejected as a mechanism for trying genocide cases. In August 1994, the new Justice Minister stated that "*gacaca* proceedings would 'trivialize the genocide' and diminish the credibility of convictions."[14] At an international justice conference in late 1995, where the key features of the 1996 Genocide Law were developed, *gacaca* was briefly considered for property offenses: "the Conference urges that in cases not involving crime against the person, customary Rwandan procedures such as the A*GACACA* be used, or adapted, to the extent possible."[15] Shortly afterwards, several Rwandan scholars rejected applying *gacaca* to genocide crimes: "The justice of *gacaca* would be incompetent in the matter of genocide because it cannot even judge a

[10] Reyntjens, "Le *gacaca*," 41.
[11] Laurel L. Rose, "Justice at the Local level: Findings and Recommendations for Future Actions" (Kigali: USAID, 1995).
[12] Karekezi "Juridictions *gacaca*," 33.
[13] Penal Reform International, *Interim Report on Research on Gacaca Jurisdictions and its Preparation (July–December 2001)* (2002), 29-30. For footage of a prison *gacaca*, see Aghion "*Gacaca*: Living Together Again in Rwanda?"
[14] Human Rights Watch, *Law and Reality*, 13.
[15] Office of the President, *Recommendations of the Conference Held in Kigali from November 1st to 5th, 1995 on: Genocide, Impunity and Accountability: Dialogue for a National and International Response* (1995), 23.

homicide case."[16] Instead, they proposed that *gacaca* function as local-level truth commissions to differentiate the innocent from the guilty.

Three years later, faced with an enormous genocide caseload and detainee population, the government revisited the idea of adapting *gacaca*. That occurred during President Bizimungu's weekly "reflection meetings" with political, military, and economic elites at his official residence (*Urugwiro*) between May 1998 and March 1999. Those meetings focused on four aspects of national reconciliation: democracy, justice, the economy, and security. The published report provides a fascinating, if sanitized, view into the opaque world of RPF policymaking, including the debates around modernizing *gacaca*.[17]

From the outset, then, genocide *gacaca* was linked to democratization, economic development, and security. *Gacaca* would promote democratization and accountability by getting the population to participate in rendering justice. It also would contribute to economic development by sentencing those who confessed to community service. *Gacaca* would improve security by going after the "many others who participated in the genocide and massacres who have not yet been arrested and brought before justice, and who continue to disturb security."[18] Furthermore, *gacaca* was linked to larger processes of political and economic decentralization that started in 2000 as an outgrowth of the *Urugwiro* meetings.

The *Urugwiro* report makes two key recommendations for genocide justice: maximal prosecutions and participatory justice. It rejects the Nuremberg model of exemplary prosecutions of high-ranking officials:

> The genocide and massacres are a *collective offence*. No family . . . in Rwanda was not affected. . . . But, on the other hand, the genocide and massacres have been the culprit's offence: because there is hatred between a *citizen* whose family member was killed by a neighbor and that neighbor. That *citizen* cannot logically think that it is government which is more responsible for what happened to him. Therefore, this proves that it would not be enough to punish such a crime at a high level.[19]

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[16] United Nations High Commissioner for Human Rights, *Gacaca: Le droit coutumier au Rwanda* (1996), 20.
[17] Office of the President, *Report on the Reflection Meetings*. Clark's interviews with three participants in those debates, including the current President and Minister of Justice, make clear that *gacaca* was elite-driven and not, as Clark claims, "initiated and synthesized within Rwandan society." Clark, *The Gacaca Courts*, 50, 57-60.
[18] Office of the President, *Report on the Reflection Meetings*, 57 and 58.
[19] Office of the President, *Report on the Reflection Meetings*, 6.

This is a remarkable passage. The report acknowledges the state bears greater responsibility for the genocide but shifts the focus to the individual criminal responsibility of non-state actors (neighbors). The report then seeks to address the collective nature of the crime – not through state responsibility but through multiplying the number of individual prosecutions. There is also the curious binary opposition of citizen-victims and neighbor-perpetrators which seems to replicate the Tutsi-Hutu binary. Hence, the reason a Tutsi citizen-victim may not "logically think that it is government which is more responsible" is because the post-genocide state is Tutsi-led. Maximal prosecutions were expected to promote reconciliation between Tutsi citizen-victims and Hutu neighbor-perpetrators.

The report also advocates participatory justice on three grounds. First, participatory justice would increase the capacity of the judicial system which otherwise would "take about 200 years to try" the huge number of detainees.[20] Second, it is the "better" way to address crimes of genocide "committed in public, by many people."[21] Rather than having the punishment fit the crime, the method of judging will fit the crime. Finally, participatory justice dovetails with the report's overall emphasis on restoring the unity of Rwandans through "PARTICIPATION from the population."[22] Following Arendt and Jaspers, such participation might be seen as a way of imposing, or at least acknowledging, the collective, political responsibility of all Rwandans for the crimes committed in their name.

When it came time to devise a "new" system of participatory justice for the genocide, the *Urugwiro* participants "looked[ed] back and examine[d] how in the ancient Rwanda, Rwandans settled their disputes by using *Gacaca*."[23] After a cursory treatment of pre-colonial and colonial *gacaca*, the report summarizes the debates over applying *gacaca* to genocide cases. It lists several concerns raised by participants:

- . . . whether trying cases of genocide and massacres in *Gacaca* would not be minimizing the genocide and massacres and making them a simple offense [like the type traditionally heard in *gacaca*]. . . .
- . . . the people are not educated, that they cannot know how to implement laws and carry out trials in an appropriate way;

[20] Office of the President, *Report on the Reflection Meetings*, 59. The report states that the 1996 Genocide Law's "guilty plea procedure which would have accelerated trials has also been slown [sic] down because of lawyers, especially the foreign ones and other employees who spend their time in Rwandese prisons, preaching that people who are detained there should not confess." *Ibid.*
[21] Office of the President, *Report on the Reflection Meetings*, 60.
[22] Office of the President, *Report on the Reflection Meetings*, 4.
[23] Office of the President, *Report on the Reflection Meetings*, 57.

- . . . nothing would prevent people from being partial . . . for those with whom they have family relations and friendship;
- . . . Rwandans are used not to tell the truth, which would make *Gacaca* impossible . . .
- . . . carrying out trials of the genocide and massacres by *Gacaca* would be the origin of other disputes
- . . . this would not be in conformity with international laws[24]

Other participants, who favored modernizing *gacaca*, countered in part:

- The people are not so uneducated that they cannot be educated . . . the people can know the truth, can be made used to the good culture as they were made used to killings; the people can carry out trials of what they saw themselves, based on one organic law which is well explained;
- Regarding the people's partiality, by not saying the truth or being in favor of those with whom they have family ties, this is possible, but because prosecuting and carrying out trials before the new *Gacaca* would be done in public, there are people who may contradict them and give concrete evidence[25]

The following chapters demonstrate how these early policy debates played out in Kigali and on Rwanda's hills.

As part of the *Urugwiro* meetings, President Bizimungu established a commission in October 1998 to explore "a new type of arbitration court" that could try lower-level genocide suspects. The commission's January 1999 report laid out the elements of what became modernized *gacaca* without ever once using the term.[26] Six months later, the commission issued a report "recommend[ing] that the new judicial institutions which aim to foster a system of participatory justice be called '*Gacaca* Tribunals' (*Inkiko-Gacaca*)."[27]

The commission proposed scrapping the specialized chambers for genocide cases in the national courts and replacing them with four layers of *gacaca* tribunals that would prosecute all but the most serious category of genocide offenses. *Gacaca* courts would be made up of "persons of integrity" elected by local residents. The *gacaca* system would retain

[24] Office of the President, *Report on the Reflection Meetings*, 62-63.
[25] Office of the President, *Report on the Reflection Meetings*, 64.
[26] Republic of Rwanda, *Les tribunaux d'arbitage dans les process du genocide perpetre au Rwanda a partir du 1 octobre 1990 jusqu'au 31 decembre 1994* (Jan. 1999).
[27] Republic of Rwanda, *Gacaca Tribunals Vested with Jurisdiction over Genocide Crimes against Humanity and Other Violations of Human Rights which Took Place in Rwanda from 1st October 1990 to 31st December 1994*, (July 1999), 25.

the 1996 Genocide Law's four categories of genocide crimes, but would allow those who pleaded guilty to Category 2 crimes and all who committed Category 3 crimes to serve portions of their sentence doing community service. The committee's report recommended a "public awareness campaign" as "[t]he system of justice working through institutions elected by the population itself is new" and hence "will need to be well explained so that all Rwandans embrace it."[28] The commission's first chairman noted some of the concerns about *gacaca* in 2000:

> Some people maintain that this system might . . . bring back temptations of denouncement, feelings of revenge and propagation of hearsay. Yet others say . . . one could be convicted for an offence never committed. Others are not happy with the sentences that will be passed for those who will have pleaded guilty . . . Another problem lies with worrying statements made by some suspects who plead guilty in words just as a formality, but do not truly repent.[29]

That was prescient. As later chapters will show, *gacaca* gave rise to false accusations and unrepentant confessions, thereby causing tensions within communities.

Modern *Gacaca* as Ersatz Tradition

Gacaca is often portrayed as "traditional" by Rwandan officials and outsiders.[30] In his public speeches, President Kagame promoted *gacaca* as a "traditional participatory system"[31] and one that "had served us well before colonialism."[32] In mid-2008, the Minister of Justice stated "Rwanda had to step back into its past to find a solution for its present predicament."[33] In fact, *gacaca* bore no resemblance to customary dispute resolution.[34] For one thing, genocide

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[28] Republic of Rwanda, *Gacaca tribunals*, 24.
[29] Remarks by former Minister of Justice Faustin Nteziryayo summarized in National Unity and Reconciliation Commission, *Report on the National Summit of Unity and Reconciliation, Kigali 18-20 October 2000* (Kigali: NURC, no date).
[30] See, e.g., Richard Sezibera, "The Only Way to Bring Justice to Rwanda," *The Washington Post*, April 7, 2002; Erin Daly, "Transformative Justice: Charting a Path to Reconciliation," *International Legal Perspectives* 12 (2002), 179.
[31] President Paul Kagame, "Speech by His Excellency President Paul Kagame at the University of Washington," April 22, 2004.
[32] President Paul Kagame, "The Challenges of Human Rights in Rwanda after the 1994 Genocide: Speech by His Excellency Paul Kagame, President of the Republic of Rwanda at the University of Connecticut," September 19, 2005.
[33] Comments of Tharcisse Karugarama, Workshop on "Rwanda's Move Towardss Commonwealth Membership," Kigali, August 5, 2008.
[34] Even as knowledgeable a Rwanda scholar as Timothy Longman incorrectly depicts *gacaca* as a mix of customary and modern law. Timothy Longman, "Justice at the Grassroots? Gacaca Trials in

gacaca was a state institution intimately linked to the state apparatus of prosecutions and incarceration, and applying codified, rather than customary, law. This was recognized by its official title: *inkiko gacaca*, or *gacaca* courts. Second, modern *gacaca* courts judged serious crimes and meted out prison terms rather than resolving minor civil disputes with restitution awards. Third, modern *gacaca* applied individual criminal responsibility rather than collectivize civil responsibility against a family, clan, or lineage. Fourth, the *inyangamugayo* were elected, comparatively young, and nearly one-third women in contrast to the male elders of the past.[35] Finally, "[t]he main difference between the traditional and the new systems is probably the destruction of the social capital that underlies the traditional system."[36]

Gacaca is rather what Hobsbawn and Ranger term "an invention of tradition."[37] As the legal anthropologist Sally Engle Merry observes, "Government reformers sometimes promote new state judicial institutions with traditional symbolic trappings, claiming to reinstitute traditional law."[38] While *gacaca* may be the Rwandan government's best-known (re)invented tradition, it is far from the only one. Since 1999, the government has named several policies and programs after Rwandan traditions.[39] Such ersatz "traditions" bestow legitimacy on government programs, while, at the same time, insulating them from Western critiques. Anticipating criticism from Human Rights Watch at a 2008 conference on the judicial sector, the Rwandan Minister of Justice declared that "*Gacaca* is Rwandan culture"[40] – even though he once privately told me how he helped invent genocide *gacaca*.

If anything, *gacaca* has more antecedents in Mozambique's popular courts and Uganda's resistance councils than in Rwandan customary law. The RPF's leadership cut its teeth as part of Yoweri Museveni's National Resistance Army (NRA). In its guerrilla training

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Rwanda" in *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, ed. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge: Cambridge University Press, 2006), 209-13.

[35] Service National des Juridictions Gacaca, "Report on Improving the Living Conditions for the *Inyangamugayo*" (2005).

[36] Reyntjens and Vandeginste, "Rwanda: An Atypical Transition," 118.

[37] Eric Hobsbawm and Terence Ranger, ed., *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983).

[38] Merry, "Legal Pluralism," 882.

[39] For a good overview, see Chambers and Golooba-Mutebi, *Is the Bride Too Beautiful?*, 55-56. The authors endorse these as "neo-traditional cultural practices," whereas they are really modern (and high modernist) state programs with traditional, cultural labels stuck on them.

[40] Comments of Tharcisse Karugrama, "International Conference on the Impact of the Judicial Reforms," Kigali, June 17, 2008.

in Mozambique, the NRA was inspired by FRELIMO's revolutionary justice.[41] During the 1981-1986 bush war, the NRA set up local resistance councils, partly modeled on FRELIMO's popular courts, to administer and adjudicate in the areas it controlled. The councils were comprised of all the adults in a village and were managed by a nine-member committee elected from the community. After the NRA took power in 1986, it disbanded customary justice mechanisms, replacing them with resistance councils. The NRA then set about codifying, formalizing, and institutionalizing popular justice as part of the state's revamped justice system:

> The NRM government no longer saw RC [Resistance Council] courts as offering a new model of justice for all. Instead, it was intended that RC courts should offer an alternative justice route to the technical, less accessible and expensive formal court system and be expressions of popular justice. . . . The RC courts would be available in people's own villages, use the local language, be presided over by people known and trusted (and elected), use straightforward and informal procedures and allow popular participation in the settlement of their own disputes. The law applicable and remedies available would also follow local customs.[42]

That experiment in legal pluralism did not last long. After only a few years, the NRM began transforming the now renamed Local Committees into the lowest courts within a unitary judicial system. As Bruce Baker puts it, "popular justice began to die the minute the revolution seized control of the state."[43] Over time, "[p]opular justice was to become lower court justice with popular elements."[44] Inevitably, the legitimacy of the Local Committees declined and fewer litigants made use of them.[45] As later chapters will show, the RPF failed to learn that lesson.

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[41] Yoweri Museveni, *Sowing the Mustard Seed: The Struggle for Freedom and Democracy in Uganda* (London: Macmillan, 1997), 30. For an early, fulsome description of Mozambique's popular courts, see Albie Sachs, "Changing the Terms of the Debate: A Visit to a Popular Tribunal in Mozambique," *Journal of African Law* 28, nos.1-2 (1984), 99-106.

[42] Bruce Baker, "Popular Justice and Policing from Bush War to Democracy: Uganda 1981-2004," *International Journal of the Sociology of Law* 32, no. 4 (2004), 4.

[43] Baker, "Popular Justice and Policing from Bush War to Democracy," 12-13.

[44] Baker, "Popular Justice and Policing from Bush War to Democracy," 6. A good description of this transformation can be found at *id*., 1-5.

[45] Lynn S. Khadiagala, "The Failure of Popular Justice in Uganda: Local Councils and Women's Property Rights," *Development and Change* 32, no. 1 (2001), 64-66.

Modern *Gacaca* as Hybridity?

Clark contends that modernized *gacaca* exemplifies hybridity. He applies the term to both the institution ("[t]he hybridity of *gacaca* as a modern-traditional institution") and its functions (*gacaca* "has displayed a hybridity of retributive and restorative functions").[46] There are weaknesses to this argument. First, it assumes that genocide *gacaca* actually synthesizes elements of the "traditional" institution. Yet, as argued above, the only traditional aspect of these community courts is the label "*gacaca*" (and even that term may be a neo-traditional neologism). Second, *gacaca*'s mix of retributive and restorative features does not make it a legal hybrid.[47] As Boaventura de Sousa Santos makes clear, a legal hybrid is "a new kind of legal pluralism [that] challenge[s] conventional dichotomies" such as "official/ unofficial, formal/informal, traditional/modern, monocultural/ multicultural."[48] *Gacaca*, however, sits firmly on one side of those dichotomies: it is official, formal, modern, and monocultural. That contrasts sharply with Mozambique's community courts, which de Sousa Santos describes as "the legal hybrid institution par excellence": "They are recognized by law . . . but their operation is not regulated by law, nor are they part of the official legal system."[49]

Calling *gacaca* traditional or hybrid obscures the fact that it is modern, state-imposed informalism. Many nationalist elites, including the RPF leadership, view legal pluralism as an obstacle to state-building, and hence take steps to dismantle, coopt, or re-make customary law. Richard Abel explains how state-sponsored "informalism expands the grasp of the state at the expense of other sources of authority that appear to be potential competitors."[50] India's *nyaya panchayats* (village courts) and *lok adalats* (people's courts) provide well-documented examples of such state informalism. They soon proved unpopular and ineffectual. As Merry

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[46] Clark, *The Gacaca Courts*, 48, 249. See Phil Clark, "Hybridity, Holism, and 'Traditional' Justice: The Case of the *Gacaca* Courts in Post-Genocide Rwanda," *George Washington University International Law Review* 39, no. 4 (2007). For similar views of *gacaca* as hybrid, see Roelof H. Haveman, "*Gacaca* in Rwanda: Customary Law in Case of Genocide" in *The Future of African Customary Law*, ed. Jeanmarie Fenrich, Paolo Galizzi and Tracy E. Higgins (Cambridge: Cambridge University Press, 2011), 414-20; Doughty, Contesting Community, 122.

[47] Clark offers no theory of hybridity. Clark, *The Gacaca Courts*, 48, 84, 343. For a recent literature review, see Tom Goodfellow and Stefan Lindemann, "The Clash of Institutions: Traditional Authority, Conflict and the Failure of Hybridity in Buganda," *Commonwealth & Comparative Politics* 51, no. 1 (2013), 5-9.

[48] Boaventura de Sousa Santos, "The Heterogeneous State and Legal Pluralism in Mozambique," *Law & Society Review* 40, no. 1 (2006), 46. For a more recent discussion of hybridity, see Oliver P. Richmond, "De-romanticising the local, de-mystifying the international: hybridity in Timor Leste and the Solomon Islands," *The Pacific Review* 24, no. 1 (2011), 115-136.

[49] De Sousa Santos, "The Heterogeneous State," 56.

[50] Richard L. Abel, "Introduction" in *The Politics of Informal Justice: The American Experience*, ed. Richard Abel (Academic Press, 1982), vol. 1, 275.

explains, "popular justice established by the state itself gradually becomes formalized and incorporated into state law."[51] Once *gacaca* is seen as state-imposed "informalism," its difficulties start to resemble those encountered in other state efforts: increased formalism, decreased popular participation, and increased state coercion.

Gacaca's Inception

It took three years from the commission's 1999 report for *gacaca* to be launched. During that period, new laws were enacted (and old ones amended), a new administrative body was created within the Supreme Court, *gacaca* judges were elected and trained, and the population was sensitized.

Codifying *Gacaca*

The 2001 *Gacaca* Law closely followed the principles and structure set out in the commission's 1999 report. That law retained the central features of the 1996 Genocide Law – the four categories of genocide crimes and reduced sentences for guilty pleas – while creating approximately 11,000 *gacaca* courts to hear all but the most serious, Category 1 crimes (which were still to be handled by the national courts). Category 2 crimes (homicide) were tried by 106 district-level courts, Category 3 crimes (manslaughter and assault) by 1545 sector-level courts, and Category 4 (property crimes) by 9,201 cell-level courts.[52] Those courts had authority to: summon witnesses; order searches for evidence; issue arrest and release orders; take (undefined) protective measures for victims and witnesses; prosecute and sentence those who gave incomplete or false testimony or who pressured witnesses or judges; and issue judgments and pass sentences. Each court was composed of 19 judges and a General Assembly (comprising all adults resident in the community).

The 2001 *Gacaca* law also sought to increase incentives for plea bargaining. While the 1996 Genocide Law offered substantially reduced sentences in exchange for guilty pleas, only some 20,000 of the estimated 120,000 detainees had made confessions by early 2000.[53] About 2,000 had made confessions in response to the public executions of 22 convicted *génocidaires* in early 1998. Another 15,520 made confessions as a result of sensitization

[51] Merry, "Popular Justice," 31-32. See *id.* at 40-51.
[52] Rwanda's administrative organization has changed several times since the genocide and is still being transformed. *Gacaca* was based on the 2001 administrative division of the country into 11 provinces, 106 districts, 1,545 sectors, and 9,201 cells. The cell, the smallest administrative unit, grouped approximately 100 to 500 families. In addition, cells were then sub-divided into 10 households called *nyumbakumbi*.
[53] Amnesty International, *Gacaca: A Question of Justice*, 18.

efforts in prisons led by a Belgian NGO.[54] Still, the government recognized the need to obtain more confessions to speed up trials. Hence, the *gacaca* law made plea bargaining more attractive by allowing those who confessed to Category 2 and Category 3 crimes to serve half their reduced sentences doing community service (*travaux interet general*, or TIG) as an alternative to incarceration.

Under the 2001 law, *gacaca* courts had subject matter jurisdiction over genocide and crimes against humanity, as well as ordinary crimes "committed with the intention of perpetrating genocide or crimes against humanity."[55] Importantly, the 2001 law also included war crimes within *gacaca*'s jurisdiction. Like the 1996 Genocide Law, the *Gacaca* Law's temporal jurisdiction was limited to crimes committed between October 1, 1990 and December 31, 1994. That effectively excluded most of the RPF killings associated with the closing of refugee camps in Rwanda and Congo in 1995 and 1996.

As the 2001 law spelled out, *gacaca* consisted of four stages: (1) pre-trial collection of information; (2) pre-trial categorization of suspects; (3) trial, judgment and sentencing; and (4) appeal. *Gacaca* proceedings started with a lengthy pre-trial phase at the cell level, where *gacaca* judges held weekly meetings to compile local histories of the genocide and establish lists of victims, property damages, and suspects. The lists of suspects were based not only on the evidence given in *gacaca* hearings, but also on prisoners' confessions and state prosecutors' files. The second phase involved cell-level judges "categorizing" the accused; that is, placing them in one of the four categories of genocide crimes based on evidence of their worst crimes. The files of the accused were then sent to the appropriate jurisdiction for trial. Trials were public. At the end, judges deliberated privately over the judgment and sentence, and then announced their decision publicly. Finally, appeals were limited: they were not allowed from guilty pleas (even if allegedly coerced) or from convictions for property offenses.

Electing and Training *Gacaca* Judges

The government ran elections for some 259,000 judges in approximately 11,000 *gacaca* courts in October 2001. In theory, the elections were meant to be an expression of participatory democracy but, in practice, many candidates were nominated by local officials.[56] The *gacaca* elections thus resembled the March 2001 local elections, where

[54] Avocats sans frontières, *Justice pour tous au Rwanda: Rapport annuel 1999* (1999), 31.
[55] 2001 *Gacaca* Law, art. 1.
[56] Penal Reform International, *Interim Report*, 30-31 & 35 n.39.

government officials also had predetermined most of the results through the nomination process.[57] The vast majority of the elected judges were peasants and most had finished primary school (56 percent at the cell-level and 65 percent at the sector level).[58] Although women made up an estimated 52 percent of the population at the time, they represented 35 percent of judges at the cell level and 23 percent at the sector level.[59] Elected judges were supposed to be "persons of integrity" in their local communities. Yet, thousands were later replaced, with some being accused of having participated in the genocide.

The government provided six days of training for *gacaca* judges in spring 2002. That was clearly inadequate given the judges' low education and literacy levels, as well as the complexities and ambiguities of the *gacaca* law.[60] The training focused mainly on the procedural aspects of *gacaca*, with very little explanation of how to define crimes, weigh evidence, and apply standards of proof.[61] In a letter to then Prosecutor General Gahima, the US Justice Department's resident legal advisor in Rwanda stated that "judges and prosecutors who were providing training to individuals responsible for the actual training of the *Gacaca* judges were teaching vastly different instructions on categorization." He continued:

> For example, in a situation where a victim dies from an infection or loss of blood resulting from a machete blow, the prosecutors . . . as well as court of appeal judges, including those who were conducting "training of trainers" seminar, were surprised to find that they did not agree on whether such a defendant should be placed in category 2 or 3.
>
> Some judges, moreover, were giving instructions that accomplice liability theory did not apply in *Gacaca*. Thus, an individual who actively assisted someone in the murder of an innocent civilian during the genocide would not be placed in the same category as the one who struck the fatal blow. In their view, the person who struck the fatal blow would be placed in the second category and the accomplice

[57] International Crisis Group, *Consensual Democracy in Post-Genocide Rwanda: Evaluating the March 2001 District Elections* (2001).
[58] Penal Reform International, *Interim Report*, 36.
[59] Penal Reform International, *Interim Report*, 36. The government states that 34 percent of judges were women but does not make clear whether that was the average during the entire period of *gacaca*. Service National des Juridictions *Gacaca*, "Summary of the Report Presented at the Closing of *Gacaca* Court Activities" (2012).
[60] African Rights, *Gacaca Justice: A Shared Responsibility* (2003), 4-12.
[61] See Cour Supreme, Departement des Juridictions *Gacaca*, *Manuel explicatif sur la loi organique portant creation des jurisdictions gacaca* (2001); African Rights, *Gacaca Justice*, 4-17.

in the third category. More disturbing, of course, is that other judges were giving the completely opposite instruction.[62]

Not surprisingly, then, some judges seemed unclear how to categorize people accused of showing attackers where Tutsi were hiding.[63] Thus, it was inevitable that poorly-trained local judges treated like cases very differently.[64]

Sensitizing the Population

The government sought to educate the Rwandan public about *gacaca*. A survey of some 1,700 adults in 2000 had demonstrated that 41 percent had little or no knowledge of *gacaca*.[65] The government sought to change that through a public awareness campaign that included radio announcements, roadside billboards, and posters at petrol stations. The 2001 elections for *gacaca* judges provided an important opportunity to sensitize the population about the workings of *gacaca*. Furthermore, some prosecutors used presentations and releases of those without case files (the *sans dossiers*) to educate local communities about *gacaca* – so much so that these presentations came to be known as "pre-*gacaca*."[66] Penal Reform International expressed concern that "many so called awareness programs in Rwanda are organized from a top-down perspective and have more characteristics of dictating *Gacaca* than of sensitizing the audience via open dialogue or interactive approaches."[67]

Launching *Gacaca*

President Kagame officially launched *gacaca* on June 18, 2002. In his speech, he set out five ambitious aims. These were to:

Make known "all" the truth about what had happened

Accelerate the [genocide] judgments

Uproot the culture of impunity

Unite Rwandans on the basis of justice, which reinforces unity and reconciliation

Demonstrate the capacity of the "Rwandan family" to resolve its own

[62] Letter from Pierre-Richard St. Hilaire to Prosecutor General Gerald Gahima, March 26, 2002.
[63] Catherine Honeyman et al., "*Gacaca* Jurisdictions Interim Report of Observations" (2002), Part C.
[64] Avocats sans frontières, *Monitoring des juridictions gacaca: Rapport analytique, mars-septembre 2005* (2005), 20-21 & n.43, n.44.
[65] Stella Ballabola, "Perceptions about the *Gacaca* Law in Rwanda: Evidence from a Multi-Method Study," *Cahiers du Centre de Gestion des Conflits*, no. 3 (2001), 112, 113.
[66] For one example, see Aghion, "*Gacaca*: Living Together in Rwanda."
[67] Penal Reform International, *Interim Report*, 13.

problems[68]

Later chapters will measure *gacaca*'s success in part against those goals.

Conclusion

This chapter has explored how the government invented genocide *gacaca* as state-run community courts to achieve its goal of maximalist prosecutions for the 1994 genocide. From conception to completion, *gacaca* lasted 13 years. During that period, the government made numerous changes to *gacaca* in response to both internal politics and external pressures. The next chapter will describe and explain those changes in some detail.

[68] "Speech of President Kagame at the Official Launch of *Gacaca* Jurisdictions, June 18, 2002" in Penal Reform International, *PRI Research on Gacaca Report: Rapport III, April – June 2002* (2002) (my translation from the French).

CHAPTER 7: *GACACA*'S EVOLUTION

"*Gacaca* is not the last chapter."
– Former Prosecutor General Gerald Gahima[1]

Introduction

Gacaca evolved considerably over the years as it ran a gauntlet of legal amendments, administrative orders, shifting priorities, donor worries, NGO critiques, practical hurdles, and local resistance. As a high ranking justice official told me in mid-2006: "*Gacaca* is not a textbook. We are writing the book as we practice it. Sometimes we change the paragraph before we write the next one."[2] The government's willingness to adapt *gacaca* over the years is striking, especially given its highly authoritarian nature, the permissiveness of international donors, and the weakness of civil society organizations.

This chapter begins by looking at how *gacaca* evolved and then moves on to explain why *gacaca* evolved the way it did. It examines the key actors involved in reshaping *gacaca*: the ruling party, the donors, non-governmental organizations, and local actors. The chapter then looks at the dramatic changes to *gacaca*'s handling of rape cases. It concludes by assessing where *gacaca* fits on the spectrum of accountability.

How *Gacaca* Evolved

Gacaca was first launched in June 2002. Following a two-and-a-half year pilot phase, it was rolled out nationwide in January 2005, and trials of lower-level perpetrators finally got underway throughout the country in July 2006. Most of those trials were completed by the end of 2007, partly as a result of an increase in *gacaca* benches hearing cases concurrently. In late 2008, *gacaca* courts began trying cases involving higher-level suspects (including those accused of rape). In 2009, the government opened a new information-gathering phase. After most trials ended in August 2010, *gacaca* continued hearing some appeals. *Gacaca* officially closed in June 2012 having tried more than 1.9 million cases involving just over a million suspects.[3] Most remarkably, the vast majority of those trials occurred in a four-year period from mid-2006 to mid-2010.

Gacaca proceeded in fits and starts over the years. There were several causes for that. The government suspended *gacaca* activities at various periods: the annual genocide commemorations in April, the 2003 constitutional referendum, the 2003 and 2008

[1] Interview with Gerald Gahima, Prosecutor General of Rwanda, Kigali, November 2003.
[2] Interview with Johnston Busingye, Secretary General, Ministry of Justice, Kigali, July 2006.
[3] Service National des Juridictions *Gacaca*, "Summary of Report Presented at the Closing of *Gacaca* Court Activities," 10, 13.

parliamentary elections, the 2003 and 2010 presidential elections, the 2004 judicial reforms, and the 2006 administrative reforms. The government also kept modifying *gacaca*, which meant proceedings had to be halted as *gacaca* judges were re-trained.[4] Furthermore, *gacaca* slowed as the number of cases mushroomed and the population lost interest. In response, the government took steps to accelerate *gacaca* in 2007.

Modifying *Gacaca*

Gacaca changed dramatically over 12 years. Since the first *gacaca* law in 2000, Parliament amended the law five times, most substantially in 2004 and 2008. President Kagame also issued several Presidential decrees, including those for the election of *gacaca* judges (2001), community service (2001), and mass releases (2003). In addition, the government agency charged with implementing *gacaca* issued 15 instructions clarifying and occasionally modifying *gacaca*'s operation. This section details the six key changes to *gacaca*.

Gacaca spurred an avalanche of new accusations – nearly a million by government estimates. As the prisons started filling up again, *gacaca* had to be dramatically revised to keep its promise of reducing the enormous number of genocide detainees. The government lowered the overall length of sentences and increased the proportion of time to be served doing community service. The 2004 law made clear that mitigating circumstances should result in lower sentences. The 2007 *Gacaca* Law extended plea-bargaining to Category 1 crimes. More radically, *gacaca*'s administrator decreed in mid-2007 that convicted *génocidaires* would do the community service portion of their sentences *before* doing jail time.[5] As a result, the number of genocide prisoners dropped from approximately 98,000 in June 2007 to 47,000 in September 2007. By early 2011, the number of genocide prisoners had stabilized at around 40,000.[6]

Second, *gacaca* was simplified and streamlined to process the expanding caseload. The 2004 law reduced the four categories of genocide crimes to three by combining murder, manslaughter and assault into a single category. The same law also restructured *gacaca* by eliminating the district and provincial courts and expanding the jurisdiction of sector courts to

[4] Interview with Domatilla Mukantaganzwa, Executive Secretary, Service National des Juridictions *Gacaca*, Kigali, July 2006.
[5] The government is eventually expected to issue pardons so that hundreds of thousands are not forced to go to prison after completing their community service.
[6] Human Rights Watch, *Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts* (2011), 63 n. 265.

hear all murder, manslaughter, and assault cases (that did not rise to the level of Category 1). In addition, it created 1,545 new sector-level courts to hear appeals. Finally, the 2004 law reduced the size of the *gacaca* bench from 19 judges to nine (and the quorum to seven). In 2007, the *gacaca* law was amended again to accelerate the process. The law created another 2,200 benches within existing jurisdictions, which allowed for multiple, concurrent trials.[7]

Third, *gacaca* became less participatory and more coercive over time. In 2005, for example, the Service National des Juridictions *Gacaca* (SNJG) delegated *gacaca*'s information-collection phase to the most local-level administrators (*nyambakumi*, those charged with administering ten households) even though that was not legally authorized and those officials had received little or no training. That change reinforced the power of state officials at the expense of *gacaca* judges and local communities, as well as making *gacaca* more susceptible to false accusations and corruption.[8] As public interest flagged, local officials and *gacaca* judges took steps to coerce attendance. Officials rounded up the population and fined (or threatened to fine) late arrivals and absentees. The 2004 *Gacaca* Law reinforced *gacaca*'s coercive aspect by making attendance compulsory.[9]

Fourth, *gacaca* became increasingly retributive and less restorative over time. As *gacaca* became less participatory and more accelerated, there were fewer opportunities for victims and perpetrators to engage in "genuinely dialogic processes."[10] As more serious crimes were transferred to its jurisdiction, *gacaca* started handing down harsher punishments (including life imprisonment). At the same time, many of those sentenced to community service were forced to live in labor camps rather than reintegrated back into their local communities. Furthermore, the repair of victims was largely neglected.

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[7] Organic Law No. 10/2007 of 01/03/2007 Modifying and Complementing Organic Law No. 16/2004 of 19/06/2004 Establishing the Organization, 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 1st 1990 and December 31, 1994, as Modified and Complemented to Date, March 1, 2007, art. __.

[8] Penal Reform International, *Monitoring and Research Report on the Gacaca: Information-Gathering during the National Phase* (2006), 2, 6-24

[9] Organic Law No. 16/2004 of 19/06/2004 establishing the organization, 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 1st 1990 and December 31, 1994, *Official Gazette of the Republic of Rwanda*, June 19, 2004, art. 29.

[10] Carolyn Hoyle, "Can International Justice Be Restorative Justice?" in *Critical Perspectives in Transitional Justice*, ed. Nicola Palmer, Phil Clark and Danielle Granville (Cambridge: Intersentia, 2012), 193.

Fifth, the government reneged on *gacaca*'s early promise to compensate genocide survivors. *Gacaca* courts dutifully tallied up human and material (but not moral) losses from the genocide. Under the 2001 *gacaca* law, those lists of damages were supposed to be transmitted to the Compensation Fund so reparations could be paid to survivors. However, the 2004 *Gacaca* Law put off the issue of compensation and, as of 2013, the compensation fund had still not been created. In an effort to make *gacaca* more palatable to genocide survivors, the 2004 law required those pleading guilty to make public apologies and locate their victims' remains.[11]

Sixth, *gacaca* quickly became "victor's justice." During the early pilot phase, participants occasionally demanded justice for family members allegedly killed by the RPF's forces. In response, the government removed *gacaca*'s jurisdiction over war crimes when it amended the law in 2004. That made the law consistent with government pronouncements that *gacaca* courts would not try war crimes committed by the RPF's rebel forces during the 1990-1994 civil war and 1994 genocide. It also accorded with the government's reluctance to try its own soldiers for war crimes or to allow the International Criminal Tribunal for Rwanda to do so.

Seventh, *gacaca* became more professional and bureaucratic. The government created a new administrative agency, the Service National des Juridictions *Gacaca*, that was independent of the Supreme Court to run *gacaca*. Over time, the government sought to improve the situation and status of *gacaca* judges, partly to reduce turn-over and corruption. With the help of donors (especially Belgium), the government provided judges with radios, bicycles, health care, limited financial recompense, per diems for training sessions, and judicial sashes (in the colors of the new Rwandan flag).[12]

Why *Gacaca* Evolved

To understand why *gacaca* evolved in these six ways, it is necessary to examine the role of key actors: the RPF-led government that implemented and revised *gacaca*, the donors who financed *gacaca*, the civil society organizations that monitored *gacaca*, and the local actors who sometimes resisted and reshaped *gacaca*.

[11] 2004 *Gacaca* Law, art. 54.
[12] See Service National des Juridictions Gacaca, "Improving the Living Conditions for the *Inyangamugayo*."

RPF-Led Government

There were always noticeable divisions within the RPF over genocide justice in general and *gacaca* in particular. Those divisions arose from personality clashes, turf wars, and substantive differences. What made such divisions unusual was their visibility outside the RPF's inner circle and their persistence over such a long period. Genocide justice was one of the few issues where President Kagame tolerated policy differences in public and did not impose a party line. That suggests *gacaca* was not one of his main priorities. In fact, President Kagame's most notable intervention into genocide justice was his sudden announcement of mass releases in January 2003. That took most policymakers by surprise and disrupted the pilot phase of *gacaca*. Most likely, the President's announcement was a bid for Hutu votes in the 2003 elections, rather than a Damascene conversion over the rights of long-suffering genocide suspects.

Policymaking on *gacaca* was complicated by three factors. First, the justice sector had three competing centres of power until the 2006 judicial reforms: the Prosecutor General's office, the Ministry of Justice, and the Supreme Court. There was no clear separation of powers and all three organs were subject to pressure from the President. The Prosecutor General not only did not answer to the Minister of Justice, he also engineered the removal of six Supreme Court justices in 2002. Meanwhile, the Vice-President of the Supreme Court was in charge of the Law Reform Commission. Second, ministers are the public face of government policymaking, but the real power usually lies with the secretary-generals, who are almost always Anglophone members of the ruling party. Finally, government officials were constantly aware that their positions were insecure. President Kagame has a penchant for reshuffling government posts on a regular basis, perhaps to prevent the emergence of any challengers to his rule. As government officials fall out of favor, some find themselves suddenly facing allegations of genocide, genocide ideology, divisionism, or corruption.

In the initial phase of *gacaca* policymaking (1999-2003), there were four key figures: Gerald Gahima, the Prosecutor General; Jean de Dieu Mucyo, the Minister of Justice; Johnson Busingye, the Secretary-General of the Ministry of Justice; and Aloysie Cyanzayire, the head of the *Gacaca* department in the Supreme Court. Gahima, Mucyo, and Cyanzayire all served on the 1999 government commission that proposed *gacaca*. Gahima was known to be hostile to *gacaca* and clashed with both Mucyo and Cyanzayire. Although a member of Kagame's inner circle, Gahima did not get his way on *gacaca*. By 2004, the power dynamics had been up-ended: Gahima fled into exile to escape corruption charges, Mucyo was demoted

to lead the new National Commission for the Fight against Genocide, Busingye was promoted to head the new High Court, and Cyanzayire was made president of the Supreme Court. Another important figure in the development of *gacaca* also fell on hard times: Alberto Basomingera, the justice official who helped codify *gacaca*, was imprisoned on genocide charges.

From 2003 to 2012, there were two key figures in *gacaca* policymaking: Domitilla Mukantaganzwa, Executive Secretary of the Service National des Juridictions *Gacaca*, and Tharcisse Karugarama, the Minister of Justice. One diplomat who worked closely with Mukantaganzwa for a period remarked that "everything is centralized in Domatilla, every decision is taken by Domatilla."[13] Mukantaganzwa allegedly got on well with President Kagame, but became increasingly marginalized after the arrest of her husband, a former Kigali mayor and provincial governor, on corruption charges. Karugarama is the architect of the legal and judicial reforms that professionalized the justice sector. A former Vice-President of the Supreme Court, he was passed over for the presidency of the Supreme Court (which went to Cyanzayire) and then was unemployed for about a year. Since his political resurrection, he has been careful to toe an aggressive line against the RPF's critics.

This short description points up three features of RPF policymaking. Policy is personality-driven, and those personalities are determined by neo-patrimonial politics centred on President Kagame. In addition, very little is known about the internal policymaking processes within the RPF. None of the RPF insiders who have gone into exile have talked about policymaking. For example, Gahima's recent book on genocide justice is a largely impersonal account that provides no real sense of the internal debates within the RPF.[14] Finally, the RPF leadership is highly pragmatic and willing to modify policies.

Donors

The RPF often portrays *gacaca* as an "African solution to an African problem,"[15] but that ignores the vital role that international donors played in financing and supporting *gacaca*. From the beginning, donors confronted a stark dilemma:

> Do they grasp the nettle and participate, on the grounds that anything is preferable to the abuse [of then 120,000 detainees] in prisons, or do they hold firm to established legal principles and stay aloof, thus increasing the

[13] Interview with a donor, Kigali, June 2006.
[14] Gahima, *Transitional Justice in Rwanda*.
[15] See, e.g., Paul Kagame, "Remarks of President Paul Kagame at the International Peace Institute," New York, September 21, 2009.

likelihood that *gacaca* will fail?[16]

Donors answered that question very differently. The United States and United Kingdom never funded *gacaca* directly due to human rights concerns. By contrast, Belgium, The Netherlands, and the European Union were enthusiastic supporters. Switzerland and Austria adopted a more conditional approach, adjusting their support over time in response to *gacaca*'s performance.

Overall, donors gave approximately $42 million to *gacaca*-related programming from 2000 to 2009.[17] As part of that sum, they provided the Service National des Juridictions *Gacaca* with $18.3 million (or 37 percent of that agency's total budget) between 2001 and 2012, with the largest donors being The Netherlands ($8.4 million), Belgium ($4.4 million), and the European Union ($2.2 million). Smaller donors included Austria ($1.3 million), the United Nations Development Program ($1.1 million), and Switzerland ($0.7 million).[18] Most of the money went to institutional support, technical assistance, logistics and equipment, and training of *gacaca* judges. Belgium also helped improve the *gacaca* judges' standard of living.[19] Several donors supported *gacaca* indirectly, through funding international and national organizations to provide technical assistance to the government, raise public awareness of *gacaca*, and assist genocide survivors cope with trauma.[20]

Major donors to *gacaca* also funded independent monitoring by international and national NGOs, with Belgium giving approximately $17 million over eight years. Even as Penal Reform International, Avocats sans frontières, and LIPRODHOR documented serious concerns with *gacaca*, most donors took little to no action. That perplexed Penal Reform International's head of mission: "*Gacaca* was designed in 1998-1999 to deal with 130,000 – no more. No one dared to think 1 million could be judged. . . . No one has been traumatized by this figure – not the government and not the donors."[21] Rather remarkably, the arrest and

[16] Moussalli, *Report of the Special Representative*, 35.
[17] Human Rights Watch, *Justice Compromised*, 127-29.
[18] Service National des Juridictions Gacaca, "Summary of the Report Presented at the Closing of *Gacaca* Court Activities."
[19] Human Rights Watch, *Justice Compromised*, 127-29; Belgium Embassy, "Matrice d'interventions des partenaires internationaux dans le domaine de la *gacaca*" (November 2002); Interviews with donor representatives, September 2002 and July 2006.
[20] USAID, "USAID Assistance to the *Gacaca* Process" (n.d.).
[21] Interview with former head of Penal Reform International, Kigali, July 2006.

detention of a Belgian priest by a *gacaca* court had no discernible effect on Belgium's support to *gacaca*.[22]

In response to government criticism of Penal Reform International's reports, the UK's Department for International Development (DFID) stopped funding that NGO's monitoring. By contrast, Switzerland reacted to those reports (which it also helped fund) by imposing conditionality on continued support to *gacaca*. Swiss Cooperation was particularly concerned that *gacaca* might not be contributing to reconciliation. It proposed very specific performance indicators for *gacaca*, including a restricted definition of complicity, better reasoned judgments, guarantees of the right against self-incrimination, and penalties that would be more favorable to reconciliation.[23] The Service National des Juridictions *Gacaca* rejected such conditionality and stopped inviting Swiss diplomats to stakeholder meetings on *gacaca*. As one diplomat dryly remarked, "That's typical."[24]

The Service National des Juridictions *Gacaca* could afford to ignore Switzerland, which was proffering only 300,000 euro. But why didn't more donors follow Switzerland's lead?[25] There were several reasons apart from Rwanda's "genocide credit." First, *gacaca* inspired genuine admiration among several donors as yet another example of the RPF's ambitious policies to overcome the legacy of genocide. Second, donors were loathe to criticize a policy that reflected such a high degree of local ownership – all the more so given the RPF's notoriously prickly reaction to even mild criticism. Third, donors did not see any plausible alternatives to *gacaca* given the failings of the national courts and the limitations of the ICTR. Had donors not been so tainted by their failure to prevent or halt the genocide, they might have been able to suggest an amnesty for lower-level perpetrators. Fourth, as Barbara Oomen observes:

> The notion of participatory justice struck a chord at a time that was all about democracy, decentralization and getting away from a strong central state. This

[22] Interview with Belgian diplomat, Kigali, June 2006. On the arrest and *gacaca* hearing of Father Guy Theunis, see Chapter 8.
[23] Swiss Cooperation, "Proposition de contrat d'objectifs pour l'appui de la Suisse au Service National des Juridictions *Gacaca*" (May 26, 2006).
[24] Interviews with diplomats in Kigali, June 2006; Human Rights Watch, *Justice Compromised*, 129.
[25] Both Austria and Switzerland decided not renew their contributions to the technical assistance fund led by The Netherlands. Austria subsequently limited its direct funding of SNJG to the creation of an audio-visual documentation center. Human Rights Watch, *Justice Compromised*, 129; Lars Waldorf, "Assessment of Rwanda's *Gacaca* Process: Report Prepared for the Austrian Development Corporation," (2006).

was supplemented by another international trend at the end of the 1990s: a search for alternative systems of justice.[26]

Fifth, negative conditionality had fallen out of favor in development practice. Sixth, key donors (like the European Union) were moving towardss budgetary support to Rwanda's justice sector, of which *gacaca* formed only a small component. Seventh, there was little donor coordination, particularly after the Belgian Embassy stopped hosting regular stakeholder meetings on *gacaca*. The lack of coordination was partly the consequence of the split between donors (like the UK and EU) who provided budget support and those who did not (like Belgium, The Netherlands, and the United States).[27] Finally, Oomen and Brown fault Rwanda's donors for viewing transitional justice mechanisms, like *gacaca*, as largely apolitical and technocratic.[28] My own conversations and interviews with a range of donors between 2002 and 2008 revealed that donors were largely aware of the political dimensions of *gacaca* but chose to focus on more technocratic issues where they thought they might make more headway in discussions with the government.[29]

Civil Society

The government was wary of any independent *gacaca* monitoring by donors or civil society. It preferred to monitor *gacaca* through its own organs: the Service National des Juridictions *Gacaca*, the National Human Rights Commission, and the National Unity and Reconciliation Commission. In a 2000 report for the Belgian government, Peter Uvin proposed a comprehensive *gacaca* monitoring system to provide quick feedback to the government and donors on *gacaca*'s progress.[30] Belgium and the UK subsequently funded the International Institute for Democracy and Electoral Assistance, a Stockholm-based inter-governmental organization, to coordinate *gacaca* monitoring by government bodies, local NGOs, and international NGOs. The project collapsed in 2003 when the organization was

[26] Barbara Oomen, "Donor-Driven Justice and its Discontents: The Case of Rwanda," *Development and Change* 36, no. 5 (2005), 903.
[27] See Nathalie Holvoet and Heidy Rombouts, The Denial of Politics in PRSP's Monitoring and Evaluation: Experiences from Rwanda (Antwerp: Institute of Development Policy and Management, 2008), 37.
[28] Oomen, "Donor-Driven Justice," 889; Stephen Brown, "The Rule of Law and the Hidden Politics of Transitional Justice in Rwanda," in *Peace-building and Rule of Law in Africa: Just Peace?* ed. Chandra Lekha Sriram, Olga Martin-Ortega and Johanna Herman (London: Routledge, 2011).
[29] According to Schotsmans, donors changed tack in July 2002 after recognizing their limited influence. Martien Schotsmans, "'But We Also Support Monitoring': INGO Monitoring and Donor Support to *Gacaca* Justice in Rwanda," *International Journal of Transitional Justice* 5, no. 3 (2011), 400.
[30] Uvin, "Introduction of a Modernized *Gacaca*," 18-20.

refused accreditation to work in Rwanda. As a result, *gacaca* monitoring remained a patchwork quilt of different organizations competing for the same donor funding and applying different methodologies.

In 2003, the government took a more dramatic step to control *gacaca* monitoring. A government minister issued a regulation forbidding researchers from taking notes during *gacaca* proceedings. At that point, Uvin advocated freezing all support to *gacaca*:

> three years ago when the *gacaca* policy was first floated, the government assured loud and clear that everyone who wanted to monitor *gacaca* was welcome to do so. This climate of transparency was one of the key factors that gave the international community sufficient confidence to invest massively in this risky but fascinating undertaking. The *gacaca* contract has now been deliberately and clearly broken. The response should be immediate: a full freeze of all support to *gacaca*. This is not to force the government into copying western justice systems, but simply to hold it accountable to its own promises.[31]

The Netherlands and United Kingdom stepped in and pressured the government to rescind that regulation.

Rwandan civil society organizations played no role in government policymaking on *gacaca*. There were no civil society representatives on the government's 1999 commission, not even from IBUKA, the main survivors' organization. IBUKA's 2002 proposal for compensation to genocide survivors was shelved by the government. LDGL, the Rwanda-based regional human rights organization, met with intimidation and threats when it attempted to lobby Parliament about the 2004 amendments to *gacaca*.[32] Several organizations, including IBUKA, LIPRODHOR, and PAPG (a collective whose membership included IBUKA and LDGL) monitored *gacaca* in the early period, but there is no evidence that their reports or recommendations influenced government policy or implementation. When the government produced a draft law for ending *gacaca* in 2012, IBUKA complained that "[s]urvivor organizations were not consulted by the Ministry of Justice or any other Ministry in the drafting of this law, yet this law is of great concern to survivors, who have

[31] Peter Uvin, "Wake Up! Some Policy Proposals for the International Community in Rwanda" (2003).
[32] Interview with LDGL's former executive secretary, Kigali, July 2006.

lived with and participated in *Gacaca* for the past ten years."[33] A few months later, IBUKA expressed its "dissatisfaction" with not being consulted on a draft presidential decree on community service "as a number of the articles negatively impact on the survivors of the Tutsi genocide, especially their right to reparation."[34] Nine survivors' organizations then produced an advocacy document with the international NGO REDRESS that called on the government to create a Reparation Task Force.[35] There is little evidence that IBUKA's recent advocacy had much impact.

Two international NGOs, Avocats sans frontières and Penal Reform International, did regular *gacaca* monitoring with the express purpose of shaping government policy. Avocats sans frontières' reports mostly examined the fairness of *gacaca* trials while also measuring the efficacy of the NGO's trainings for *gacaca* judges. In a 2008 report, Avocats sans frontières listed 11 recommendations it had made to the Service National des Juridictions *Gacaca* over the prior three years. Those recommendations went well beyond the rights of the accused: it advocated the government consult with genocide survivors about changes to *gacaca* laws, create a compensation fund for the neediest survivors, reinforce the capacity of *gacaca* judges, and hold regular meetings with all *gacaca* stakeholders. More controversially, Avocats sans frontières recommended that the government adopt some framework for addressing RPF war crimes and "crimes of vengeance."[36]

Whereas Avocats sans frontières focused more on the legal and procedural aspects of *gacaca*, Penal Reform International took a broader political approach linked to an action research agenda. Penal Reform International quickly ran into difficulties with its initial report on *gacaca*'s preparations in January 2002. The Ministry of Justice criticized the NGO for distributing the report without sufficient consultation and for addressing sensitive topics such as ethnicity and RPF war crimes. In response, Penal Reform International agreed to submit drafts to the Ministry for comments and revisions and to inform the Ministry of its research plans on a quarterly basis. After Penal Reform International released a second report in July 2002, the government prevented it from working in some prisons for a brief period,

[33] IBUKA, "Submission to Parliament of Rwanda on Draft Organic Law Terminating 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" (2012), 1.
[34] IBUKA, "Submission on the Draft Presidential Order Determining the Modalities of Implementation of Community Service as an Alternative Penalty to Imprisonment" (2012), 1.
[35] IBUKA, SURF, REDRESS, et al., "Recommendations for Reparation for Survivors of the 1994 Genocide Against Tutsi: Discussion Paper" (2012).
[36] Avocats sans frontières, *Monitoring des juridictions gacaca: Rapport analytique No. 4 (mai-decembre 2007)* (2009), 8-15.

threatened to withdraw its work permits, and threatened to declare its lead *gacaca* researcher (Dutch anthropologist Klaas de Jonge) *persona non grata*. DFID and the Dutch Embassy intervened behind the scenes and Penal Reform International was permitted to continue its *gacaca* monitoring. But afterwards the NGO practiced self-censorship: it never published its reports on ethnicity and RPF war crimes to avoid jeopardizing its programs and endangering its Rwandan staff.[37]

Avocats sans frontières and Penal Reform International attempted to "combine an outsider with an insider position, as well as advocacy with service delivery."[38] That was an unstable and, in the end, untenable combination in Rwanda's highly authoritarian environment. Avocats sans frontières and Penal Reform International had little impact on *gacaca* policy because the government reacted negatively to their reports and donors were unwilling to prod the government to implement their recommendations.[39] An Avocats sans frontières head of mission acknowledged that his NGO's impact was "very weak."[40] The Penal Reform International head of mission stated: "My feeling is that we are being used as an alibi by donors. . . . When I said [to one donor] if we alarm you, what do you do? And he said 'Nothing.'"[41]

Avocats sans frontières and Penal Reform International did make one important change to *gacaca* policy. In September 2005, *Gacaca*'s Executive Secretary proposed dramatic, substantive modifications to *gacaca*, including the creation of a national-level *gacaca* court to try Category 1 suspects and hand down death sentences. Afterwards, four international NGOs (Avocats sans frontières, Penal Reform International, RCN Democratie & Justice, and the Danish Institute for Human Rights) sent an open letter to the Service National des Juridictions *Gacaca* expressing concern over the proposed changes. As the head of Penal Reform International told me, "It's been two to three years that we've had no honest, transparent discussion on any issues – even on technical matters. . . . Our idea was to provoke

[37] Interviews with Penal Reform International staff, Kigali, September 6 and 8, 2002 and July 2006; Belgian Embassy meeting, September 9, 2002.
[38] Schotsmans, "'But We Also Support Monitoring,'" 406.
[39] Schotsmans points out that the Service National des Juridictions *Gacaca* did adopt several technical recommendations proposed by Avocats sans frontières. Schotsmans, "'But We Also Support Monitoring,'" 404 & n. 73.
[40] Interview with Avocats sans frontières head of mission, Kigali, July 2006.
[41] Interview with Penal Reform International head of mission, Kigali, July 2006. Schotsmans found the same attitudes in her interviews with various NGOs. Schotsmans, "'But We Also Support Monitoring,'" 409 & n. 105.

something."[42] When the Service National des Juridictions *Gacaca* did not respond to that letter, the NGOs lobbied *gacaca*'s donors, who then pressed the government for assurances that *gacaca* courts would not hand down death sentences. As one donor put it, "We said we won't finance it and now when they change the law, they won't do it."[43] While the INGOs' advocacy with donors succeeded, it made subsequent relations with the Service National des Juridictions *Gacaca* "very cold."[44]

Local Actors

Some important changes to *gacaca* were partly a response to how local actors reshaped, resisted, and appropriated *gacaca* out on the hills. During *gacaca*'s pilot phase, some local actors occasionally talked about the suffering of Hutu refugees in the DRC, Hutu suspects in overcrowded prisons, and Hutu victims of RPF killings, only to be cut off by local officials and *gacaca* judges. In one *gacaca*, two judges stood at the end of the session and described how RPF soldiers had "disappeared" their family member. When they asked why *gacaca* could not try the case, an official explained, "*Gacaca* treats uniquely the question of genocide," and told them to take their complaint to the local officials or the military courts. To reduce such awkward challenges, the government removed *gacaca*'s jurisdiction over war crimes in 2004.

Many local actors stopped showing up to *gacaca* as the novelty wore off and tedium set in. The priority for most rural Rwandans is eking out a daily subsistence from their own smallholdings and from casual labor. As described in Chapter 9, the government responded by coercing participation.

Finally, local actors complained about injustices in *gacaca* to various governmental oversight bodies. In their 2010 annual reports to Parliament, the National Human Rights Commission listed complaints of due process violations in 367 *gacaca* cases and the Office of the Ombudsman cited some 230 *gacaca*-related complaints. This apparently prompted the Service National des Juridictions *Gacaca*'s decision to keep *gacaca* open while it reviewed the complaints and sent those with merit back to the *gacaca* courts.[45]

A Case Study: *Gacaca*'s Rape Reversal

Perhaps *gacaca*'s most unexpected change had to do with its treatment of sexual violence during the genocide. After years of insisting that rapists be treated on a par with

[42] Interview with Penal Reform International head of mission, Kigali, July 2006.
[43] Interview with a donor, Kigali, July 2006.
[44] Interview with Avocats sans frontières head of mission, Kigali, July 2006.
[45] Human Rights Watch, *Justice Compromised*, 25-26.

genocidal leaders, the RPF reversed itself in 2008, amending the *gacaca* law to shift all sexual violence cases from the national courts to *gacaca*. The RPF made that dramatic change without legislative hearings and without consulting women's or survivors' organizations.[46] Ironically, that same year, Rwanda became the first country to have a majority of female parliamentarians and it passed a law against gender-based violence.

Rwanda has been widely acclaimed for female representation in politics. The 2003 elections ushered in a parliament that was 49 percent female, and the 2008 elections saw Rwanda become the first country in the world with a majority of female parliamentarians at 56 percent.[47] However, this parliamentary representation has not translated into significant policy gains for women. With one exception, the most important laws affecting women's rights, including the 1999 inheritance law, were enacted before the 2003 elections, when women made up less than 25 percent of Parliament.[48] Jennie Burnet observes that "as their [political] participation has increased, women's ability to influence policy making has decreased."[49] There are four key explanations for this paradox. The RPF's orchestration of elections means that female legislators, even those from nominally opposition parties, really owe their positions to the RPF. Prominent female politicians and civil society activists have been accused of genocide ideology or corruption when they fell afoul of the RPF. Women's organizations have been severely weakened as their more experienced activists have moved into parliament and ministries where they become largely coopted. Finally, female politicians and activists have had difficulty finding issues in common that transcend their political, ethnic, linguistic, and class differences.[50]

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[46] Avocats sans frontières, *Rapport analytique No. 4*, 9.
[47] Jennie E. Burnett, "Gender Balance and the Meanings of Women in Governance in Post-Genocide Rwanda," *African Affairs* 107, no. 428 (2008), 376-378.
[48] Claire Devlin and Robert Elgie, "The Effect of Increased Women's Representation in Parliament: The Case of Rwanda," *Parliamentary Affairs* 61, no. 2 (2008), 251. The one exception is the 2008 law on gender-based violence which, unusually, was initiated by parliament (and specifically, the Forum of Women Parliamentarians) rather than by the executive. For a highly positive account of the policy-making process around that law, see Elizabeth Pearson, "Demonstrating Legislative Leadership: The Introduction of Rwanda's Gender Based Violence Bill" (The Initiative for Inclusive Security/Hunt Alternatives Fund, 2008).
[49] Burnet, "Gender Balance," 363
[50] Burnet, "Gender Balance," 378-380; Jennie E. Burnet, "Women Have Found Respect: Gender Quotas, Symbolic Representation, and Female Empowerment in Rwanda," *Politics and Gender* 7, no. 3 (2011), 309-310.

Thousands of Tutsi women suffered sexual violence during the genocide, with estimates running as high as 250,000 to 500,000.[51] The Rwandan Penal Code at the time punished rape by a prison term of five to 10 years, and punished rape accompanied by torture with the death penalty.[52] During discussions of the 1996 Genocide Law, sexual violence was originally slated to be a Category 4 crime alongside property offenses. Rwandan women activists and parliamentarians challenged that:

> Local women's organizations . . . – with UNIFEM support – put together a team to gather women's input and testimony from across the country. These issues were taken to the Rwandan Women's Parliamentary Forum . . . and individual victims were brought to the Parliament to meet with Forum members. This group, along with the Forum, drafted a document which was given to all parliamentary members as a basis for advocacy and education.[53]

As a result of that lobbying, the 1996 Genocide Law listed sexual torture as a Category 1 crime (although it did not define that crime).[54] The legislature did not use the term rape "because it did not express the gravity of the offence, and because as such, it was not punishable by the death penalty."[55] Rape was specifically added in the 2001 *Gacaca* Law and also placed in Category 1, thus ensuring it would be tried in national courts.[56] While that signaled the government's seriousness in prosecuting rape, it had two unfortunate aspects. First, it contravened a fundamental principle of human rights and the rule of law by retroactively imposing a harsher penalty (a possible death penalty) than existed at the time of the crime's commission.[57] More crucially, it meant very few would confess to committing

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[51] René Degni-Ségui, *Report on the Situation of Human Rights in Rwanda*, U.N. Doc. E/CN.4/1996/68 (1996). See AVEGA Agahozo, *Survey of Violence Against Women in Rwanda* (1999). Straus questions these estimates. Straus, *The Order of Genocide*, 52.

[52] Code Penal, arts. 360, 361 in *Codes et Lois du Rwanda*, ed. Filip Reyntjens and Jan Gorus (1995), Vol. I, 417.

[53] Nahla Valji, *Supporting Justice: An Evaluation of UNIFEM's Gender and Transitional Justice Programming in Rwanda (1994-2008)* (2008), 19. See Sarah Wells, "Gender, Sexual Violence and Prospects for Justice at the *Gacaca* Courts in Rwanda," *Southern California Review of Law and Women's Studies* 14, no. 2 (2005), 184 & n. 97.

[54] The national courts split over whether rape constituted sexual torture under that law. Letter from Pierre St. Hilaire, Resident Legal Advisor to Rwanda, to Gerald Gahima, Prosecutor General of Rwanda (Dec. 6, 2001), 1. See Human Rights Watch, *Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda* (2004), 32, 44.

[55] De Beer, *The Organic Law*, 43 n. 2. Rape presumably fell within bodily assault in Category 3.

[56] 2001 *Gacaca* Law, arts. 51, 72.

[57] William A. Schabas and Martin Imbleau, *Introduction to Rwandan Law* (Quebec: Les Editions Yvon Blais, Inc., 1997), 45-46.

rape during the genocide. In a sample of 3005 confessed prisoners in Gitarama, only 12 had admitted to rape.[58]

There were relatively few prosecutions of sexual violence in Rwandan national courts. A 2000 report found that only 49 out of a sample of 1051 suspects were prosecuted for rape or sexual torture, and only nine were eventually convicted.[59] A later report found that 32 out of a sample of 1000 judgments from 1996 to 2003 involved charges of rape or sexual torture.[60] That was partly due to the unwillingness of victims to risk social stigma by making accusations and the reluctance of perpetrators to confess. Furthermore, survivors of sexual violence encountered numerous difficulties within the national justice system, such as prosecutors not trained in sexual violence cases and a lack of witness protection.[61]

Even though rape cases were to be tried by ordinary courts, *gacaca* courts were responsible for pre-trial fact-finding in public hearings. Few rape survivors or judges seemed aware that the law gave survivors and alleged rapists the right to request *in camera* hearings.[62] At one early pre-trial session, a rape survivor gave her testimony in writing, but the judges pressed her to testify orally because they found her handwriting illegible.[63] Not surprisingly, rape survivors rarely came forward to testify.[64] As the former president of IBUKA, the largest survivors' organization, stated in 2003: "You cannot say you've been raped in public – that's humiliating. . . . Some young girls have married and their husbands don't know, their children don't know."[65] In response to those concerns, the government amended the *gacaca* law in 2004 to ensure greater privacy and dignity for survivors.[66] The revised law banned both accusations and confessions of sexual violence in public. A victim

[58] Interview with Penal Reform International staff, Kigali, February 28, 2002.
[59] Martine Schotsmans, *Le droit a la réparation des victims de violences sexuelles pendant le génocide: analyse de l'état actuel, obstacles, suggestions de solutions* (Kigali: Avocats sans frontières, 2000), 3. Human Rights Watch, *Struggling to Survive*, 19. For a discussion of the case law on rape, see Avocats sans frontières, *Vade-Mecum: Le Crime de génocide et les crimes contre l'humanite devant les juridictions ordinaires du Rwanda* (2004), 115-117.
[60] Human Rights Watch, *Struggling to Survive*, 19. For a discussion of the case law on rape, see Avocats sans frontières, *Vade-Mecum*, 115-117.
[61] Human Rights Watch, *Struggling to Survive*, 20; Human Rights Watch, *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath* (1996), 89-91.
[62] See Wells, "Gender, Sexual Violence and Prospects for Justice," 190 and nn. 135 and 136.
[63] Kibungo Province 2 *gacaca*, October 14, 2002. For a similar example, see African Rights, *Gacaca Justice*, 38-39.
[64] Human Rights Watch, *Struggling to Survive*, 20-28. This accorded with the public attitudes revealed in a 2002 government survey. National Unity and Reconciliation Commission, *Opinion Survey on Participation in Gacaca and National Reconciliation* (2003), 19.
[65] Remarks of Antoine Mugesera at CLADHO Conference on *Gacaca*, Kigali, February 14, 2003.
[66] 2004 *Gacaca* Law, arts. 38, 47.

had to make her accusations in private to a *gacaca* judge or a prosecutor of her choice. Prosecutors, not *gacaca* courts, would then investigate the charges before transferring the case to national court. Still, despite the changes, some *gacaca* courts continued to discuss rape cases publicly.[67]

In 2005, when it became clear that pre-trial *gacaca* hearings would lead to a flood of new Category 1 cases, the government came under pressure to narrow the scope of Category 1 crimes. At that time, *Gacaca*'s Executive Secretary told me: "Rape is going to stay within Category 1 because rape has been used to eliminate the Tutsi group within the country. And it was done with the aim of deliberately infecting them with AIDS. It was done to destroy their sexual parts so they cannot reproduce themselves."[68] While the 2007 *gacaca* law reduced the number of crimes in Category 1 crimes, rape stayed put.

The 2008 *gacaca* law also kept rape in Category 1, but transferred rape cases (except those involving high-level officials in the genocidal government) to *gacaca* courts. Although key women's civil society organizations opposed this, they did not conduct any public advocacy or lobbying. As the legal representative of AVEGA, the genocide widows' association, told Human Rights Watch: "We knew the law would pass so we didn't publicly oppose it."[69] That demonstrated just how coopted and quiescent those women's organizations had become in the 12 years since their successful lobbying around the placement of sexual violence in Category 1. After *Gacaca*'s Executive Secretary spoke at a 2008 conference, a Rwandan woman criticized the transfer of rape cases to *gacaca*:

> Rwandans are frustrated, but we shall bear it. . . . Judges are not professional so we can't ask them to keep professional secrets. So that means all the things the women are saying will be on the streets the next day. We asked that those people accused of raping should appear in the classical [national] courts.[70]

The Executive Secretary insisted that "the victims made the choice" to have their rape trials transferred to *gacaca*.[71] In fact, representatives of women's survivors were only consulted

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[67] See, e.g., Avocats sans frontières, *Rapport Analytique No. 4*, 27; Avocats sans frontières, *Monitoring of the Gacaca Courts, Judgment Phase, Analytical Report No. 3, October 2006 –April 2007* (2008), 24; Avocats sans frontières, *Observation des Juridictions Gacaca: Province de Butare, Juin 2005* (2006), 3, 40-41, 44; Commission Nationale des Droits de la Personne, *Rapport de la Restitution Annuelle des Resultats du Monitoring des Juridictions Gacaca* (2005), 26-27.
[68] Interview with Domatilla Mukantaganzwa, SNJG executive secretary, Kigali, July 2006.
[69] Human Rights Watch, *Justice Compromised*, 113.
[70] Remarks at "Conference on the Tutsi Genocide," Kigali, July 2008.
[71] Remarks of Domatilla Mukantaganzwa, Service National des Juridictions *Gacaca* SNJG executive secretary, at "Conference on the Tutsi Genocide," Kigali, July 2008. She also

after the decision had been taken. The government also ignored advocacy by Avocats sans frontières, Human Rights Watch, and Penal Reform International to keep rape cases in the national courts.[72]

Using the 2008 law, the government transferred some 8,000 sexual violence cases to *gacaca*.[73] That law maintained the earlier prohibition on public accusations and confessions, and further required *gacaca* rape trials to be held *in camera*.[74] Most of the 20 rape victims interviewed by Human Rights Watch in 2009 feared their cases would not be kept confidential.[75] They worried that in Rwanda's close-knit communities, their identities would quickly be known once neighbors saw them go to closed *gacaca* hearings. One of my informants told me that she would not pursue her rape case in *gacaca*. The Service National des Juridictions *Gacaca* has not provided statistics showing how many of the 8,000 transferred rape cases actually went ahead or showing their outcomes. Several of Human Rights Watch's informants stated that they had been intimidated or harassed after testifying in their rape cases.[76]

Gacaca's Forms of Accountability

At this point, it is helpful to consider where *gacaca* fits on the spectrum of accountability's features. The decision to conduct genocide trials through *gacaca* courts was a highly legalistic act in itself. Procedural formalism increased as the government tried to improve *gacaca*'s workings and fairness. Yet, those well-meaning efforts were partially undermined by the simultaneous push to speed up trials. In the end, *gacaca* never met international standards for due process. *Gacaca*'s legalism was clearly illiberal: it served an increasingly authoritarian regime's rule by law. *Gacaca* trials also expressed illiberal values through non-compliance with human rights standards for fair trials and through occasional show trials of political opponents.[77]

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stressed that "those [judges] who let out secrets will be put in prison for one to three years." Ibid.

[72] See Avocats sans frontières, Human Rights Watch, and Penal Reform International, "Lettre aux Autorites Judiciares sur le Nouveau Projet de Loi *Gacaca* 2008," May 19, 2008, in Avocats sans frontières, *Rapport analytique No. 4*, Annex X.

[73] Human Rights Watch, *Justice Compromised*, 113; Avocats sans frontières, *Rapport analytique No. 4*, 28 n.86. Following the repeal of the death penalty in 2007, the sentence for rape ranged from 20 years to life.

[74] A trauma counselor, security officer, and SNJG representative were supposed to attend those *in camera* hearings. 2008 *Gacaca* Law, art. 38.

[75] Human Rights Watch, *Justice Compromised*, 114.

[76] Human Rights Watch, *Justice Compromised*, 117-18.

[77] *Gacaca*'s compliance with fair trial norms is explored in detail in Chapter 8.

Gacaca was a curious mix of individual and collective responsibility. *Gacaca* courts imposed individual criminal responsibility on perpetrators and bystanders for their acts (and occasionally for their mere presence at barricades or on patrols). Yet, *gacaca*'s maximal prosecution strategy – which resulted in 1.7 million convictions (1.3 million for crimes against property and another 400,000 for crimes against persons) – had the effect of imposing collective guilt on the Hutu population. As Mark Osiel rightly notes, "if the number of prosecutions reaches into the hundreds or thousands, then trying individuals for their discrete wrongs ceases to be any different from blaming whole groups for collective harms. This is particularly true if individual prosecutions are aimed exclusively at members of one social group."[78] Furthermore, the attempt to have all Rwandan adults participate in *gacaca*'s pre-trial hearings was a form of collective political responsibility (in Arendt and Jaspers' sense).

Gacaca was always an uneasy combination of retributive and restorative justice. This was evident in the way that apologies and confessions led to *both* punishment and community reintegration. Over time, the restorative element was increased in three ways: perpetrators were required to make apologies to victims if they wanted to benefit from plea bargains; convicted *génocidaires* were allowed to do community service before doing prison time; and most property offenses were resolved through mediation rather than trial. Nevertheless, the retributive element became dominant: there were fewer opportunities for meaningful victim-perpetrator dialogue during *gacaca* hearings; *gacaca* handed down more severe punishments as it dealt with more serious offenses; large numbers of prisoners performed community service in labor camps rather than in their home communities; and victims did not receive compensation. Such changes prompted some scholars to revise their initial appraisals of *gacaca*'s potential for restorative justice.[79]

Gacaca was communitarian rather than cosmopolitan. The main focus was on prosecuting ordinary crimes defined by the Rwandan Penal Code, not on the international crimes of genocide and crimes against humanity. *Gacaca* explicitly served the interests of post-conflict state-building and nation-building. In launching *gacaca*, President Kagame proclaimed that it would "unite Rwandans" and also "demonstrate the capacity of the

[78] Osiel, *Making Sense*, 153.
[79] *Compare* Mark A. Drumbl, "Restorative Justice and Collective Responsibility: Lessons for and from the Rwandan Genocide," *Contemporary Justice Review* 5, no. 1 (2002), 13 with Drumbl, *Atrocity, Punishment and International Law*, 93-97; *compare* Helena Cobban, "The Legacies of Collective Violence: The Rwandan Genocide and the Limits of the Law," *Boston Review* (Apr.-May 2002), 15 *with* Cobban, *Amnesty After Atrocity?* 74.

'Rwandan family' to resolve its own problems."[80] *Gacaca* also had a clear localist dimension: communities were made responsible for prosecuting crimes committed in their midst – crimes often committed by their own members.

Conclusion

As this chapter shows, *gacaca* changed dramatically between its launch in 2002 and its closure in 2012, particularly in its treatment of rape cases. The government altered *gacaca* in response to changing political circumstances. Occasionally, it reacted to pressure from donors and, to a lesser extent, from civil society and local actors. Overall, *gacaca* became more legalistic, collective, and retributive over time due to the huge surge in its caseload. It remained illiberal and communitarian throughout. The next four chapters will examine in detail how *gacaca* fared with respect to justice, truth, reparations, and reconciliation.

[80] Speech of President Kagame at the Official Launch of *Gacaca* Jurisdictions, June 18, 2002.

CHAPTER 8: *GACACA*'S JUSTICE

"Genocide is too heavy for the shoulders of justice."
– Zarir Merat, former head of mission, Avocats sans frontières[1]

Introduction

In launching *gacaca*, President Kagame set out three different understandings of what it was meant to accomplish in the way of justice:

Accelerate the judgments

Uproot the culture of impunity

Unite Rwandans on the basis of justice[2]

Fairness – both procedural and substantive – was noticeably absent. In other words, President Kagame focused on *gacaca* delivering mass justice, not individualized, liberal-legal justice. That partly explains the clash between the RPF and human rights advocates over *gacaca*. While the government emphasized the speedy processing of cases, human rights advocates critiqued the lack of fair trials and individual miscarriages of justice.

This chapter begins by looking at how *gacaca* dramatically accelerated the pace of trials and thereby delivered mass justice. Next, it shows how gacaca combated impunity for the genocide while reinforcing impunity for the RPF's crimes against humanity and war crimes. Finally, the chapter demonstrates how *gacaca* trials were often procedurally unfair.

Mass Justice

Gacaca accomplished President Kagame's goal of accelerating genocide judgments beyond anyone's wildest predictions. Originally designed to speed up trials for some 120,000 genocide suspects in pre-trial detention, *gacaca* unleashed a tsunami of accusations. That necessitated urgent measures to accelerate *gacaca* trials. By the time *gacaca* ended, it had tried 1,779,893 cases (plus 178,741 appeals) involving 1,003,227 suspects.[3] This was truly justice on a mass scale. Inevitably, quantity came at the expense of quality and fairness.

Category 1 trials accounted for just 2 percent (41,375 cases) of *gacaca*'s total caseload. Those cases had the highest confession rate (37 percent) as many chose not to risk

[1] Interview with Zarir Merat, former head of mission, Avocats sans frontières, July 2008.
[2] "Speech of President Kagame at the Official Launch of *Gacaca* Jurisdictions, June 18, 2002." The latter goal is discussed in Chapter 11 on reconciliation.
[3] All statistics in this section are calculated (or re-calculated) based on data given in Service National des Juridictions de *Gacaca*, "Summary of the Report Presented at the Closing of *Gacaca* Court Activities" (2012), 10-13. The discrepancy in the number of cases and suspects is due to the fact that some suspects were involved in multiple cases.

incurring a life sentence. They also had a 12 percent acquittal rate. Forty-six percent (19,177) of those trials were appealed. Category 2 trials represented 23 percent (443,134 cases) of the overall caseload. Those crimes had a lower confession rate (19 percent) and the highest acquittal rate (37 percent). Thirty percent (134,394) of those trials were appealed (making up 75 percent of all appeals). Category 3 trials and mediations involving property offenses comprised 66 percent (1,295,384 cases) of the caseload. Property cases had the lowest confession rate (7 percent). That reflects the extent of pillaging during the genocide, as well as the inability of most suspects to pay restitution or compensation. They also had the lowest acquittal rate (4 percent), which probably reflects the fact that most convictions and sentences were based on mediated agreements. Only two percent (25,170) of those Category 3 cases were appealed. Again, that low figure is due to the vast majority of those cases being mediated.

There was considerable variation in *gacaca* across the country, which largely reflected the regional dynamics of the genocide. The most suspects (480,286) were tried in the southern and central provinces of Butare and Gitarama which had more Tutsi and more inter-marriage before 1994. By contrast, the fewest suspects (56,480) were tried in the northern provinces of Byumba and Ruhengeri where there were fewer Tutsi and where the RPF had controlled part of the territory.[4]

According to the government's statistics, 361,590 persons were convicted of Category 2 crimes (either at trial or on appeal). This is almost twice the number of genocide perpetrators estimated by Straus. Part of the explanation for this discrepancy may be that Rwanda's *gacaca* courts convicted bystanders. The *gacaca* laws broadened accomplice liability. The 1996 Genocide Law defined an accomplice as a person "who provided *essential* assistance in the commission of the offence."[5] The 2001 and 2004 *Gacaca* Laws expanded the category of accomplices to include anyone who assisted the commission of the crime "by any means."[6] Avocats sans frontières found that this definition

> can encourage the judges to adopt a very broad conception of complicity and to limit investigations on individual responsibility. For example, some defendants prosecuted for complicity were sentenced to 25 to 27 years even though the court could not establish with exactitude the means or the aid. . . .

[4] Service National des Juridictions de *Gacaca*, "Summary of the Report Presented at the Closing of *Gacaca* Court Activities," 10-13.
[5] 1996 Genocide Law, art. 3 (emphasis added); Avocats sans frontières, *Vade-Mecum*, 160.
[6] 2004 *Gacaca* Law, art. 53; 2001 *Gacaca* Law, art. 53.

> Another accused was convicted as an accomplice even though he had only revealed his presence at the scene of the crime. Note that this accused protested his conviction, claiming he had helped the justice process by testifying about what he had seen. One can fear that such convictions inhibit talking by the population.[7]

In *gacaca*, some people were convicted for being present at roadblocks or on night patrols when Tutsi were killed.[8] In early 2007, the Service National des Juridictions *Gacaca* finally took the position that people who were merely present at barriers should not be convicted, but it never issued a directive to that effect. Avocats sans frontières found that *gacaca* courts got better at handling those cases. Still, it observed that some courts continued to "consider presence at a barrier or during an attack as an irrebuttable presumption despite the lack of proof or witnesses – or even like a crime in itself."[9] The *Gacaca* Laws also imposed the same sentencing range on accomplices as on perpetrators. One *gacaca* court, for example, handed down a 25-year sentence to a woman who gave food to the *Interahamwe*, the Hutu extremist militia.[10]

The second way *gacaca* held bystanders criminally responsible was through the duty of rescue. The Rwandan Penal Code has a Good Samaritan law: it punishes the crime of failure to render assistance to those in need.[11] The 2001 *Gacaca* Law immunized bystanders from criminal liability for failure to render assistance: "Testimony [in *gacaca*] . . . can never serve as a basis to take proceedings against its author charging him with the offence of failure to render assistance."[12] When the *Gacaca* Law was amended in 2004, that immunity provision was deleted. As a result, some *gacaca* courts convicted and sentenced persons for failure to render assistance, treating it as a Category 2 crime.[13] In October 2007, Service National des Juridictions *Gacaca* finally issued a circular making clear that persons should

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[7] Avocats sans frontières, *Rapport analytique No. 3*, 38.
[8] *See* Avocats sans frontières, *Rapport analytique 2005*, 14, 20 & n.40; Avocats sans frontières, *Rapport analytique No. 3*, 37-38; Avocats sans frontières, *Rapport analytique No. 4*, 20-21.
[9] Avocats sans frontières, *Rapport analytique No. 4*, 22.
[10] Avocats sans frontières, *Rapport analytique 2005*, 20 & n.42.
[11] Rwandan Penal Code, art. 256 in *Codes et Lois du Rwanda*, 409. Unlike common law jurisdictions, civil law jurisdictions often criminalize persons who fail to act as Good Samaritans. See, e.g., Liam Murphy, "Beneficence, Law, and Liberty: The Case of Required Rescue," *Georgetown Law Journal* 89 (2001), 606-08.
[12] 2001 *Gacaca* Law, art. 95.
[13] Avocats sans frontières, *Rapport analytique No. 4*, 18 & n. 42; Avocats sans frontières, "Observation des Juridictions *Gacaca*: Ville de Kigali, Juin 2005" (2006), 19-23.

not be convicted for failure to render assistance "except if it is proved that they have had some responsibility for crimes."[14]

Victor's Justice

The mass prosecution of 1,003,227 genocide suspects through *gacaca* fulfilled another of President Kagame's goals: it demonstrated a commitment to "uproot the culture of impunity" which the RPF blames for the cycles of anti-Tutsi violence since 1959. What it also underscored, however, was the continuing impunity for crimes against humanity and war crimes committed by the RPF against Hutu civilians during the 1990 to 1994 period. As Sibomana ruefully observes, "Impunity is always in the interest of the state, and the current state in Rwanda is no exception."[15]

When he launched *gacaca*, President Kagame made clear it would not handle crimes committed by RPF soldiers. He stated that *gacaca* would "establish the difference between genocide and the other crimes committed during and after the war" and that those "should not be mixed."[16] Local officials and *gacaca* judges reinforced that message. At one pilot session, the *gacaca* president clarified who would be inscribed on the list of victims: "These are the victims of the genocide only. That is to say, this list does not concern those who were killed by the *inkotanyi* [RPF soldiers]. Do not confuse those things."[17] Still, some individuals would raise the issue of RPF crimes in *gacaca*. To try and put a stop to that, the government deleted all references to war crimes when it amended the *gacaca* law in 2004.

Gacaca was an expression of victor's justice – that is, accountability for the losing side and impunity for the winning side.[18] Rwanda is perhaps the most sympathetic case for "victor's justice" because the victor's crimes are dwarfed by the loser's crimes. The RPF certainly justifies *gacaca*'s selective prosecution on the grounds that genocide cannot be equated with the lesser crimes which may have been committed by RPF soldiers.[19] One problem with that justification is that the 1996 Genocide Law and subsequent *gacaca* laws

[14] Service National des Juridictions *Gacaca*, Circulaire No. 18/MA/MA/2007 du 30 Octobre 2007 du Secretaire Executif du SNJG (October 30, 2007), translated and attached to Avocats sans frontières, *Rapport analytique No. 3*, Annexe XI, 100-01.
[15] Sibomana, *Hope for Rwanda*, 107.
[16] "Speech of President Kagame at the Official Launch of *Gacaca* Jurisdictions."
[17] Byumba Province 4 *gacaca*, July 26, 2002.
[18] Schabas and Drumbl critique the notion of victor's justice. William A. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press, 2012), 96; Mark A. Drumbl, "Book Review," *Criminal Law Forum* 20 (2009), 498. For a partial rejoinder, see Waldorf, "'A Mere Pretense of Justice,'" 1271-76.
[19] See, e.g., Martin Ngoga, "The Institutionalisation of Impunity: A Judicial Perspective on the Rwandan Genocide," in *After Genocide*, 331.

target *all* crimes committed during the genocide – not just the crime of genocide. The 1.3 million cases of property offenses tried by *gacaca* courts are clearly less serious than the RPF's killing of approximately 25,000 to 45,000 civilians in 1994.

Unfair Justice

The main debate over *gacaca* justice was whether trials were fair and whether that mattered. Human rights advocates insisted on applying international human rights norms to *gacaca,* while the government and some scholars argued these norms did not fit the Rwandan context.

***Gacaca* and Human Rights**

Early on, Amnesty International criticized *gacaca* for violating the international norms of fair trials that Rwanda has agreed to follow.[20] These norms emphasize fair process rather than fair outcomes. As the UN's Human Rights Committee makes clear, the fair trial provisions of the International Covenant on Civil and Political Rights "guarantee[] procedural equality and fairness only and cannot be interpreted as ensuring the absence of error."[21] In 2009, that Committee expressed "concern that the *gacaca* system of justice did not operate in accordance with the right to a fair trial, particularly with regard to the impartiality of judges and the protection of the rights of the accused."[22] As *gacaca* wound down, Human Rights Watch issued a lengthy report documenting *gacaca*'s shortcomings, which it largely blamed on "the curtailment of the fair trial rights of the accused."[23]

Several inter-related arguments have been advanced to justify *gacaca*'s non-compliance with international human rights. One was that a compromise of fair trial standards was necessary to rectify a larger human rights violation: the continuing lengthy detention of 120,000 genocide suspects under life-threatening conditions. As the Minister of Justice told Human Rights Watch in 2011:

> it was the Government of Rwanda which identified human rights concerns before *Gacaca* was implemented, establishing *Gacaca* as a practical solution to such concerns . . . The very creation of *Gacaca* itself is clear evidence that

[20] Amnesty International, *Gacaca: A Question of Justice*, 30-40. Rwanda ratified both the International Covenant on Civil and Political Rights and African Charter on Human and Peoples' Rights. The Rwanda's 2003 Constitution "[r]eaffirm[s] our adherence to the principles of human rights enshrined in [those two treaties]." Rwanda Constitution, preamble.
[21] Human Rights Committee, General Comment No. 32, CCPR/C/GC/32 (August 23, 2007), ¶ 26. See Amnesty International, *Gacaca: A Question of Justice*, 30.
[22] UN Human Rights Committee, "Concluding Observations of the Human Rights Committee," CCPR/C/RWA/CO/3, 7 May 2009, ¶ 17.
[23] Human Rights Watch, *Justice Compromised*, 4.

> Rwanda found it unacceptable to leave suspects in prison for indeterminate amounts of time.[24]

Early on, Peter Uvin pointed out that "the human rights flaws inherent in the *gacaca* process are easier to overlook if the net result is to free people rather than to imprison them."[25] He also reminded donors that saddling *gacaca* with fair trial guarantees would only make it more like the ordinary justice system that had already failed to reduce the huge number of pre-trial detainees.

A second argument was that international fair trial rights did not fit the reality of post-genocide Rwanda (or other post-conflict contexts for that matter). As the Minister of Justice explained to Human Rights Watch, "the involvement of a large part of the Rwandan population" in the genocide meant that "[a]pplying the type of due process alluded to in your report [*Justice Compromised*] in such circumstances was simply untenable."[26] Eleven years earlier, Uvin had made a similar argument:

> Criminal law standards were not designed to deal with the challenges faced when massive numbers of people – victims and perpetrators of crimes – have to live together again, side by side, in extremely poor and divided countries. They were also not designed to function under conditions of extreme poverty, and [in] the absence of a strong historical tradition of independent justice. Some adaptation to the real-world circumstances of Rwanda is needed.[27]

For these commentators then, fair trial rights (and human rights more generally) need to be applied contextually.

A third argument critiqued the application of "Western" fair trial standards to *gacaca*. The Minister of Justice argued that "Human Rights Watch envisages a conception of 'due process' which is . . . shaped by a western notion of justice."[28] Longman, who once worked for Human Rights Watch in Rwanda, took a similar perspective: we should "look not simply at whether *gacaca* provides a fair trial in the way that classical Western courts do, but to the

[24] Tharcisse Karugarama, "Comments on Forthcoming HRW Report on *Gacaca*," May 5, 2011 attached to Human Rights Watch, *Justice Compromised*, 138, 142.
[25] Uvin, "Introduction of a Modernized *Gacaca*," 9. The Special Representative of the UN Human Rights Commission made a similar point. Moussalli, *Report of the Special Representative*, 35.
[26] Karugarama, "Comments on Forthcoming HRW Report on *Gacaca*," 137.
[27] Uvin "Introduction of a Modernized *Gacaca*," 4. See Schabas, "Justice, Democracy, and Impunity in Post-Genocide Rwanda," 532.
[28] Karugarama, "Comments on Forthcoming HRW Report," 138.

more basic question of whether *gacaca*'s structures provide a fair trial." [29] In like fashion, Roelof Haveman, the former vice-rector of the government's judicial training center, and Alphonse Muleefu, a former legal officer in the Service National des Juridictions *Gacaca*, defended *gacaca*'s fairness against "organizations such as Human Rights Watch . . . [which] compare the practice of the Rwandan system with a nonexistent ideal."[30]

A fourth argument took the position that *gacaca* had its own built-in safeguards.[31] These included *gacaca*'s own laws, government monitoring, and extra-legal protections. The Justice Minister pointed to the Service National des Juridictions *Gacaca* and National Commission of Human Rights which "deployed [their] personnel all over the country for monitoring and to ensure that *Gacaca* judges respected minimum procedural rules as provided for in the Organic Law on *Gacaca*."[32] He also suggested that "the community's sense of ownership over the process" would protect people's rights.[33]

A fifth argument was that neo-traditional, restorative justice mechanisms should be granted more leeway to diverge from international human rights standards.[34] The UN Human Rights Committee has firmly rejected that argument.[35] Similarly, the African Commission on Human and People's Rights has declared that "Traditional courts are not exempt from the provisions of the African Charter relating to fair trial."[36] Nevertheless, popular and restorative justice mechanisms pose real challenges to human rights universalism.[37]

A sixth argument is that human rights legalism failed to take into account the broader aims of *gacaca*. The Justice Minister criticized Human Rights Watch for "characteriz[ing] *Gacaca* as a formal legal institution, applying a strict procedural framework" and thus

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[29] Longman, "Justice at the grassroots?" 214.
[30] Haveman and Muleefu, "The Fairness of *Gacaca*," 220.
[31] See Clark, *The Gacaca Courts*, 154-61; Longman, "Justice at the grassroots?" 214-19; Uvin, "Introduction of a Modernized *Gacaca*," 5.
[32] Karugarama, "Comments on Forthcoming HRW Report," 139.
[33] Karugarama, "Comments on Forthcoming HRW Report," 140. See Clark, *The Gacaca Courts*, 164.
[34] See Clark, *The Gacaca Courts*, 256; Longman, "Justice at the grassroots?" 213-14.
[35] The Committee stated that "Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times." Human Rights Committee, General Comment No. 32.
[36] Dakar Declaration, following Seminar on the Right to Fair Trial in Africa (September 11, 1999). Post-apartheid South Africa has taken a different, if ambivalent, approach. See Thomas W. Bennett, "Customary Criminal Law in the South African Legal System," in *The Future of African Customary Law*, 376-80.
[37] See, e.g., International Council on Human Rights Policy, *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (2009).

"neglect[ing] to highlight one of the most important objectives of *Gacaca*: the reconciliation of Rwandans and the revealing of the truth."[38]

There is some merit to these arguments. First, the practical application of human rights often requires hard choices about priorities and trade-offs. International instruments (e.g. treaties and their interpretations) and higher principles (e.g. universality and indivisibility) offer little guidance about how to make those choices.[39] But it was not helpful to frame those choices as zero-sum – as either *gacaca* or indefinite pre-trial detention – when there were other possible alternatives. Moreover, there were various ways to make *gacaca* more human rights compliant – as the Service National des Juridictions *Gacaca* and Ministry of Justice discovered over time. Second, Human Rights Watch and (to a lesser extent) Amnesty International do adopt a legalistic approach to human rights. They have been faulted for that, but there are both principled and pragmatic reasons for leaning heavily on the international treaties that states themselves have agreed to.[40] There is also good reason for taking a legalistic approach to *gacaca*, which, after all, is a state-run judicial mechanism (rather than, say, a truth and reconciliation commission). To criticize Human Rights Watch for not paying more attention to *gacaca*'s reconciliation goals is to misunderstand what such human rights NGOs actually do: they monitor state compliance with human rights commitments. Those NGOs never claim that is the only way to assess state policies.

Third, several of the arguments point up the gap between international human rights and *gacaca*'s values. There are often real tensions in translating or mediating between universal norms and local customs when it comes to human rights.[41] But this was not really an issue with *gacaca*. For one thing, *gacaca* was neither popular nor restorative justice. For another, the Rwandan government had domestically incorporated many of those international standards into *gacaca*'s laws, directives, and manuals. Finally, state agents from the Service

[38] Karugarama, "Comments on Forthcoming HRW Report," 143. See Clark, *The Gacaca Courts*, 96-97.
[39] See Philip Alston, "Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals," *Human Rights Quarterly* 27, no. 3 (2005), 798-808.
[40] The best-known justification for a legalistic approach is Kenneth Roth, "Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization," *Human Rights Quarterly* 26, no. 1 (2004), 63-73. For the critique, see Conor Gearty, *Can Human Rights Survive?* (Cambridge: Cambridge University Press, 2006), chapter 3; David Kennedy, "The International Human Rights Movement: Part of the Problem?" *Harvard Human Rights Journal* 15 (2002).
[41] See Mark Goodale, "Introduction: Locating Rights, Envisioning Law Between the Global and the Local"; Merry, "Transnational Human Rights and Local Activism," 38-51.

National des Juridictions *Gacaca* and the Rwandan Human Rights Commission were responsible for ensuring that *gacaca* actually complied with those domestically incorporated legal standards.[42]

The more compelling claim is that *gacaca* had its own safeguards which were realistic adaptations to the Rwandan context. The real issue then is whether those legal and extra-legal safeguards actually worked in practice. As *gacaca* progressed, Uvin and Longman lost their initial optimism.[43] Clark, however, continues to insist that *gacaca* confounded its human rights critics:

> My research indicates that, nationwide, approximately 25 percent of *gacaca* cases have resulted in acquittals. . . . This situation is far from the brand of mob justice predicted by many human-rights observers of *gacaca*.[44]

This argument misses the mark in two respects. The assertions that "AI [Amnesty International] and HRW [Human Rights Watch] [argue] that *gacaca* is likely to result in mob justice" are simply inaccurate.[45] In addition, fair trials refer to the process rather than the outcome (i.e. the percentage of acquittals).

Did *Gacaca* Provide Fair Trials?

There are three essential components for fair trials: independent and impartial judges; an "equality of arms" between prosecution and defense; and reasoned judgments. Judges are independent when insulated from political influence or interference. They are impartial when they do "not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other."[46] For there to be fair trials, judges must also *appear* to be independent and impartial. Equality of arms means the defense generally has the same procedural rights – such as the right to examine and cross-examine witnesses – as the prosecution so that it is not unfairly disadvantaged. Fair trials implicitly require reasoned judgments. Reasoned judgments ensure transparency and protect

[42] See, e.g., National Commission for Human Rights, *Annual Report for 2007* (2008), 76-77.
[43] Compare Longman, "Justice at the grassroots?" with Timothy Longman, "An Assessment of Rwanda's *Gacaca* Courts," *Peace Review* 21, no. 3 (2008), 309; compare Uvin "Introduction of a Modernized *Gacaca*" *with* Uvin, "Wake Up! Some Policy Proposals for the International Community in Rwanda."
[44] Clark, *The Gacaca Courts*, 155.
[45] Clark, *The Gacaca Courts*, 155. See *id*. at 157. Clark offers no sources to back up this claim.
[46] Human Rights Committee, General Comment No. 32, ¶ 21. This paragraph distills relevant paragraphs of that General Comment.

against arbitrariness. In that way, they reinforce judicial independence and impartiality. Furthermore, reasoned judgments are essential to the right of appeal.

Despite some legal safeguards, *gacaca* trials were often unfair in practice.[47] There were several reasons for this. First, judges did not have sufficient training. As Avocats sans frontières observed, the trainings "concentrated more often on the organization of trials or on the content of various modifications to the *Gacaca* Law rather than on reinforcing the judges' capacities for mastering the fundamental principles of fair trials."[48] Second, judges were prone to bias, influence, and corruption given their social and economic status. Third, the government pressured judges to try cases quickly, particularly during 2007. Both Avocats sans frontières and the genocide survivors' organization IBUKA criticized the government for emphasizing speed over justice.[49] As one donor representative told me, "SNJG is completely focused on the organization and logistics of [the trials] – and the quality is forgotten."[50] It may be that some of gacaca's unfairness at the trial level was identified and corrected on appeal.[51] However, there is very little data about the process or outcomes of those appeals.

Judicial Independence and Impartiality

Gacaca's laws and procedures sought to ensure the independence and impartiality of *gacaca* judges in several ways. Judges were required to be *inyangamugayo* (persons of integrity) and could not hold government posts. They had to recuse themselves from cases involving relatives, close friends, and enemies. Judges had to conduct most hearings in public and deliberate in private. Decisions were made by consensus or, failing that, by majority vote. The quorum of five judges also made it harder to bribe the court. Persons could be sanctioned for pressuring the judges.

Longman predicted that *gacaca*'s laws and structure, along with community oversight, would make it difficult for judges to be partial or corrupt. He approvingly quoted

[47] Despite arguing that "[f]airness should be seen in practice rather than as a statement on paper," Haveman and Muleefu assess *gacaca*'s fairness wholly on the basis of written laws while ignoring the voluminous documentation by Avocats sans frontières and Penal Reform International into how *gacaca* actually worked in practice.

[48] Avocats sans frontières, *Monitoring des jurisdictions gacaca: Rapport analytique No. 5 (Janvier 2008-Mars 2010)*, 20. Avocats sans frontières partly blamed this on the Service National des Juridictions *Gacaca*'s s declining collaboration with donors and NGOs. Id.

[49] Avocats sans frontières, *Rapport analytique No. 5*, 19-20; Avocats sans frontières, *Rapport analytique No.* 3, 55-58; Hirondelle, "IBUKA Criticizes *Gacaca* Judgments," December 5, 2007.

[50] Interview with donor representative, Kigali, June 2006.

[51] I am grateful to Professor William Schabas for emphasizing this point.

Erin Daly's claim that "The sheer number of tribunals operating simultaneously should protect the process as a whole from undue influence by the central government."[52] Longman later acknowledged that *gacaca* had proved disappointing "mostly as a result of government manipulation of the process."[53]

Judges were susceptible to political pressure from government officials, local elites, and the community. There were several reasons for this. Most judges were not well educated. While 85 percent were literate, many had not gone beyond primary school. Additionally, most lacked the social status that often comes with occupation or wealth: 93 percent were farmers (compared to 3 percent who were teachers) and 92 percent earned less than 10,000 FRW ($20) per month.[54] Furthermore, judges were enmeshed in the micro-politics and patronage networks of their local communities. Finally, they lacked any meaningful security of tenure. They could be – and were – replaced for vague reasons, including "genocide ideology," "culture of divisionism," and "fulfilling any act incompatible with the quality of a honest person."[55] Given all these factors, it was not surprising that national and international human rights organizations documented cases where district coordinators, *gacaca* officials, and police influenced or interfered with *gacaca* trials.[56]

From the start, *gacaca* judges had their impartiality challenged on multiple grounds: their relations with the accused or the victims, corruption, and, most damningly, their participation in the genocide. It was often difficult to know the motivations of the accusers or the truth of those accusations. One *gacaca* president told me that genocide survivors had falsely accused him of corruption when he proposed conducting further investigations into their allegations against a particular suspect.[57]

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[52] Longman, "Justice at the grassroots?" 216, quoting Erin Daly, "Between Punitive and Reconstructive Justice: The *Gacaca* Courts in Rwanda," *New York University Journal of International Law and Politics* 34, no. 2 (2000), 355, 377.
[53] Longman, "An Assessment of Rwanda's *Gacaca* Courts," 309.
[54] Service National des Juridictions *Gacaca*, *Report on Improving the Living Conditions for the Inyangamugayo*, 3.
[55] 2001 *Gacaca* Law, art. 12.
[56] Human Rights Watch, *Justice Compromised*, 110-11; Penal Reform International, *Le témoignage et la preuve devant gacaca* (2008), 44-50; National Commission for Human Rights, *Annual Report for 2008* (2009), 59; National Commission for Human Rights, *Annual Report for 2007*, 37 and 45; National Commission for Human Rights, *Annual Report 2006* (2007), 134-35; National Commission for Human Rights, *Annual Report for the Year 2004*, 75; US State Department, "Rwanda Chapter of the US 2009 Country Reports on Human Rights Practices" (2010).
[57] Interview with cell-level *gacaca* president, Kibuye Province 2, February 2004.

It was unrealistic to expect impartiality – let alone the appearance of impartiality – in rural communities where judges had family, neighborly, and patronage ties with accusers, accused, and witnesses. In addition, judges often had personal knowledge of the crimes as well as personal stakes in the outcomes of trials. While some judges behaved impartially, others did not.[58] Some judges, particularly presiding judges, "manifested their opinions and intemperate reactions during the hearings."[59] At one *gacaca*, a judge accused a woman of being involved in the death of her child and the woman responded: "You people said we should tell the truth and yet you are a judge and you don't tell the truth." When the woman tried to explain further, the judge shouted, "Keep quiet! I know that my child will never rise again from death."[60] Some judges refused to recuse themselves despite clear conflicts of interest. One of the most notorious cases involved a judge presiding over the genocide conviction of Francois-Xavier Byuma, the human rights activist who had previously accused him of raping a girl.[61]

At the start of *gacaca*, one judge warned me that judges might turn to corruption if they were not paid.[62] Judges never received a salary, though, as *gacaca* progressed, the government and donors provided them with some benefits, such as free health insurance, bicycles, and radios. Corruption was tempting where 81 percent of judges earned less than 5000 FRW ($10) per month and 67 percent spent eight days or more per month on *gacaca*.[63] The Government Ombudsman ranked *gacaca* courts among the most corrupt local institutions.[64] Government agencies, human rights organizations, and journalists documented judges taking bribes, mostly from the accused in exchange for acquittals or reduced sentences.[65] By January 2008, the Service National des Juridictions *Gacaca* had removed

[58] See e.g., National Commission for Human Rights, *Annual Report for the Year 2004*, 71, 74-75.
[59] Avocats sans frontières, *Rapport analytique No. 3*, 50.
[60] Gitarama Province 3 *gacaca*, September 9, 2002.
[61] Human Rights Watch, *Justice Compromised*, 29-31; Service National des Juridictions *Gacaca*, "The Case of Francois-Xavier Byuma," June 12, 2007. For more cases where judges did not recuse themselves, see Human Rights Watch, *Justice Compromised*, 105 n. 508.
[62] Interview with cell-level *gacaca* judge, Kigali 1, July 2002.
[63] Service National des Juridictions, *Gacaca*, *Living Conditions for the Inyangamugayo*, 3-4.
[64] "Ombudsman's report exposes misconduct in government circles," *The New Times*, June 23, 2009.
[65] See, e.g., Avocats sans frontières, *Rapport analytique No. 4*, 46-48; Penal Reform International, *Le témoignage*, 44-50; Human Rights Watch, *Justice Compromised*, 105-09; Hirondelle, "Corrupt *Gacaca* Judge Caught Red-Handed," November 18, 2009; National Commission for Human Rights, *Annual Report for 2007*, 77.

some 56,000 corrupt or ineffective judges.[66] A small number were successfully prosecuted. In 2010, there were 14 convictions for bribes ranging from $40 to $800.[67]

Numerous *gacaca* judges were accused of involvement in the genocide. In my research sites, several judges resigned after being accused of genocide.[68] Not all those accused lost their positions. A young judge denied taking part in any attack and was defended by several others. One of his defenders stated, "This is a false testimony, these are people who want to destroy the court." His fellow judges decided the accuser had lied and the judge kept his seat.[69] By the end of 2009, some 45,000 judges had been dismissed for involvement in the genocide.[70]

Equality of Arms

Gacaca also tried to provide some "equality of arms" between the parties. Much discussion of *gacaca* has focused on the absence of defense counsel. Clark subtitles his book "Justice Without Lawyers" and criticizes "the proposal made by human-rights critics that lawyers be included in the *gacaca* process."[71] In fact, none of the main human rights organizations advocated the participation of defense lawyers in *gacaca*.[72] The Danish Institute of Human Rights made an innovative and pragmatic proposal to level the playing field between *gacaca* judges and the accused by having paralegals provide legal counselling to the accused before hearings. Several European donors sent a letter to the head of *gacaca* expressing support, but the government never responded.[73]

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[66] Hirondelle, "*Gacaca* Trials Could Also Try First Category Defendants," January 4, 2008. It is not possible to present this figure as a percentage because there is no publicly available record of how many persons served as *gacaca* judges between 2002 and 2012.
[67] Office of the Ombudsman, "Persons Definitively Convicted for Corruption [Quarters 1and 2, 2010]" (n.d.); Office of the Ombudsman, "Persons Definitively Convicted for Corruption [Quarters 3and 4, 2010]" (n.d.). That figure represented seven percent of all corruption convictions that year.
[68] *Gacaca* field notes, 2002. See Sheena Kaliisa, "*Gacaca* Court Session Begins with Judge Accused of Rape," *Internews*, June 20, 2002; Ephrem Rugiririza, "Des juges au banc des accuses," *Diplomatie Judiciaire*, No. 92 (December 2002); Service National des Juridictions *Gacaca*, "Table Indicating the Achievements."
[69] Kibungo Province 2 *gacaca*, October 14, 2002.
[70] Human Rights Watch, *Justice Compromised*, 104.
[71] Clark, *The Gacaca Courts*, 162.
[72] Human Rights Watch, *Justice Compromised*, 29; Human Rights Watch, "Rwanda" in *World Report 2003* (2004); Human Rights Watch, "Rwanda: Elections May Speed Genocide Trials," October 4, 2001; Amnesty International, *Gacaca – A Question of Justice*, 44-46.
[73] Letter to Madame Aloysie Cyanzayire, Vice Président de la Cour Suprême et Président du Département des Juridictions *Gacaca*, July 29, 2002 ; Human Rights Watch, *Justice Compromised*, 29 & n. 70.

Curiously, the *gacaca* laws did not prohibit defense lawyers outright, perhaps because the Rwandan Constitution proclaims that "the right to defence [is] absolute at all levels and degrees of proceedings."[74] In practice, however, *gacaca* officials and judges only permitted an accused to be accompanied by defense counsel in exceptional cases.[75] As the Justice Minister explained:

> we determined that each and every citizen should be empowered to be a lawyer, a prosecutor and a witness. The idea of not allowing lawyers in their formal style was one of the ways we created conditions which would allow the population to speak freely about what they saw and experienced during the genocide. Not allowing lawyers was also a way of maximizing the community's sense of ownership over the process.[76]

Even without such restrictions, most defendants would have gone unrepresented given the small Rwandan bar, the defendants' indigence, and the government's push to speed up genocide trials.

Several commentators argue that equality of arms did not require defense counsel in *gacaca* given that judges were non-professionals, state prosecutors did not participate, and civil parties were not represented.[77] Longman and Uvin also predicted that participation by the community would protect the accused just as well as defense counsel and perhaps better.[78]

Uvin contended that defense lawyers were not necessary as "the play of argument and counter-argument, of witness and counter-witness by the community basically amounts to the same thing as a fair defense, maybe even better than what [Rwanda's] formal justice system has until now produced."[79]

In practice, *gacaca* often failed to guarantee the equality of arms. Some *gacaca* courts did not allow the accused to defend themselves, present defense witnesses, or confront the

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[74] 2003 Constitution, art. 18.
[75] See Human Rights Watch, *Justice Compromised*, 28-31.
[76] Karugarama, "Comments on Forthcoming HRW Report on *Gacaca*," 140.
[77] Interestingly, a South African court ruled that defense counsel were necessary when traditional courts deal with criminal claims given the complexity of the issues and potential severity of the penalties. See Bennett, "Customary Criminal Law in the South African Legal System," 377-78.
[78] Uvin, "Introduction of a Modernized *Gacaca*," 5; Longman, "Justice at the grassroots?" 218. Longman at least acknowledged that defendants would be disadvantaged at the pre-trial stage without access to their case files (often prepared by state prosecutors) and without the means to conduct investigations or locate witnesses. *Id*. at 219.
[79] Uvin, "Introduction of a Modernized *Gacaca*," 5. Longman makes the same argument. Longman, "Justice at the grassroots?" 218.

witnesses against them.[80] Avocats sans frontières explained that few defense witnesses were called in *gacaca* hearings due to

> the lack of interest in receiving these testimonies during the information collecting phase, where the emphasis was on getting the population to recount facts and gives the names of victims and accused. The judges and the local authorities only considered witnesses who made accusations and the manuals distributed by the SNJG only had space for collecting information about guilt. . . . this weighed heavily on the fairness of the trials which followed.[81]

Avocats sans frontières also found that *gacaca* courts did not allow sufficient examination and cross-examination of defendants and witnesses.[82]

Gacaca also violated the equality of arms in other ways. First, some courts inverted the presumption of innocence, treating the accused as guilty until they had proven their innocence.[83] At a September 2006 *gacaca* trial I attended, the presiding *gacaca* judge told an accused "For you to be innocent, it is necessary that the bodies be found."[84] Second and relatedly, *gacaca* did not provide adequate protection from self-incrimination. The 2004 *Gacaca* Law imposed criminal sanctions on "[a]ny person who omits or refuses to testify on what he or she has seen or on what he or [she] knows."[85] Some were convicted for refusing to testify against themselves.[86] Others, such as human rights activist Francois-Xavier Byuma, were compelled to testify under threats of prosecution.[87] In late 2006, the SNJG issued an instruction directing *gacaca* courts not to prosecute defendants for giving false testimony in their own trials.[88] But judges continued to get it wrong.[89] Third, *gacaca* subjected persons to double jeopardy. The 2004 *gacaca* law allowed *gacaca* courts to re-try persons acquitted by

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[80] US State Department, "Rwanda Chapter of the US 2009 Country Reports on Human Rights Practices," March 2010; Human Rights Watch, *Justice Compromised*, 44-45; National Commission for Human Rights, *Annual Report for 2007*, 47; National Commission for Human Rights, *Annual Report 2006*, 53-55; National Commission for Human Rights, *Annual Report 2005*, 30-31.
[81] Avocats sans frontières, *Rapport analytique No. 4*, 32.
[82] Avocats sans frontières, *Rapport analytique 2005*, 13, 22 & n.46.
[83] Avocats sans frontières, *Rapport analytique No. 5*, 34-35; Avocats sans frontières, *Rapport analytique No. 4*, 35-36.
[84] Kigali 1 *gacaca*, September 2006.
[85] 2004 *Gacaca* Law, art. 29.
[86] Avocats sans frontières, *Rapport analytique No. 4*, 35; Avocats sans frontières, *Rapport analytique No. 3*, 45-46.
[87] Service National des Juridictions *Gacaca*, "The Case of Francois-Xavier Byuma," 2. See Human Rights Watch, *Justice Compromised*, 30.
[88] Instruction No. 10/06 of 1/09/2006 from the Executive Secretary of the National Service of *Gacaca* Jurisdictions Regarding Arrest and Detention by *Gacaca* Jurisdictions (2006).
[89] Avocats sans frontières, *Rapport analytique No. 4*, 10.

national courts on the same charges.[90] Although the law was tightened up in 2008, it still permitted double jeopardy in cases where there had been no final appeal in the national courts.[91] In fact, several accused were convicted by *gacaca* courts after having been acquitted by national courts or other *gacaca* courts on the same charges and facts.[92] Avocats sans frontières concluded that the lack of finality in genocide judgments "had created a feeling of fear and vulnerability in Rwandan society."[93]

Reasoned Judgments

The *Gacaca* Laws required that "judgments must be reasoned."[94] Over several years and several reports, Avocats Sans Frontières critiqued *gacaca* courts for not explaining their judgments.[95] In its monitoring from 2008 to 2009, it observed 508 judgments, all of which were incomplete or incorrect in their reasoning. Some judgments did not even make clear whether an accused's confession had been accepted or not.[96] In my observations, I also found that *gacaca* courts rarely provided the evidentiary findings or legal reasoning to justify their judgments. In particular, judges rarely made any inuiry or findings into whether the accused had committed the crimes with genocidal intent (as required by the *gacaca* laws). As a result, "neither the parties nor the public can understand the logic and legality of the decisions taken."[97]

Many *gacaca* courts also did not explain how they calculated sentences. Some failed to specify the category in which the accused was placed, while others failed to explain whether the accused had made their guilty pleas before or after being accused.[98] That made it impossible to know whether the sentences conformed to the law. At one trial I attended, the court mistakenly computed the sentence and sent the confessed *génocidaire* back to prison when, in fact, he should have been sentenced only to community service.[99] Over four-and-a-

[90] 2004 *Gacaca* Law 2004, art. 93.
[91] 2008 *Gacaca* Law, art. 24.
[92] Human Rights Watch, *Justice Compromised*, 49-55; Avocats sans frontières, *Rapport analytique No. 5*, 37-42; Avocats sans frontières, *Rapport analytique No. 3*, 49.
[93] Avocats sans frontières, *Rapport analytique No. 5*, 42.
[94] 2004 *Gacaca* Law, arts. 25 and 67.
[95] Avocats sans frontières, *Rapport analytique No. 4*, 38-40; Avocats sans frontières, *Rapport analytique No. 3*, 18-23; Avocats sans frontières, *Rapport analytique [No. 1]*, 13-14 & n. 21.
[96] Avocats sans frontières, *Rapport analytique No. 4*, 17.
[97] Avocats sans frontières, *Rapport analytique No. 5*, 32.
[98] Avocats sans frontières, *Rapport analytique No. 5*, 53; Avocats sans frontières, *Rapport analytique No. 3*, 23; Avocats sans frontières, *Rapport analytique [No. 1]*, 22 & n.46.
[99] Avocats sans frontières blamed some mistakes in computing sentences on the change of laws and regulations in 2007. Avocats sans frontières, *Rapport analytique No. 4*, 41.

half years of monitoring *gacaca* trials, Avocats sans frontières found that 72 percent of those convicted (836 of 1169) had received sentences ranging from 10 years to life. They observed "a strong tendency to inflict the maximum sentence allowed by the law, without analyzing the context in which the crime was committed and without establishing the degree of responsibility of the authors."[100]

Political Show Trials

At times, the RPF instrumentalized and politicized *gacaca* to sideline prominent Hutu elites or intimidate perceived political opponents. In spring 2005, several prominent Hutu government officials and military figures (including the Prime Minister, Minister of Defense, a major general, the governor of Ruhengeri province, and several RPF parliamentarians) were called to *gacaca* sessions, where some were accused of genocide.[101] A statement posted on the official *gacaca* website seemed to endorse a political witch-hunt:

> It is predicted that the type of people who have for the last ten years enjoyed the cover of the blanket put on them by the nature of their political positions, will without doubt be pointed out. In any case such characters are very many. Behind the scenes, fingers are pointing to big shots in the political arena.[102]

In 2005, *Gacaca*'s Executive Secretary estimated that 668 government officials had been accused before *gacaca* courts.[103] By the end of that year, five parliamentarians had resigned in the face of such accusations.[104]

In early September 2005, a *gacaca* court in Kigali ordered the arrest of Major General Laurent Munyakazi, one of the most high-ranking Hutu military officers, on charges of intimidating survivors and tampering with evidence.[105] Shortly thereafter, the same *gacaca* court "arraigned" Father Guy Theunis, a white Belgian priest, who had been arrested on accusations of inciting genocide. According to a well-informed source, the decision to arrest Theunis "never came from *gacaca* – it was never raised there."[106] After a seven-hour hearing dominated by prominent RPF officials, the *gacaca* judges did exactly what government

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[100] Avocats sans frontières, *Rapport Analytique No. 5*, 52.
[101] Hirondelle, "*Gacaca* Court Might Indict Three Sitting Members of Parliament," March 14, 2005; Hirondelle, "*Gacaca* Goes for the Big Fish: Views in the Rwandan Press," March 29, 2005; Mary Kimani, "Independent Justice or Courts Under Orders?" *International Justice Tribune*, April 25, 2005.
[102] Peter Karasira, "*Gacaca*: Justice for All or Injustice for Some?" (2005).
[103] Hirondelle, "*Gacaca* Court Might Indict Three Sitting Members of Parliament," March 14, 2005.
[104] U.S. Department of State, *2005 Country Reports on Human Rights Practices: Rwanda* (2006).
[105] Munyakazi was eventually tried and convicted by a military court.
[106] Interview with Belgian diplomat, Kigali, July 2006.

officials (including the head of the Service National des Juridictions *Gacaca*) had already stated those judges would do: they assigned him to Category 1, transferred his case to the national courts, and sent him to pre-trial detention in Kigali Central Prison.[107] Those proceedings underscored the ease with which RPF elites could manipulate *gacaca* for political ends. They also showed the close links between the formal justice system and *gacaca*, which was reduced to ratifying the prosecutor's arrest and the government's call to place him in Category 1.

Even after the information collection phase ended in mid-2006, new accusations against political opponents continued to surface and make their way to trial. Dr. Théoneste Niyitegeka, a doctor who made a hapless bid to be a presidential candidate in 2003, was accused of having turned over a hospital patient to killers during the genocide. After hearing contradictory evidence from two accusers and exculpatory evidence from 12 witnesses, the *gacaca* court acquitted him in late 2007. A *gacaca* appeals court subsequently convicted Dr. Niyitegeka and sentenced him to 15 years without explaining its decision.[108] In early 2008, Alfred Mukezamfura, the Speaker of the Chamber of Deputies and leader of the Centrist Democratic Party, was accused of having incited genocide with his newspaper articles in 1994. After he claimed asylum in Belgium, a *gacaca* court tried him *in absentia* and handed down a life sentence.[109] In early 2009, Stanley Safari, a parliamentarian with the Prosperity and Solidarity Party, was accused of genocide after criticizing the government. A *gacaca* court also tried him *in absentia* and sentenced him to life imprisonment.[110]

Conclusion

As a state institution of retributive justice, *gacaca* needed to comply with the international human rights norms for fair trials that Rwanda has repeatedly endorsed in its treaty ratifications and Constitution. The government itself recognized that by incorporating many of those norms into *gacaca*'s laws and regulations. But those legal safeguards were

[107] Author's field notes from *gacaca* session with Father Guy Theunis, Kigali, September 4, 2005. See Human Rights Watch, *Justice Compromised*, 99-100; "Numéro Spécial: L'Odyssée du Pere Theunis," *Dialogue*, No. 240 (November-December 2005). In November 2005, Rwanda released Father Theunis on Belgium's agreement to investigate the charges against him. Several months later, President Kagame publicly stated that Father Theunis "was indeed involved" in the genocide. Spiegel Online, "Spiegel Interview with Rwandan President Paul Kagame: 'You Can't Trust the UN,'" February 28, 2006.
[108] Human Rights Watch, *Justice Compromised*, 98-99; Human Rights Watch, "Rwanda: Review Doctor's Genocide Conviction," February 16, 2008.
[109] Human Rights Watch, *Justice Compromised*, 100-101.
[110] Human Rights Watch, *Justice Compromised*, 101.

largely jettisoned or neutered as the caseload ballooned and the government pressured *gacaca* courts to speed up trials. The problems with procedural fairness coupled with victor's justice impeded *gacaca*'s ability to deliver on its stated goals of truth and reconciliation.

CHAPTER 9: *GACACA*'S TRUTHS

"*Uwavuga ay inzuki ntiyanywa ubuki.*"
("He who speaks of what bees do will not drink honey.")
– Rwandan proverb[1]

"We must establish incredible events by credible evidence."
– Justice Robert Jackson[2]

Introduction

President Kagame pledged that *gacaca* would "make known 'all' the truth about what had happened" during the genocide. To do that, *gacaca* promoted truth-telling (through perpetrator confessions and witness testimonies) and truth-testing (through judicial fact-finding and community contestation). In keeping with transitional justice discourse and practice elsewhere, *gacaca* regarded truth as an antidote to amnesia and a handmaiden to reconciliation.

This chapter begins by describing how *gacaca* approached truth more narrowly than truth commissions. It then explores the larger context of truth-telling in *gacaca*: coerced attendance and unpopular participation. Next, the chapter examines the cultural and political impediments to truth-telling in *gacaca*. It goes on to discuss various mechanisms that were supposed to produce forensic truth. The chapter concludes by assessing whether *gacaca* actually produced such truth.

Truths, Truth Commissions, and *Gacaca*

Truth commissions struggle to define what they mean by truth. The South African Truth and Reconciliation Commission identified "four notions of truth": "factual or forensic truth" based on objective facts and verifiable evidence; "personal or narrative truth" grounded in individual subjectivity; "social truth" achieved through inter-subjective dialogue and debate; and "healing and restorative truth" or the state's public acknowledgment of past human rights violations.[3] Audrey Chapman and Patrick Ball argue that "the TRC failed to

[1] Pierre Crepeau and Simon Bizimana, *Proverbes du Rwanda* (Tervuren, Belgium: Musée Royal de l'Afrique Centrale, 1979), 597. The authors explain this proverb as "It is not good to say all the truth." *Id.*
[2] Robert H. Jackson, *The Nürnberg Case* (New York: Alfred A. Knopf, 1947), 10 quoted in Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (Philadelphia: University of Pennsylvania Press, 2005), 19.
[3] South African Truth and Reconciliation Commission, *South African Truth and Reconciliation Commission: Final Report*, vol. 1, chap. 5, ¶¶ 29–45. This typology "written some eighteen months into the process, served more as an after-the-fact rationale or explanation for what the TRC was already doing than as a set of guidelines." Hugo van der Merwe and Audrey R. Chapman, "Did the

recognize the extent to which its various approaches to truth conflict with one another and with reconciliation."[4] Graeme Simpson goes further, concluding that the Commission's

> two processes – quasi-judicial fact-finding versus victim-centred storytelling – were fundamentally irreconcilable, and for a simple reason: different kinds of truth were at stake. . . . Whereas legal examination presumes that competing interpretations may be 'judged' by an objective standard and definitely resolved, historical or psychological investigation . . . recognizes that there is no single, easily integrated truth, only competing versions.[5]

Despite such critiques and their own misgivings, subsequent truth commissions in Sierra Leone and Peru adopted a similar typology.[6]

The larger epistemological debate within truth commissions is whether to privilege objective or subjective truths. The South African Truth and Reconciliation Commission tried to split the difference: the amnesty hearings emphasized forensic truth while the human rights violation hearings emphasized personal narrative truths. But there was insufficient sharing of data between those two sets of hearings.[7] Chapman and Ball strongly argue that truth commissions should focus on provable facts rather than subjective narratives. They write that "the conflation of the subjective with objective truth-finding weakens the political and moral importance of truth by making truth a matter of personal opinion, and not the product of verifiable scientific best practices."[8] In sharp contrast, Wilson stresses the need to examine empirically observable phenomenon as well as their interpretation. He faults the South

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TRC Deliver?" in *Truth and Reconciliation in South Africa: Did the TRC Deliver?* ed. Audrey R. Chapman and Hugo van der Merwe (Philadelphia: University of Pennsylvania Press, 2008), 242.

[4] Audrey Chapman and Patrick Ball, "The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala," *Human Rights Quarterly* 23, no. 1 (2001), 34. For other critiques of this typology, see Paul Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (London: Routledge, 2010), 2, 20-27; Deborah Posel, "The TRC Report: What Kind of History? What Kind of Truth?" in *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission*, ed. Deborah Posel and Graeme Simpson (Johannesburg: University of the Witwatersrand Press, 2001), 155–56; Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001), 37-38.

[5] Graeme Simpson, "'Tell No Lies, Claim No Easy Victories': A Brief Evaluation of South Africa's Truth and Reconciliation Commission" in *Commissioning the Past*, 239.

[6] See Sierra Leone Truth and Reconciliation Commission, *Sierra Leone Truth and Reconciliation Commission Final Report*, vol. 1, chap. 3, ¶ 21; Eduardo Gonzalez Cueva, "The Peruvian Truth and Reconciliation Commission and the Challenge of Impunity," in *Transitional Justice in the Twenty-First Century*, 79-80.

[7] Van der Merwe and Chapman, "Did the TRC Deliver?" 244.

[8] Chapman and Ball, "The Truth of Truth Commissions," 42. They also claim at one point that these subjective truths are not really truths at all, but are rather "policy goals." Id.

African Truth and Reconciliation Commission for emphasizing legalistic positivism and reducing subjective narratives to "emotional window dressing."[9]

Some argue that *gacaca* was a new form of truth and reconciliation commission or a creative mix of truth commission and tribunal.[10] In fact, *gacaca* was an explicit rejection of the South African truth commission model then in ascendance. Most obviously, it was a judicial body focused on findings of individual criminal accountability. That led it to eschew "macro-truths": the causes and patterns of genocidal violence.[11] As a court, *gacaca* was much more perpetrator-focused than victim-focused. *Gacaca*, unlike a truth commission, did not produce a final report let alone any policy recommendations.

In contrast to truth commissions, *gacaca* did not prompt any public discussion of what type of truth would result. From the outset, Rwandan policymakers viewed *gacaca* as a vehicle for producing forensic truth in public.[12] That was not surprising given that *gacaca* was designed by lawyers as an extension of the state court system. Still, it underscores *gacaca*'s sharp break with the past: customary *gacaca* would have emphasized ritual and reconciliation narratives in a non-public setting. So, any assessment of genocide *gacaca* against its own stated goals must focus on its legal production of truth. This means looking at how witness testimony was tested and sifted through *gacaca* hearings to become judicial findings.

Unpopular Popular Justice: Participation and Coercion in *Gacaca*

Gacaca's truth-telling depended on popular participation. That assumed people would willingly show up – and speak up – at *gacaca* hearings. Early signs were hopeful. There were good turnouts for the pre-*gacaca* presentations of the *sans dossiers*. A public opinion survey by the Berkeley Human Rights Center showed *gacaca* with a 91 percent approval rating. Longman, one of the authors of that survey, concluded that "*gacaca* is highly popular with the general population primarily because it gives the people of Rwanda a rare opportunity to control their own destinies."[13] But once *gacaca* pilot proceedings started, it quickly became

[9] Wilson, *The Politics of Truth and Reconciliation*, 37-38.
[10] See, e.g., Bernard Rimé et al., "The Impact of *Gacaca* Tribunals in Rwanda: Psychosocial Effects of Participation in a Truth and Reconciliation Process after a Genocide," *European Journal of Social Psychology* 41, no. 6 (2011), 698.
[11] On macro-truths, see Audrey R. Chapman and Patrick Ball, "Levels of Truth: Macro-Truth and the TRC" in *Truth and Reconciliation in South Africa*.
[12] See Office of the President, *Report on the Reflection Meetings*, 64.
[13] Longman, "Justice at the Grassroots?" 224. See Timothy Longman et al., "Connecting Justice to Human Experience: Attitudes towards Accountability and Reconciliation in Rwanda" in *My Neighbor, My Enemy*, 206, 217. For additional surveys, see Ballabola, "Perceptions about the *Gacaca*

apparent that many Rwandans did not want to participate. At an early pilot hearing, one participant plaintively observed: "This number here in *gacaca* is small compared to the number of people who used to go for attacks when an alarm was made."[14]

Showing Up

Poor attendance slowed the pre-trial phase with *gacaca* sessions delayed or cancelled when the required quorum of 100 adults was not met.[15] It often took several hours for a sufficient number to gather, meaning that *gacaca* took up most of the day for those who had arrived on time. Officials regularly berated those assembled for showing up late. As one provincial coordinator for *gacaca* stated:

> I want to know why you always come late. Are you harvesting? Sick? In fact, I want to know if you really support *gacaca* . . . Do you want us now to wait until you finish harvesting? In fact, that's not the matter – you do other things . . . This is a Rwandan solution, but you don't take this seriously, so you separate yourselves from your fellow Rwandans.[16]

Similarly, *gacaca* judges often chastised people for not showing up to *gacaca*. As one stated:

> There are 80 people [here]. I find people are sick in their heads. They are ill. They need doctors. . . . I know they are hiding in their houses. It's very sad. There's no rain today but they are staying in their houses until 4 p.m. . . . Even if they don't come, *gacaca* will happen. If they don't come, the *responsable* and the *conseiller* have to go find them in their houses and punish them. They will have to pay a fine.[17]

Early on, *gacaca* judges and local officials threatened fines but rarely imposed them.

Law in Rwanda," 113; LIPRODHOR, *Juridictions gacaca au Rwanda: Resultats de la recherche sur les attitudes et opinions de la population rwandaise* (2000).

[14] Butare Province 1 *gacaca*, January 2003.

[15] Author's field notes, June 2002 – March 2004. See Alice Urusaro Karekezi et al., "Localizing Justice: *Gacaca* Courts in Post-Genocide Rwanda," in *My Neighbor, My Enemy*, 69; National Commission for Human Rights, *Annual Report for the Year 2003* (2004), 66; Projet d'Appui de la societe civile au processus *gacaca* au Rwanda (PAPG), *Rapport de synthese de l'etat d'avancement des travaux des juridictions gacaca au cours des mois de mars-juin 2003* (2003), 5; LIPRODHOR, *Rapport d'observations sur les activites des assemblees des juridictions gacaca de cellule* (2002), 9; Penal Reform International, *Report V*, 27.

[16] Butare Province 1 *gacaca*, November 2002.

[17] Byumba Province 1 *gacaca*, November 2002.

Gacaca sessions were also delayed or cancelled when judges arrived late or not at all.[18] In one site, *gacaca* had to be postponed three times in a row, twice because there were not enough judges. Later, when *gacaca* was postponed yet again, the *gacaca* coordinator stated: "We can't continue replacing these judges: it's not a football match where you can replace whoever is tired."[19] A week later, the official had to convince some judges not to resign in frustration with postponed meetings.[20] Absentee judges provoked three responses. Sometimes, local officials pressured judges to attend *gacaca*. One sector head stated he would visit the dispensary to make sure that judges who claimed to be sick were there. He further added that judges absent without reason would be considered thieves.[21] Other times, *gacaca* courts achieved the quorum by appointing new judges from the audience.[22] In one location, two reserve candidates tried to beg off, citing old age, illiteracy, and employment. The presiding judge rejected each excuse and a prominent survivor asked them: "Can these [two] say they are not *inyangamugayo* [persons of integrity] anymore?" Eventually, both capitulated and agreed to be sworn in.[23] On some occasions, *gacaca* hearings proceeded without the required quorum of judges.[24]

There were several reasons for absenteeism and tardiness among the population and judges. First, some 80 percent of Rwandans depend on subsistence farming and itinerant labor to survive. One *gacaca* judge explained that "People come after having searched for food for their families."[25] Second, many quickly tired of *gacaca*'s protracted sessions, which were often tedious and bureaucratic (especially during the pilot phase's information collection). In March 2003, Alberto Basomingera, a justice official who had served on the original *Gacaca* Commission, publicly acknowledged problems with attendance in eight out of 12 provinces, observing, "People are getting tired . . . [t]he longer [*gacaca*] lasts, the more

[18] See, e.g., Butare Province 3 *gacaca*, October 3, 2002; Butare Province 4 *gacaca*, October 5, 2002; Gitarama Province 3 *gacaca*, December 16, 2002; Butare Province 2 *gacaca*, December 5, 2002 and January 1, 2003. The 2004 amendments to the *gacaca* law reduced the size of the judicial benches from 19 to seven judges (and the quorum from 15 to five). 2004 *Gacaca* Law, art. 26.
[19] Butare Province 5 *gacaca*, October 10, 2002.
[20] Butare Province 5 *gacaca*, October 16, 2002.
[21] Gitarama Province 3 *gacaca*, October 28, 2002.
[22] The *Gacaca* Law stated that "When this quorum is not reached, the General Assembly appoints within itself other honest people in a sufficient number to complete the quorum." 2001*Gacaca* Law, art. 26. *Inyangamugayo* on the reserve list from the October 2001 elections could be sworn in to replace judges who resigned. *Gacaca* Election Law, art. 59.
[23] Byumba Province 3 *gacaca*, September 23, 2002.
[24] Kigali 3 *gacaca*, September 4, 2002; Byumba Province 4 *gacaca*, October 4 and 25, 2002.
[25] Interview with *gacaca* judge, Kigali, July 2002.

likely the tiredness of the population."[26] Third, many Rwandans saw little reason to participate in *gacaca*. Some Hutu feared being accused of genocide while others perceived *gacaca* as victor's justice.[27] Some Tutsi survivors feared being re-traumatized while others had little hope for compensation. Meanwhile, most Tutsi returnees did not have much to contribute as they had been outside the country during the genocide.

Finally, many peasants saw *gacaca* as one more state obligation to evade. After all, they were already required to participate in weekly *umuganda* (community labor) as well as frequent sensitization campaigns. Absenteeism and tardiness in *gacaca* was yet another expression of everyday resistance to state authority. As James Scott observes more generally:

> In the Third World it is rare for peasants to risk an outright confrontation with the authorities over taxes, cropping patterns, development policies, or onerous new laws; instead they are likely to nibble away at such policies by noncompliance, foot dragging, deception. . . . Their individual acts of foot dragging and evasion, reinforced by a venerable popular culture of resistance and multiplied many thousand-fold, may, in the end, make an utter shambles of the policies dreamed up by their would-be superiors in the capital.[28]

Such resistance was not limited to *gacaca*. Rwandans frequently shirked *umuganda*, just as they had during President Habyarimana's regime.[29] Poor participation also hampered other local-level justice initiatives, including local hearings (*proces en itinerance*) by national courts.[30] Several *abunzi* (mediation committee) hearings had to be cancelled when litigants, and even the mediators themselves, failed to show up.[31]

Coercion

Poor attendance prompted the state to make *gacaca* more coercive. During the pilot phase, local officials threatened fines, closed shops and *cabarets* (local bars), and searched for stragglers. As early as 2003, the former president of IBUKA and RPF central committee member worried that "the population should come voluntarily without being forced to do

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[26] Alberto Basomingera, Attorney General, Ministry of Justice, Remarks at the CLADHO Conference on *Gacaca*, Kigali, February 14, 2003.
[27] See Rettig, "*Gacaca*," 42.
[28] James C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (New Haven: Yale University Press, 1987), xvi-xvii.
[29] See De Lame, *A Hill among a Thousand*, 121-22.
[30] RCN Justice & Democratie, *Programmes d'aide á la justice classique: Rapport d'activities, Novembre 2002* (2002), 24.
[31] Field notes, Gitarama 2, August 2008; Doughty, Contesting Community, 174-75.

so."[32] After the pilot phase, the government amended the *gacaca* law to make participation "compulsory for every Rwandan."[33] The 2004 law stated: "Every Rwandan citizen has the duty to participate in the *Gacaca* courts activities."[34] Under that law, the failure to attend *gacaca* could incur the same penalty as refusing to testify: three to six months' imprisonment (for a first offense).[35] In a 2004 meeting of donors and NGOs, a high-level *gacaca* spokesman stated that a person who did not participate in *gacaca* risked being "mistaken for a *génocidaire*."[36]

As *gacaca* courts started functioning throughout the country in 2005, coercive measures were widely imposed on the population.[37] Out on Rwanda's hills, *gacaca* judges and local officials ordered local paramilitary forces to close down shops, round up people for *gacaca*, and prevent people from leaving early. At one *gacaca*, the sector *conseiller* was clearly embarrassed when I showed up two hours late to find only 50 people waiting for the session to start. He launched into a lengthy harangue, telling those assembled at one point: "It is a shame to have people who do not want to come to *gacaca*. We also have visitors who have come from Kigali [my research assistant and me], and I do not know if they are going to see something with this number of participants." Eventually, he ordered the *nyambakumi* (local officials in charge of ten households) to round up people. A half-hour later, laughter rippled through those waiting as they saw farmers on an adjacent hill running to hide in banana groves.[38]

Some local officials fined, or threatened to fine, people who did not attend *gacaca* even though the *gacaca* laws did not authorize that.[39] When asked why they attended *gacaca*, many of my respondents stated that it was an obligation or that they risked being fined. One

[32] Antoine Mugesera, Remarks at CLADHO Conference on *Gacaca*, Kigali, February 14, 2003.
[33] Service National des Juridictions *Gacaca*, *Programme of Gacaca Sessions' Meetings in Districts and Towns* (2005), preamble.
[34] 2004 *Gacaca* Law, art. 29.
[35] 2004 *Gacaca* Law, art. 29.
[36] Personal communication to author, June 22, 2004.
[37] Clark denies coerced participation was "a widespread phenomenon" despite observing it in some of his own research sites. Clark, *The Gacaca Courts*, 158. He does not mention evidence of coercion from various international and local NGOs. See, e.g., Avocats sans frontières, *Rapport analytique 2005*, 4 & n.9; LIPRODHOR, *Situation des droits de la personne au Rwanda: Rapport 2003-2004*, 31; Penal Reform International, *Information-Gathering During the National Phase*, 43; Penal Reform International, *Research on the Gacaca (Report V)* (2003), 32, 41, 62, 70, 73; Penal Reform International, *Rapport de synthèse de monitoring et de recherché sur la Gacaca: Phase pilote janvier 2002-décembre 2004* (2005), 41. Clark also argues that coerced participation was justified. Clark, *The Gacaca Courts*, 158-59.
[38] Kibuye Province 2 *gacaca*, September 2005.
[39] Author's field notes.

donor representative who regularly attended one *gacaca* stated "I was amazed to see how they were fined all the time and they were doing it because [*gacaca*] was an obligation, not because they wanted to do it."[40] While fines were widespread, the practice was not uniform. One local official told me he was not authorized to fine those not attending *gacaca*.[41] Penal Reform International also found that some local officials were instructed not to fine absentees.[42]

Local officials mostly stopped imposing fines in 2007 once trials were fully underway.[43] That was because the *gacaca* laws did not require a quorum for trials. Hence, trials often had small audiences numbering between 20 and 50 adults. Even when local officials mistakenly thought the quorum still applied to trials, it became much harder for them to keep track of who was participating once *gacaca* benches were multiplied to permit concurrent trials. Still, some officials continued or adapted coercive meaures. For example, there were reports that some local authorities stamped people's identity cards to indicate *gacaca* attendance.[44]

Coercion was not confined to *gacaca*. Rather, it is part of everyday life on Rwanda's hills as local officials seek to impose state policies. The government's National Unity and Reconciliation Commission has acknowledged this: "It is unclear how voluntary the involvement in public decision-making is since half of all respondents [in opinion surveys conducted in 2005, 2006, and 2007] agree with the statement that, 'if the coordinator does not force people to act, nothing will be done in the sector.'"[45] A 2012 report found that "Women repeatedly cited fines as the main reason for choosing to give birth at the health centre."[46] Some local officials devised an elaborate system of hefty fines, ranging from 2000 FRW ($4) for poor personal hygiene to 10,000 FRW ($20) for non-participation in night-time security patrols – hefty sums given that, on average, rural Rwandans earn just 700 FRW ($1.40) per day. [47]

[40] Interview with donor representative, Kigali, June 2006.
[41] Interview with local official, Byumba Province 2, June 2003.
[42] See Penal Reform International, "Entretien avec le responsable de la cellule: 14 Janvier 2003," CD-ROM II.
[43] Human Rights Watch, *Justice Compromised*, 86.
[44] Doughty, Contesting Community, 165.
[45] National Unity and Reconciliation Commission, *Social Cohesion in Rwanda: An Opinion Survey, Results 2005-2007* (2008), 3. See *id*. at 47.
[46] Chambers and Golooba-Mutebi, *Safe Motherhood in Rwanda*, 39.
[47] Ingelaere, "The Ruler's Drum and the People's Shout," 73-74.

Speaking Up

Even when people were forced to show up to *gacaca* sessions, there was no guarantee they would actually speak up – despite sanctions for witnesses who kept silent and repeated threats from *gacaca* judges and local officials.[48] A survey conducted by the government's National Unity and Reconciliation Commission in mid-2002 found 44 percent of non-prisoners and non-survivors saying they would not speak at *gacaca*.[49] During one *gacaca* session, a government official berated the majority for keeping quiet:

> It is impossible that 20,000 people were killed by 10 or 20 people only. People used to go into beer places and some of these beer places were near the roadblock and you could even see the people [killing] at the roadblock. . . . You don't want to tell us. Don't you know that whoever doesn't tell what he knows will be punished? . . . It is in fact a way to identify the real killers of these people so that peace and unity comes back in our society. Some say it is impossible. It will be impossible if you don't talk.[50]

That speech did not cajole further testimony from the audience. At another *gacaca* session, a local official chastised the assembled crowd: "These people died during the day. These people did not commit suicide. No one says anything."[51] In another community, a *gacaca* official told the crowd: "Many people claim the former bad regime made them participate in genocide, but now who is making you stop telling what happened?"[52]

People were often reluctant to talk during pre-trial hearings and trials. At one pre-trial *gacaca*, a survivor demanded:

> My child was killed when [X] was present. There were many people by then when my child died. I was in hiding and I was able to learn of this from friends. Why can't these people speak the truth? Why? These people were present.[53]

Avocats sans frontières, which conducted widespread monitoring of *gacaca*, reported:

> the population does not speak voluntarily during the hearings. In numerous cases, they only speak when called on to do so by the judges. The audience

[48] See African Rights, *Gacaca Justice*, 46.
[49] National Unity and Reconciliation Commission, *Opinion Survey on Participation in Gacaca*, 10.
[50] Butare 1 *gacaca*, October 2002.
[51] Butare 1 *gacaca*, September 2002.
[52] Byumba 2 *gacaca*, October 2002.
[53] Butare 1 *gacaca*, September 2002. See Karekezi et al., "Localizing Justice," 79.

> sometimes adopts a wait-and-see attitude, leaving the job of incriminating the accused to survivors.[54]

The National Unity and Reconciliation Commission observed that active participation in *gacaca* varied over time and by region.[55]

People kept silent for any number of reasons: fear, mistrust, complicity, indifference, disobedience, and self-preservation. Still, the silences were pervasive and persistent enough to earn the name *ceceka* ("pact of silence"). Opinion surveys by the National Unity and Reconciliation Commission found that 80 percent of survivors and 30 percent of detainees agreed with the statement that "The accused who have not confessed are obeying a pact of silence."[56] An opinion survey in Sovu found that 66 percent of respondents agreed that "*Ceceka* keeps people from speaking the truth at *gacaca*."[57] In many communities, it was small groups of survivors (including Hutu widows whose Tutsi husbands were killed) who did most of the talking, while their neighbors remained silent.[58]

Truth-Telling in *Gacaca*

Even when people spoke in *gacaca*, it was hard to discern if they were speaking the truth. In the first place, truth-telling was constrained by Rwandan cultural practices. It also was shaped by the RPF's regime of truth. In addition, truth-telling was influenced by micro-politics. Finally, it was affected by the fallibility of individual memories.

Cultural Practices

As anthropologists have shown, truth and truth-telling are culturally contingent. For example, Marian Ferme observes that many groups in Sierra Leone consider "a person who communicates directly what she or he desires or thinks . . . to be an idiot or no better than a child."[59] Hence, Sierra Leone's truth commission, which valorized public truth-telling about violence, "set itself in opposition to widespread local practices."[60]

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[54] Avocats sans frontières, *Rapport Analytique No. 4*, 10-11. See Avocats sans frontiers, *Rapport analytique No. 3*, 44.
[55] National Unity and Reconciliation Commission, *Social Cohesion in Rwanda*, 24.
[56] National Unity and Reconciliation Commission, *Social Cohesion in Rwanda*, 66-67.
[57] Max Rettig, "*Gacaca*: Truth, Justice, and Reconciliation in Rwanda," *African Studies Review* 51, no. 3 (2008), 40-41.
[58] Author's *gacaca* observations; Penal Reform International, *Report V*, 37.
[59] Mariane Ferme, *The Underneath of Things: Violence, History and the Everyday in Sierra Leone* (Berkeley: The University of California Press, 2001), 6-7; see Tim Kelsall, "Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone," *Human Rights Quarterly* 27, no. 2 (2005).
[60] Shaw, "Linking Justice with Reintegration?"

Similarly, *gacaca*'s insistence on public truth-telling was fundamentally at odds with cultural practices in much of Rwanda.[61] Transparency and directness are considered undesirable and even foolish traits. Put another way, hypocrisy and deception are valued as prudential qualities for maintaining good social relations.[62] Likewise, Rwandan culture frowns on adults who show public emotion. Several Rwandan proverbs caution that "it is not good to say all the truth."[63] The European scholar who collected and translated more than 4,000 Rwandan proverbs explained that "the moral value of speech is not a function of [how much it] corresponds to reality . . . above all, it is a function of usefulness."[64] A Rwandan scholar stated that "truth was not spoken for itself"; rather, Rwandans "say only what can be repeated before any authority."[65]

Historically, there was a "pervasive" culture of secrecy in Rwanda. As the anthropologist Danielle De Lame explains:

> Secrecy persisted as a cultural habit well beyond pre-colonial and colonial Rwanda, where people, subjected to a climate of constant insecurity, were at the mercy of capricious chiefs whose intrigues affected their lives. . . . The habit of secrecy continues in the most ordinary circumstances: one's dwelling place is mentioned evasively, and the rooms of a house are set up so as to conceal the state of one's provisions.[66]

Although De Lame's fieldwork was conducted a few years before the genocide, these habits of secrecy have been reinforced by the experience of civil war, genocide, and counter-insurgency. Many Rwandans are also adept at practicing "ritualized dissimulation" in response to demands for loyalty and compliance from successive authoritarian regimes.[67]

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[61] Clark asserts the population's "view of open truth-telling largely reflects the influence of the traditional institution of *gacaca*." Clark, *The Gacaca Courts*, 195. Yet, there is no evidence that "traditional" *gacaca* involved public truth-telling.

[62] C.M. Overdulve, "Fonction de la langue et de la communication au Rwanda," *Nouvelle Revue de Science Missionaire* 53 (1997), 279-80, 282.

[63] Crepeau and Bizimana, *Proverbes du Rwanda*, 259, 378, 417, 538, 557, 591, 597.

[64] Pierre Crépeau, *Parole et Sagesse: Valeurs Sociales dans les Proverbes du Rwanda* (1985), 224.

[65] Aloys Rukebesha, "Ésotérisme et Communication Sociale au Rwanda: Rukebesha nous parle de son ouvrage," *La Relève* 35, no. 3 (1985), 168, 169 quoted in Nancy Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge: Cambridge University Press, 2010), 132.

[66] De Lame, *A Hill among a Thousand*, 14-15.

[67] The term "ritualized dissimulation" is borrowed from Lisa Wedeen, *Ambiguities of Domination: Politics, Rhetoric, and Symbols in Contemporary Syria* (Chicago: University of Chicago Press, 1999), 82.

The RPF's Truth Regime

The Rwandan government imposed political constraints on truth-telling by insisting that *gacaca* could only hear narratives of suffering from genocide survivors. Nevertheless, Rwandans occasionally raised RPF crimes, particularly during *gacaca*'s pilot phase.[68] A dramatic encounter happened at one early *gacaca* I attended. At the end of a hearing dedicated to listing damages, two *gacaca* judges (a father and daughter) stood and stated that their relatives had been taken by RPF soldiers in July 1994 and not heard from since. The *gacaca* president told them they should take their complaint to the national courts, but when they asked why *gacaca* could not deal with the case, he turned to the *gacaca* official who explained, "*Gacaca* treats uniquely the question of genocide and massacres." The official told the two judges they should address their complaint to the local political official. The woman judge then alleged that the man who had caused her husband to be arrested was threatening her: "I ask the population to protect me, otherwise he's going to kill me as he killed my husband."[69]

There was even less discussion of RPF war crimes as *gacaca* progressed. In 2004, the government removed *gacaca*'s jurisdiction to hear war crimes. The use of local officials to collect information meant fewer opportunities to raise RPF war crimes in public hearings. Most importantly, the national roll-out of *gacaca* coincided with the government's increasing criminalization of speech and acts considered to be "divisionism," "revisionism," "genocide minimization," or "genocide ideology." Hundreds were prosecuted for these crimes between 2007 and 2012, including some high-profile political opposition figures.[70] A 2004 parliamentary commission investigating "genocide ideology" examined cases where people had allegedly talked about RPF crimes.[71] A subsequent Senate Commission defined genocide ideology as including talk of

[68] See Byumba Province 2 *gacaca*, August 14, 2002; Kibungo Province 2 *gacaca*, October 7, 2002; Kigali 3 *gacaca*, July 17, 2002 and October 9, 2002. Clark reports lengthy discussions of RPF crimes in three *gacaca* hearings, two of which occurred during the pilot phase. Clark, *The Gacaca Courts*, 211.
[69] Byumba Province 5 *gacaca*, July 21, 2002.
[70] Amnesty International, *Safer to Stay Silent: The Chilling Effect of Rwanda's Laws on 'Genocide Ideology' and 'Sectarianism'* (2010), 17; Human Rights Watch, *Law and Reality*, 40.
[71] *Rapport de la Commission Parlementaire ad hoc, crée en date du 20 janvier 2004 par le Parlement, Chambre des Députes pour analyser en profondeur les tueries perpétrées dans la province de Gikongoro, idéologie génocidaire et ceux qui la propagent partout au Rwanda*, accepted by the Parliament, June 28, 2004.

"unpunished RPF crimes."[72] A 2008 law defined genocide ideology very broadly to include, among other things, "[m]arginalizing, laughing at one's misfortune, defaming, mocking, boasting, despising, degrading, creating confusion aiming at negating the genocide which occurred, stirring up ill feelings, [and] taking revenge."[73] One person was sentenced to 20 years for "gross minimization of the genocide" after having publicly testified about RPF war crimes in *gacaca*.[74] Radio broadcasts made ordinary Rwandans well aware of the potential consequences of publicly challenging the RPF's narrative.

Micro-Politics

Gacaca narratives were often shaped by what the legal anthropologist Sally Falk Moore terms "the micropolitics of local standing."[75] In small communities, people are more concerned with demonstrating loyalty to kin and patrons than with truth-telling.[76] On Rwanda's hills, these micropolitics played out against a backdrop of pervasive secrecy, mutual suspicion, and occasional denunciation. A team of Rwandan researchers found that during early *gacaca* sessions, "the sentiment of not wanting to attract enemies (*kutiteranya*) prevailed within the general population."[77] At one *gacaca* hearing, a woman refused to answer questions about her son in *gacaca*, saying, "If my son participated in the genocide, it is his affair. Me, I cannot be a traitor to the family which gave me milk."[78] Survivors frequently complained their neighbors were hiding the truth to protect family members. For example, a woman survivor, who was also a *gacaca* judge, complained to the presiding judge: "I note that the people here who were not disturbed during the genocide hide or do not want to testify so as not to denounce their close relatives. Do they know that the law punishes them?"[79] The former head of a Rwandan *gacaca* monitoring project told me: "Families absolutely protect members of their family."[80]

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[72] Rwandan Senate, *Genocide Ideology and Strategies for its Eradication* (2006), 17 n. 6.
[73] Law No. 18/2008 of 23/07/2008 Relating to the Punishment of the Crime of Genocide Ideology, art. 3. See Waldorf, "Instrumentalizing Genocide."
[74] Human Rights Watch, *Law and Reality*, 40.
[75] Sally Falk Moore, "Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running Their Own Native Courts," *Law and Society Review* 26, no. 1 (1992), 11, 42.
[76] Moore "Treating Law as Knowledge," 37-38; Penal Reform International, *Information-Gathering during the National Phase* (2006), 1.
[77] Karekezi et al., "Localizing Justice," 79. While Karekezi was describing pre-trial sessions, the same thing occurred during trials. Avocats sans frontières, *Phase de Jugement*, 9 n.5.
[78] Gitarama Province 1 *gacaca*, October 2002.
[79] Byumba Province 1 *gacaca*, October 2002.
[80] Interview with Francine Rutazana, former head of Projet d'Appui de la societe civile au processus *gacaca* au Rwanda (PAPG), Kigali, June 2006.

Memory Misspeak

Gacaca had to rely on witness testimony given the absence or unavailability of documents (e.g. kill lists, exhumation records, medical reports, etc.).[81] Such evidence is notoriously unreliable. Witnesses often have difficulty recalling highly stressful (particularly violent) events. As time passes, memory is re-shaped by forgetfulness, continuing trauma, and intervening events.[82] Memories can be distorted when witnesses to "the same event talk to one another, overhear each other talk, or gain access to new information from the media, interrogators, or other sources."[83] Three types of bias cause witnesses to misremember events: consistency bias ("rewrite[ing] our past feelings and beliefs so they resemble what we feel and believe now"); egocentric bias (recalling the past in self-enhancing ways); and stereotypical bias (shaping the past through the prism of group stereotypes).[84]

The unreliability of witness testimony was particularly pronounced in *gacaca*. Most trials took place 12 or more years after the 1994 genocide. On top of that, much of the testimony did not come from eyewitnesses. This partly reflected the fact that rural Rwandans live in an oral culture where what is seen is not clearly differentiated from what is heard.[85] *Gacaca* narratives were also shaped by the fact that survivors and perpetrators often feared retaliation from one another. There was a real basis to such fear: survivors and witnesses in some communities were intimidated or killed to prevent them giving evidence in *gacaca*. Perpetrators also feared their former accomplices. One confessed *génocidaire* told a *gacaca* court: "Is it really possible that I participated in the massacres alone! Why am I threatened by the people who accompanied me in the massacres?"[86]

Finding Forensic Truths

Gacaca was supposed to generate forensic truth in several ways. First, it began with judges (and later, local officials) compiling information about the genocide in their communities. Second, *gacaca* created incentives for perpetrators to confess their own crimes. Third, it prompted a flood of accusations, mostly from confessed perpetrators and survivors. Fourth, the *gacaca* laws sought to prevent false testimony by sanctioning such. Fifth, *gacaca*

[81] Sometimes, oral testimony led to the locating of physical evidence (primarily victims' remains).
[82] Combs, *Fact-Finding Without Facts*, 14-17; Stover, *The Witnesses*, 6-10.
[83] Elizabeth F. Loftus, *Eyewitness Testimony* (Cambridge: Harvard University Press, 1996), viii quoted in Stover, *The Witnesses*, 9.
[84] Daniel L. Schacter, *The Seven Sins of Memory: How the Mind Forgets and Remembers* (Boston: Houghton Mifflin, 2001), 9-10.
[85] Combs, *Fact-Finding Without Facts*, 94-98; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T (October 2, 1998), ¶ 155.
[86] Byumba Province 1 *gacaca*, August 2006.

hearings were supposed to be an arena for the public to corroborate or contest those confessions and accusations. Finally, *gacaca* judges were supposed to determine the truth and falsity of the testimonies they heard.

Information Collection

Gacaca began with a lengthy pre-trial phase in which cell-level courts compiled local histories of the genocide and drew up lists of the dead, civil parties, and accused. The listing of suspects was based not only on evidence gathered in the community but also on files from state prosecutors.[87] During the pilot phase, cell-level judges often developed the lists from scratch by calling on the assembled population to give details about their households. When *gacaca* was launched nationwide in 2005, the Service National des Juridictions *Gacaca* delegated the compiling of lists to the *nyumbakumi*. There were reports that some *nyambakumi* made mistakes or falsified information on the lists.[88] While cell-level *gacaca* courts had to approve the final lists, it is unclear whether they were able to identify and correct errors.

In late 2004, Service National des Juridictions *Gacaca* instructed *gacaca* judges and *nyumbakumi* to complete an additional set of lists, which required highly specific information detailing those who had distributed arms, manned barriers, etc. That complicated their task as the terms used were imprecise. For example, it was not initially clear whether the listing of those who "worked" at barriers included everyone at the barriers or just those who had engaged in killings or assaults.[89]

In addition to compiling lists, cell-level *gacaca* courts had to fill out various forms, the most important of which documented individual confessions and listed the accused. Both of those forms included space to describe the facts.[90] Those forms translated subjective and

[87] RCN Justice & Democratie, *Rapport d'activities, November 2002*, 57-58; Interview with RCN representative, Kigali, September 23, 2002. The prosecutor's lists of accused sometimes contradicted evidence heard in pre-trial *gacaca* hearings. Gitarama Province 3 *gacaca*, September 23, 2002; Butare Province 5 *gacaca*, November 19, 2002.

[88] Penal Reform International, *Information-Gathering during the National Phase*, 2, 6-24. See also Penal Reform International, "Entretien avec le president des juges *gacaca*," No. 777, Ref. E010/T004, 2 (March 15, 2005); Penal Reform International, "Rapport d'observation des juridictions *gacaca*: 31 Julliet 2005," Ref. E012/D004, 2-3; Penal Reform International, "Rapport d'observation des juridictions *gacaca*: 4 Oct. 2005," Ref. E047/D003, 2; Penal Reform International, "Rapport d'observation des Juridictions *Gacaca*: 1 Aout 2005," Ref. E037/D004, 3.

[89] Penal Reform International, *Information-Gathering during the National Phase*, 9-10.

[90] For the earliest version of the forms and accompanying guidance, see Cour Suprème, Département des Juridictions *Gacaca*, *Manuel explicative sur la loi organique portant creation des jurisdictions gacaca* (2001), 92-100, 122-25.

inter-subjective narratives into positivistic legal knowledge, which necessarily resulted in some decontextualizing.[91]

Confessions

Gacaca was meant to increase perpetrator confessions. Hearings usually opened with the presiding judge or local official inviting people to come forward and confess their crimes, while reminding them that those who confessed before being accused would get the largest sentence reductions. Judges and officials employed the classic device of the prisoner's dilemma, repeatedly telling people to confess before being named by their accomplices in prison who had already confessed. As one *gacaca* president exhorted, "You hide the truth from us but next Friday, we are going to invite the prisoners who confessed to come here and give testimony. . . . The people who do not want to tell the truth, the prisoners are going to surprise them."[92] Generally, these invitations to confess were met with silence. Most confessions came from those in detention rather than people living freely in their communities.[93]

The truthfulness, completeness, and sincerity of those confessions were open to question.[94] Some of the guilty confessed to lesser crimes in the hopes of receiving lighter sentences and earlier releases. As the former President of IBUKA, the largest survivors' organization, worried: "It's not the truth that matters for them: the pure objective is to get out of prison."[95] Some of the innocent may have pleaded guilty in the hopes of gaining provisional release or expediting their trials. Some common criminals may have confessed to genocide, calculating they would be released earlier under *gacaca* than under the ordinary Penal Code.[96] There was also an amoral economy of guilt inside the prisons.[97] Some were paid to confess to crimes committed by others in what was known as "*kugura umusozi*" ("buying the hill"). Others were paid to falsely implicate third persons in their confessions.

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[91] On decontextualization in the context of the South African Truth and Reconciliation Commission, see Lars Buur, "Monumental Historical Memory: Managing Truth in the Everyday Work of the South African Truth and Reconciliation Commission" in *Commissioning the Past*; Chapman and Ball, "Levels of Truth," 151.
[92] Byumba Province 4 *gacaca*, October 18, 2002. See Kigali 4 *gacaca*, October 2, 2002; Butare Province 5 *gacaca*, August 7, 2002.
[93] Penal Reform International, *Report V*, 37.
[94] See Avocats sans frontières, *Rapport analytique 2005*, 11.
[95] Remarks of Antoine Mugesera, CLADO Conference on *Gacaca*, February 14, 2003.
[96] Interview with Carina Tertsakian, Kigali, August 14, 2005.
[97] See Avocats sans frontières, *Rapport analytique 2005*, 11; Tertsakian, *Le Château*, 357-58, 412-18.

In many of the trials that my team and I observed, survivors challenged the perpetrators' confessions as inaccurate and incomplete.[98] Whether confessions were accepted or not seemed to depend in part on the composition of the *gacaca* courts. In one sector in the Northern Province, the survivors who controlled the court regularly rejected confessions and sentenced defendants to lengthy prison terms (usually 25 years) without the possibility of doing community service.

Accusations

The main source of accusations in *gacaca* was confessed detainees who had to name accomplices as part of their guilty pleas. Some detainees falsely named accomplices in the hopes of having their guilty pleas accepted. Others did so out of personal grudges. As a *gacaca* president explained, "Certain prisoners accuse men who are on the outside [of prison] because they live freely with their women."[99] Some confessed detainees admitted during *gacaca* sessions that they had made false accusations.[100]

Many other accusations came from genocide survivors, few of whom had been eyewitnesses because they were either fleeing or hiding. A prominent Rwandan academic acknowledged, "[t]here are survivors who visibly lie and other survivors say so. . . . Family members denounce their own kith and kin over land – the demographic pressures come into play."[101] In some cases, a survivor's family members testified that the survivor had made a false accusation. In one instance, a husband accused his wife of lying and having mental problems, while the son defended the women his mother had accused saying they had had a personal conflict.[102] In other cases, survivors accused one another of lying.[103] In a few cases, survivors confessed to making false accusations. However, it is difficult to assess whether the original accusation was indeed false or whether the witness was bribed or intimidated into withdrawing his accusation.[104]

Some community members expressed fear that survivors would make false accusations in *gacaca*. One stated: "I have fear that some are going to impute crimes to

[98] See Avocats sans frontières, *Rapport analytique 2005*, 10.
[99] Interview, Kibungo Province 2, October 7, 2002.
[100] Butare Province 2 *gacaca*, January 16, 2003.
[101] Remarks of Alice Karekezi, CLADHO Conference on *Gacaca*, Kigali, February 14, 2003.
[102] Gitarama Province 3 *gacaca*, October 21, 2002.
[103] Kibungo Province 2 *gacaca*, October 7, 2002.
[104] Butare Province 2 *gacaca*, December 19 and 26, 2002; Butare Province 5 *gacaca*, January 4, 2003. See Penal Reform International, *Gacaca Report III*, 27.

innocent people in the absence of the criminals."[105] A *gacaca* president even stated that certain survivors wanted all Hutu imprisoned and had collaborated with certain detainees to make false accusations.[106] In some locations, there were repeated claims that groups of survivors had made lists of names "with a politics of accusing all the Hutus who lived around here."[107] This was similar to claims that IBUKA and AVEGA had organized prosecution witnesses to testify falsely against genocide suspects at the International Criminal Tribunal for Rwanda.[108]

Just as some used the genocide opportunistically to settle personal scores that had little to do with ethnic hatred or genocide ideology, others subsequently used *gacaca* to serve their own ends.[109] False accusations of genocide quickly became "weapons of the weak"[110] in land, inheritance, and family disputes – a new addition to the familiar arsenal of everyday violence on Rwanda's hills alongside rumors, witchcraft, and poisonings (*abarozi*).[111] In one *gacaca* session, a woman accused three other women of participating in roadblocks and night patrols. Five people, including a survivor and the cell official, defended the three women. One stated: "These people are my neighbors. They had land disputes before 1994 and I'm sure [she] accuses these women falsely."[112] This is consistent with studies of "accusatory practices" elsewhere: "[A] very large number of denunciations in most societies are against ordinary people – neighbors, fellow villagers, work colleagues – against whom the denouncer has an everyday grievance."[113] As Kalyvas puts it, denunciation is the "dark face of social capital."[114]

In one cell, a survivor accused the sector official of trying to bribe another survivor to bring a false accusation against someone to whom the official owed a debt. This led to a confusing exchange of accusations and counter-accusations, which lasted more than an hour after *gacaca* had finished.

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[105] Interview, Butare Province 4, July 6, 2002.
[106] Interview, Kibungo Province 2, September 16, 2002.
[107] Butare Province 2 *gacaca*, December 12 and December 19, 2002.
[108] See Combs, *Fact-Finding Without Facts*, 155-56.
[109] See Burnet, *Genocide Lives in Us*, 205-10.
[110] See Scott, *Weapons of the Weak*.
[111] For a discussion of witchcraft and poisonings in rural Rwanda before the genocide, see De Lame, *A Hill Among a Thousand*, 279, 291, 332-33, 489; Christopher C. Taylor, *Milk, Honey, and Money: Changing Concepts in Rwandan Healing* (Washington, DC: Smithsonian Institution Press, 1988).
[112] Butare Province 1 *gacaca*, Rwanda, October 2002. For other examples of land disputes being at the root of false accusations, see Doughty, Contesting Community, 212.
[113] Fitzpatrick and Gellately, *Accusatory Practices*, 17.
[114] Kalyvas, *The Logic of Violence*, 351-52.

> Cell leader: There are some unconfirmed reports that some people who give true testimonies are being threatened. . . . We have local police and Local Defense Force. So please, these people will be punished or will be arrested. We have somebody here who . . . is being threatened, so if he dies or something happens to him, the local people . . . will be responsible. Now I want him to come forward to tell us this matter.
>
> JB: I wanted to ask A why you said if I'm not arrested I will die?
>
> A: It is true that I told him that, because last time I heard people saying I want to destroy *gacaca*. . . . I heard that people say myself and the sector conseiller were handing money through a window to a certain person. Is it true or not?
>
> * * *
>
> Conseiller: This issue has involved witchcraft, medicine and money, so I want to find out the truth. Because M has been removed from the [survivors'] association, now she goes spreading propaganda.
>
> Conseiller: I know all this is a lie and they are just creating stories. I never gave money to anybody and I want to say these words as a leader of the people. [Speaking to M]: . . . all the words that you told me are lies. AN and you seem have some problems . . . Now I want the General Assembly to see these two women because in case JB dies or something happens to him it will be from the root cause of this problem.[115]

There are rumors of corruption at every level of *gacaca*, but they are difficult to verify.[116] One *gacaca* president claimed some justice officials demanded money from detainees so their cases could be heard first in *gacaca*. The President said she learned that from women in the cell who were trying to collect this money at the request of their husbands.[117] True or not, those rumors had a corrosive effect on *gacaca*.

Deterring False Testimony

The *Gacaca* laws called for the prosecution of "[a]ny person who omits or refuses to testify on what he or she has seen or on what he or [she] knows."[118] Those found guilty could

[115] Butare Province 1*gacaca*, November 2002.
[116] Human Rights Watch, *Justice Compromised*, 105-10.
[117] Kigali 1 *gacaca*, February 2003.
[118] 2004 *Gacaca* Law, art. 29.

receive prison sentences.[119] Some *gacaca* courts imposed fines and prison sentences on those who gave false testimony.[120] During the pre-trial phase in the pilot *gacaca* cells at least 390 people were detained for giving false testimony or refusing to testify.[121] According to the head of mission for Avocats sans frontières, that was counter-productive: "They come out of prison totally transformed denying the genocide and arguing that *gacaca* is a government plot."[122]

Although the 2004 *Gacaca* Law required *gacaca* courts to hold separate trials for false testimony, that was often ignored.[123] In 2006, the Service National des Juridictions *Gacaca* issued a directive requiring *gacaca* courts to hold separate trials for false testimony or refusals to testify. However, the directive was so unclear that judges mostly stopped reminding witnesses of the penalties for false testimony. According to Avocats sans frontières, that had a negative impact on truth-seeking in *gacaca*.[124]

***Gacaca* Hearings**

Gacaca hearings were largely non-adversarial (inquisitorial): judges had dossiers (consisting of notebooks and forms from cell-level *gacaca* courts and occasionally materials from state prosecutors); witnesses could give narrative testimony; and questions were mostly posed by the *gacaca* judges. It is argued that non-adversarial systems are better at revealing truth while adversarial systems are better at uncovering perjury.[125]

The truthfulness of confessions and accusations was supposed to be tested in *gacaca* hearings through robust public debate by the assembled population. Yet, many communities had changed dramatically since April 1994 as a result of genocide, civil war, counter-insurgency, and refugee flows. Also, the government's acceleration of *gacaca* in 2007 meant less time for hearing and debating testimony during trials. As *gacaca* courts moved from

[119] The 2001 *gacaca* law imposed sentences of one to three years (with half the sentence consisting of community service). 2001 *Gacaca* Law, art. 34. The 2004 law reduced the sentence to three to six months (or six to 12 months for repeat offenses). 2004 *Gacaca* Law, art. 29. It made the reduced penalties retroactive and provided that persons who had already served at least six months imprisonment should be released immediately. 2004 *Gacaca* Law, art. 104.
[120] Avocats sans frontières, *Rapport analytique 2005*, 4 & n.9; Penal Reform International, *Rapport de synthese de monitoring 2004*, 32, 41, 62, 70, 73.
[121] Service National des Juridictions *Gacaca*, "Table Indicating the Achievements."
[122] Interview with Avocats sans frontières head of mission, Kigali, July 2006.
[123] 2004 *Gacaca* Law, art. 32; Avocats sans frontières, *Rapport Analytique 2005*, 16 & n.29; Letter from Avocats Sans Frontières, The Danish Center of Human Rights, Penal Reform International and RCN Justice & Démocratie, 3.
[124] Avocats sans frontières, *Analytical Report No. 3*, 27-30.
[125] Combs, *Fact-Finding Without Facts*, 176 n. 789, 302-16.

conducting one or two to six or seven trials per day, they called fewer witnesses, relied more on detainees' confessions and accusations, and leaned more heavily on the information assembled by the cell *gacaca* courts.[126] The multiplication of *gacaca* courts within sectors, which led to multiple trials running at the same time, "handicapped effective participation of the population during trials."[127] Avocats sans frontières identified problems with some of the trials it monitored from January 2008 to December 2009: "the refusal to hear certain witnesses, the faulty presentation of evidence or investigative findings to the parties and the public, the failure to allow victims and accused to attend trials and give testimony."[128]

With judges increasingly focused on running trials quickly, they played a more passive role in truth-seeking. Avocats sans frontières found that:

> The judges content themselves with receiving statements from persons in the audience and the victim parties without questioning them and without comparing their statements to those of the accused. They sometimes let witnesses contradict themselves without confronting them. . . . The presiding judges do not systematically offer the accused the opportunity to react to the allegations by the victim parties, interveners and witnesses.[129]

Avocats sans frontières also observed that there was little testimony from defense witnesses. This was partly due to the focus on accusations during the information collection phase. But it was also because some witnesses feared being accused if they provided exculpatory testimony.[130] A survey in Sovu revealed that 63 percent of respondents agreed with the statement that "Some people are afraid to give testimony defending the accused."[131]

Judgements

The *gacaca* laws and manuals did not set out a clear standard of proof and many judges appeared to apply the balance of probabilities rather than beyond a reasonable doubt. *Gacaca* judges were also given very little guidance on how to assess witness credibility or weigh evidence.[132] In that respect, *gacaca* more closely resembled the inquisitorial civil law

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[126] Avocats sans frontières, *Rapport Analytique No. 5*, 23-24; Avocats sans frontières, *Rapport Analytique No. 3*, 57.
[127] Avocats sans frontières, *Rapport Analytique No. 4*, 40. See Avocats sans frontières, *Rapport Analytique No. 3*, 56.
[128] Avocats sans frontières, *Rapport Analytique No. 5*, 22. These problems were found in 91 of 507 trials (18 percent). For more details, see *id*. at 23-26.
[129] Avocats sans frontières, *Rapport Analytique No. 4*, 30-31.
[130] Avocats sans frontières, *Rapport Analytique No. 4*, 32.
[131] Rettig, "*Gacaca*," 41.
[132] Interview with Avocats sans frontières staff member, Kigali, July 2006.

system in which all the facts are submitted to judges.[133] Even though the Rwandan genocide involved "administrative massacres" documented by local officials, *gacaca* courts made virtually no effort to track down written orders, reports, and correspondence in communal and sector *bureaus* to corroborate testimonies.[134]

In general, *gacaca* courts did not examine guilty pleas closely to assess their accuracy.[135] Several courts accepted vague guilty pleas where the accused acknowledged having participated in attacks without specifying what crimes they had actually committed.[136] Judges also tended to place considerable weight on accusations from confessed perpetrators.[137] By and large, *gacaca* courts issued judgments and sentences without providing their factual findings.

Did *Gacaca* Produce Forensic Truth?

During the *Urugwiro* talks in 1998 and 1999, some participants flagged two obstacles to truth-telling in *gacaca*. They pointed out that "Rwandans are used not to tell[ing] the truth, which would make *Gacaca* impossible." They also argued that "nothing would prevent people from being partial . . . for those with whom they have family relations and friendship." Other participants responded that Rwandan cultural practices could be changed through education. In addition, they contended that partial testimonies could be corrected: as "the new *Gacaca* would be done in public, there are people who may contradict them and give concrete evidence."[138]

After *gacaca* had begun, government agencies repeatedly raised concerns about truth-telling in *gacaca*. The National Human Rights Commission observed that some *gacaca* judges, confessed perpetrators, and community members "do not tell the truth. They give witness only about people who are either dead or in exile, or they simply keep silent."[139] The Commission specifically noted that "[i]n some places, there was lack or bias of witness mainly due to family links and relations." To correct that, it called on the government and local officials "to remind the population [of] the interest and advantage of revealing the truth

[133] Under a common law system, much of the evidence offered in *gacaca* proceedings would have been excluded from judicial consideration as hearsay, irrelevant, or more prejudicial than probative.
[134] On the term administrative massacre, see Arendt, *Eichmann in Jerusalem*, 288. For administrative documents related to the genocide in Nyakizu commune, see Des Forges, *Leave None*, 402-31.
[135] Avocats sans frontières, *Rapport analytique 2005*, 11 & n.10; Avocats sans frontières, *Rapport analytique No. 4*, 17.
[136] Avocats sans frontières, *Rapport analytique 2005*, 18.
[137] Avocats sans frontières, *Rapport analytique No. 4*, 34.
[138] Office of the President, *Report on the Reflection Meetings*, 63-64.
[139] National Commission for Human Rights, *Annual Report for the Year 2004* (2005), 74.

to Rwandans in general." In rather contradictory fashion, the Commission called on officials "to provoke testimonies as these are the only reliable source of truth."[140]

Many Rwandans do not believe that people spoke the truth in *gacaca*. The National Unity and Reconciliation Commission's attitudinal surveys found:

> Almost two thirds of the general population believes that witness accounts on either side, the prosecution and the defense, cannot be trusted. An overwhelming number of prisoners (83%) do not believe in the truthfulness of prosecution witness accounts and a large number of survivors (77%) have doubts about statements made by witnesses for the defense.[141]

In the Sovu survey, 73 percent of all respondents (and 90 percent of survivors and returnees) agreed with the statement that "People tell lies in *gacaca*."[142] Still, for some, *gacaca* succeeded in its truth-telling aspect when perpetrators revealed the location of victims' remains – an issue of enormous emotional significance to victims' families.[143]

Conclusion

Gacaca produced partial and contested truths, as well as manifold silences. This partly reflects the difficulty of disentangling narratives after widespread and localized violence. But *gacaca*'s truth-seeking also foundered as a result of cultural practices, RPF repression, micro-politics, and local resistance. The ability of *gacaca* trials to generate forensic truth was further hampered by the quality of justice. Forensic truth requires due process – something that was often lacking in *gacaca* trials.

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[140] National Commission for Human Rights, *Annual Report for the Year 2003*, 66.

[141] National Unity and Reconciliation Commission, *Social Cohesion in Rwanda*, 5-6. A later survey, conducted after most *gacaca* trials had been completed, showed 94 percent saying that *gacaca* revealed the truth about the genocide. However, this figure was not disaggregated for perpetrators and survivors. National Unity and Reconciliation Commission, *Rwanda Reconciliation Barometer* (2010), 66-69.

[142] Rettig, "*Gacaca*," 41.

[143] Interview with Avocats sans frontières staff member, Kigali, July 2006; Interview with Benoit Kaboye, Executive Secretary, IBUKA, Kigali, July 2006.

CHAPTER 10: *GACACA*'S REPARATIONS

"For *rescapés* [survivors], reconciliation comes after compensation."
– Francine Rutazana, former Executive Secretary, Ligue des droits de la personne dans la région des Grands Lacs (LDGL)[144]

Introduction

Despite the growing literature on *gacaca*, there has been relatively little attention paid to its role in providing reparations to genocide survivors.[145] In some ways, that reflects the priorities of many successor regimes: reparations are an afterthought if they are thought of at all. *Gacaca* was supposed to lay the foundation for compensating genocide survivors. Week after week across Rwanda's hills, neighbors argued over who stole what from whom. The community courts dutifully tallied up losses to send to the promised compensation fund. When the *Gacaca* Law was amended in 2004, it put off the issue of compensation. When *gacaca* ended in 2012, the government's compensation fund still had not been created. In the end, *gacaca* only provided survivors with limited restitution, perfunctory apologies, and some community service from perpetrators.

This chapter begins with a quick overview of reparations as part of accountability. It then situates Rwanda's reparations scheme in the larger context of the 1994 genocide. The chapter next looks at the government's reparations policy focusing on compensation, rehabilitation, and memorialization. Finally, the chapter examines *gacaca*'s role in providing restitution and symbolic reparations to genocide survivors, and in extracting community service from convicted *génocidaires*.

Reparations

Accountability requires states to provide victims of atrocities with "adequate, effective, and prompt reparation" which is "proportional to the gravity of the violations and the harm suffered."[146] Reparations consist of restitution, compensation, rehabilitation, and satisfaction, as well as guarantees of non-repetition.[147] When victims are surveyed, they often prioritize reparations over truth-telling or justice.[148] Yet, the very fact that "reparations are

[144] Interview, Kigali, June 20, 2006.
[145] The notable exception is Penal Reform International, *Le jugement des infractions contre les biens commises pendant le génocide: Le contraste entre la théorie de la réparation et la réalité socio-économique du Rwanda* (2007).
[146] United Nations, *Basic Principles and Guidelines on the Right to a Remedy and Reparations*, Principle 15. See United Nations, *Updated Set of Principles to Combat Impunity*, Principle 34.
[147] United Nations, *Basic Principles and Guidelines on the Right to a Remedy and Reparations*, 19-23.
[148] See, e.g., Phuong Pham et al., *When the War Ends: A Population-based Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda* (New York: International Center for

explicitly and primarily carried out *on behalf of victims*"[149] goes some way to explaining why there is so little political will among successor regimes and donors to provide reparations.[150] For victims usually have little political clout. Successor regimes frequently ignore, evade, or delay implementing the reparations programs recommended by truth commissions or other bodies. Tellingly, only 14 of the 84 transitions between 1970 and 2004 implemented reparations programs.[151]

Instead of spending scarce resources on reparations to individuals, successor regimes (even those nominally controlled by victims and survivors) prefer to promote future-oriented development that will benefit larger social groups.

> Governments in developing countries facing demands for reparations are strongly inclined to argue that development *is* reparation. . . . Beneficiaries perceive them, correctly, as programmes that distribute goods to which they have rights as citizens, and not necessarily as victims.[152]

Development-as-reparations also undermines the ability of reparations to function as state acknowledgement of wrongdoing.[153]

The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power encourages the use of informal dispute resolution mechanisms (including "indigenous practices") to provide redress for victims.[154] Such mechanisms can provide an opportunity for perpetrators to make restitution to large numbers of victims. This is particularly important given that most post-conflict states lack the material resources and political will to provide meaningful compensation.

Transitional Justice, 2007); Simon Robins, "Whose Voices? Understanding Victims' Needs in Transition," *Journal of Human Rights Practice* 1, no. 3 (2009), 324.

[149] United Nations Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes* (2008), 2-3.

[150] Alexander Segovia, "Financing Reparations Programs: Reflections from International Experience" in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2010), 650-75.

[151] Olsen, Payne and Reiter, *Transitional Justice in Balance*, 53.

[152] United Nations Office of the High Commissioner for Human Rights, *Reparations Programmes*, 26.

[153] Naomi Roht-Arriaza and Katharine Orlovsky, "A Complementary Relationship: Reparations and Development" in *Transitional Justice and Development: Making Connections*, ed. Pablo de Greiff and Roger Duthie (New York: Social Science Research Council and the International Center for Transitional Justice, 2009), 172-73; Pablo de Greiff, "Justice and Reparations" in *The Handbook of Reparations*, 469-70.

[154] United Nations, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, U.N. Doc. A/Res/40/34/Annex (February 12, 2008), ¶ 7.

The Reparations Context: Greed, Grievances, and Genocide

During the genocide, government officials and "hate radio" stoked fears among the predominantly Hutu peasantry that returning Tutsi would dispossess them of their land. Killers were often rewarded with their victims' livestock, crops, houses, land, and personal belongings. Greed fuelled some of the killing. During one *gacaca* hearing, a detainee confessed how he had joined a group of attackers to take an old woman's cattle: "When we arrived at her house, certain people among us decided to kill her, [saying] 'If we leave this old woman, she will reclaim her cows at the end of the war.'"[155]

There is considerable scholarly debate over the role that greed, economic grievances, and land scarcity played in the 1994 genocide. Uvin argues that structural violence primed Rwanda for genocide.[156] One set of scholars make a Malthusian argument about overpopulation and land scarcity, pointing to the fact that Hutu killed Hutu over land issues in a community with few Tutsi.[157] In a study of 65 adult perpetrators, one political economist found that most were motivated by economic gain.[158] By contrast, Straus found that very few of the 220 confessed killers he interviewed were motivated by material gain.[159]

Still, it is clear that looting played a significant role in the civil war and genocide, whether as a cause or consequence of the killings. That looting has had long-term economic consequences for rural households. Violent destruction of a house between 1990 and 1996 "led to a decreased probability of escaping poverty . . . and a significant decrease (around 60 percent . . .) in average incomes."[160] Similarly, households that lost cows during that period are poorer, partly because they lack manure for fertilizing their fields.[161]

Massive population displacements during and after the genocide led to further property losses. Almost a million Tutsi refugees returned to Rwanda after the genocide seeking to reclaim land and houses they had been forced to abandon during previous bouts of anti-Tutsi violence. Under the 1993 Arusha Accords, returning Tutsi refugees could not

[155] Byumba Province 2 *gacaca*, September 12, 2002.
[156] Uvin, *Aiding Mass Violence*, 136-39.
[157] André and Platteau, "Land Relations Under Unbearable Stress." For a critique of the ecological scarcity theory, see Uvin, *Aiding Mass Violence*, 197-201.
[158] Verwimp, "An Economic Profile of Peasant Perpetrators."
[159] Straus, *The Order of Genocide*, 149.
[160] Patricia Justino and Philip Verwimp, "Poverty Dynamics, Violent Conflict and Convergence in Rwanda," *Review of Income and Wealth* 59, no. 1 (2013), 87.
[161] Lode Berlage, Marijke Verpoorten, and Philip Verwimp, "Rural Households under Extreme Stress: Survival Strategies of Poor Households in Post-Genocide Rwanda" (Report for the Belgian Department of International Cooperation, 2003), 3.

legally reclaim land and houses vacated more than ten years earlier. In practice, however, some returnees managed to regain their property with the connivance of local officials.[162] After Rwanda invaded Congo in late 1996, hundreds of thousands of Hutu refugees who had fled after the genocide were forcibly repatriated back to Rwanda. Some returning Hutu now found their fields and houses occupied by recent Tutsi returnees. Competing property claims were sometimes resolved on an *ad hoc* basis by local officials or through revived customary mechanisms.[163]

Reparations Programs

Compensation

A 1998 government census identified approximately 283,000 needy genocide survivors.[164] Many of these want reparations.[165] Yet, 20 years after the genocide, the government has not created the compensation fund promised in its 1996 Genocide Law. The fund was supposed to help cover court-awarded damages to victims. Under Rwanda's civil law system, victims can intervene in criminal proceedings as civil parties and recover damages. Over the years, national courts have awarded millions of dollars in compensation to victims, but those judgments have rarely been enforced, largely because defendants are indigent.[166] The Rwandan state also granted itself immunity from civil liability, arguing that its legal responsibilities were met by payments to a survivors' rehabilitation fund and acknowledgment of the former government's role in the genocide.[167] The Rwandan Supreme Court upheld the state's immunity in the face of a legal challenge from civil parties.[168] The court did not address the law's conflict with international norms which provide that successor governments shall pay restitution to the victims of state agents.[169]

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[162] Human Rights Watch, *Uprooting the Rural Poor in Rwanda* (2001), 7-10.
[163] Karekezi, "Juridictions *Gacaca*," 32.
[164] Rombouts, Victim Organisations and the Politics of Reparation, 381. A 2008 census estimated the total number of genocide survivors at 309,368. Hirondelle, "Census: Rwanda Genocide Survivors Estimated to Be 300,00," August 28, 2008.
[165] Longman and Rutagengwa, "Memory, Identity and Community in Rwanda," 173.
[166] For a discussion of compensation awards by Rwanda's national courts, see Heidi Rombouts and Stef Vandeginste, "Reparations for Victims in Rwanda: Caught Between Theory and Practice" in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, ed. Koen De Feyter et al. (Oxford: Intersentia: 2005), 328-30; IBUKA, SURF, REDRESS, et al., "Recommendations for Reparation for Survivors of the 1994 Genocide Against Tutsi," 7.
[167] 2001 *Gacaca* Law, art. 91.
[168] *Theophile Twagiramungu*, Judgment, No. RPAA 0004/Gen/05/CS (February 12, 2008), 11.
[169] United Nations, Declaration of Basic Principles of Justice for Victims of Crime, ¶ 11.

Over the past several years, top officials have repeatedly stated that Rwanda cannot afford a compensation fund. The Executive Secretary of the Service National des Juridictions *Gacaca* explained:

> Compensation in a legal sense, we think it's impossible for us. . . . We cannot commit ourselves on something we are not sure to achieve. Even our internal budget depends on outsiders for over 50 percent. . . . You're going to stop other lines of development of the country.[170]

Similarly, the Executive Secretary of the National Unity and Reconciliation Commission observed:

> The will from the Government is there, but the challenge is funding for that . . . because Rwanda is a poor country. From a reconciliation point of view, a form of reparations – even if it would be symbolic – would be important so survivors can also feel there is really a drive to rehabilitate them [and] restore their dignity.[171]

Some survivors' representatives find such rationales unconvincing. The former head of the main genocide widows' association stated: "The government says it is poor. That doesn't satisfy us. It is being killed two times."[172] A donor to the justice sector criticized the government for being "more interested in [creating] a beautiful Kigali" than in the welfare of genocide survivors: "The *rescapés* are only poor people. They are people from the hills. They are not important people. . . . Giving all the tax breaks to Ugandan [returnees] is more strategic for the government."[173]

The Government has drafted several compensation bills since 1997, but none made it through Parliament. A 2001 bill would have required complicated calculations using a schedule that specified different amounts for different categories of murdered kin and stolen property. In early 2002, IBUKA, the most influential survivors' organization, proposed a wholly different, lump-sum approach to the Ministry of Justice. That resulted in the 2002 compensation bill, which would have given each beneficiary approximately $23,000. Beneficiaries were broadly defined as anyone targeted because of their ethnicity or opposition

[170] Interview with Domitilla Mukantaganzwa, Executive Secretary, Service National des Juridictions *Gacaca*, Kigali, June 6, 2006.
[171] Interview with Fatuma Ndangiza, Executive Secretary, National Unity and Reconciliation Commission, Kigali, June 13, 2006.
[172] Interview with Consolee Mukanyiligira, former Executive Secretary, AVEGA-AGAHOZO, Kigali, June 27, 2006.
[173] Interview with donor representative, Kigali, June 21, 2006.

to the genocide (plus their relatives), regardless of whether they had suffered any actual injury. Compensation would have been funded through eight percent of the Government's tax revenues and appeals to the international community. Recognising that this still might have been insufficient, the 2002 bill provided that compensation could be made either in cash or services, that the amount of the fixed sums could be adjusted according to the amount of money in the fund, and that priority would be given to the most needy (without, however, defining need).[174]

The Council of Ministers approved the bill in August 2002, but, before it could be debated in Parliament, the Ministry of Justice withdrew it. Explaining why the bill was shelved, a high ranking justice official told me:

> We thought it was not a very realistic draft. . . . At the level of disbursing [compensation], let the law clearly indicate there are cases which are in acute need to whom compensation would be applied . . . and let the law make clear what we mean by acute need. Compensation is a right, yes, but let it be a compensation fund, not compensation for each and every person in a court of law.[175]

The justice official admitted that survivors' organizations had not been consulted in the drafting or withdrawal of that bill. As of September 2013, there had been no further movement on establishing a compensation fund for genocide survivors.

Rehabilitation

While the compensation fund languished, the government did create an assistance fund, the Fonds d'assistance aux rescapés du génocide ("FARG"), in 1998.[176] Ten years later, the assistance fund was reorganized.[177] At that time, the government's contribution changed from five percent of yearly tax revenues to six percent of annual domestic income.[178] The

[174] Projet de loi portant création, organisation et fonctionnement du fonds d'indemnisation des victimes des infractions constitutives du crime de génocide ou de crimes contre l'humanité commises entre le 1 octobre 1990 et le 31 décembre 1994 , arts. 14, 17, 20, 22, & 23; Rombouts, Victim Organisations, 349-50.
[175] Interview with Johnston Busingye, Secretary General, Ministry of Justice, Kigali, June 12, 2006.
[176] Law No. 02/98 of 22/01/1998 Establishing a National Assistance Fund for Needy Victims of Genocide and Massacres Committed in Rwanda Between October 1, 1990 and December 31, 1994 [hereinafter 1998 FARG Law].
[177] Law No. 69/2008 of 30/12/2008 Law Relating to the Establishment of the Fund for the Support and Assistance to the Survivors of the Tutsi Genocide and Other Crimes against Humanity Committed between 1st October 1990 and 31st December 1994, and Determining its Organization, Powers and Functioning [hereinafter 2008 FARG Law].
[178] 1998 FARG Law, art. 12(1); 2008 FARG Law, art. 22(1).

other major change was that the FARG was granted exclusive authority to bring civil actions against and collect damages from Category 1 perpetrators.[179] Survivors' organizations have objected to this restriction on a victim's right to reparations.[180]

Unlike a compensation fund, the FARG cannot be tapped to pay awards ordered by national or *gacaca* courts. Rather, it mostly provides education scholarships (especially for secondary school) and free medical care (including limited psychosocial support) to the neediest survivors.[181] The main survivors' organizations express concern that FARG does not distinguish clearly between assistance and rehabilitation.[182]

The FARG assists "survivors," a broader category than "victims." Survivors are defined as anyone who survived the genocide or massacres of those opposed to the genocide; they need not have suffered any injury.[183] In theory, survivors can be either Tutsi or Hutu, but in practice the FARG has mostly benefited Tutsi survivors. That was partly political as the FARG's administrators between 2000 and 2009 were Tutsi survivors who had links to the RPF. The FARG's preferential treatment of Tutsi survivors was also partly due to Rwanda's patrilineal culture:

> An orphan who lost his Tutsi father in the genocide, but lives with his Hutu mother is automatically considered a *rescapé* [survivor]. . . . On the contrary, a child that lost his Tutsi mother during the genocide, but lives with his Hutu father is not considered a *rescapé*.[184]

A sizeable percentage of Rwandans had viewed the fund as discriminating against Hutu – something that threatened to create new ethnic resentments.[185] To make matters worse, the

[179] 2008 FARG Law, arts. 20-22.
[180] IBUKA, SURF, REDRESS, et al., "Recommendations for Reparation for Survivors of the 1994 Genocide Against Tutsi," 8-9.
[181] See, e.g., 2008 FARG Law, arts. 4, 26; IBUKA, "Submission to Parliament of Rwanda on Draft Organic Law Terminating *Gacaca* Courts," 2. The FARG's provision of housing and micro-credit has been sporadic and largely unsuccessful. Rombouts and Vandeginste, "Reparations for Victims in Rwanda," 333.
[182] IBUKA, SURF, REDRESS, et al., "Recommendations for Reparation for Survivors of the 1994 Genocide Against Tutsi," 15.
[183] 1998 FARG Law, art. 14; 2008 FARG Law, arts. 3, 26. By contrast, the *gacaca* law uses the term "victim." 2004 *Gacaca* Law, art. 34.
[184] Rombouts and Vandeginste, "Reparations for Victims in Rwanda," 337.
[185] Burnet, *Genocide Lives in Us*, 159; Stef Vandeginste, "Victims of Genocide, Crimes against Humanity, and War Crimes in Rwanda: The Legal and Institutional Framework of Their Right to Reparation" in *Politics and the Past*, ed. John Torpey (London: Rowman & Littlefield Publishers, 2003), 265.

FARG was marred by several corruption scandals. As a result, the fund was relaunched and several top administrators were removed in 2009.[186]

Memorialization

The RPF's politics of memory are ethnic and exclusionary. The ruling party memorializes the genocide in ways that reinforce images of collective Tutsi suffering and collective Hutu guilt. Hutu victims are deliberately forgotten. The Hutu democrats killed in the first days of the genocide lie unremembered and unvisited on the remote Reberho hill in Kigali. Hutu rescuers are mostly erased from view.[187] The RPF ignored a proposal from a US State Department advisor to honor Hutu rescuers in a similar fashion to how Israel honors the "Righteous Gentiles."[188]

Overall, the RPF sees the forging of collective memory as a zero-sum competition in which any acknowledgment of Hutu suffering would reduce the recognition of Tutsi suffering. Yet, as Michael Rothberg points out in the context of Holocaust memory politics, "the misrecognition of collective memory as a zero-sum game . . . [is] one of the stumbling blocks for a more inclusive renarration of the history of memory and a harnessing of the legacies of violence in the interests of a more egalitarian future."[189] He argues that collective memory is "multidirectional" – a pluralistic space where different memories jostle and shape one another. Rothberg contends that "far from blocking other historical memories from view in a competitive struggle for recognition, the emergence of Holocaust memory on a global scale has contributed to the articulation of other histories."[190]

In the past several years, the RPF has exerted greater control over memory practices to ensure its monopoly over Rwanda's collective memory. The National Commission for the Fight against Genocide was created in 2007 to oversee all aspects of genocide commemoration. The Commission took over the running of the Kigali Memorial Centre from Aegis Trust, a UK non-profit organization, in 2011. Aegis Trust had previously run into difficulties with the government over its plans for a museum exhibition at the Murambi

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[186] See Ssuuna, "Two More IBUKA Officials Arrested."
[187] See Waldorf, "Revisiting Hotel Rwanda." One conspicuous exception is a text on five rescuers as part of Aegis Trust's exhibition at the Kigali Memorial Centre. See Kigali Memorial Centre, *Jenoside* (2004), 30-31. For a critical analysis of the narratives presented at the Kigali Memorial Centre, see Elisabeth King, "Memory Controversies in Post-Genocide Rwanda: Implications for Peace-building," *Genocide Studies and Prevention* 5, no. 3 (2010), 293-309.
[188] Letter from Pierre St. Hilaire to Antoine Mugesera, President of IBUKA, February 19, 2002.
[189] Michael Rothberg, *Multidirectional Memory: Remembering the Holocaust in the Age of Decolonization* (Stanford: Stanford University Press, 2009), 21.
[190] Rothberg, *Multidirectional Memory*, 6.

genocide memorial.[191] Jens Meierhenrich describes how the RPF's "centralization of memory" has led to the erasure of informal memory sites without any consultation of genocide survivors.[192]

Rwanda's annual genocide commemorations are highly politicized occasions. President Kagame frequently uses them to denounce political opponents and excoriate the international community. At the 2002 event, President Kagame attacked his predecessor, Pasteur Bizimungu, who had quit the RPF to start his own opposition party. For several years, President Kagame and other government officials used the commemoration ceremonies to denigrate Paul Rusesabagina, the real-life inspiration for the film "Hotel Rwanda." In 2006, in response to the French indictment for the shooting down of Habyarimana's plane, the government held the commemoration at Murambi, where government officials accused French peacekeeping troops of having played volleyball on top of mass graves in 1994. Not surprisingly, the commemoration speeches often emphasize Tutsi suffering. This message is not lost on Hutu. As one Hutu woman told a journalist, "Since the commemorations are very official, with very harsh speeches, we all feel like we are considered guilty of genocide and we prefer to remain unobtrusive."[193]

The Rwandan government has built or maintained 78 genocide memorials and nearly 400 mass tombs.[194] With assistance from international donors and NGOs, it has developed six high-profile memorials (two with museums). The most striking and controversial aspect of several well-visited memorials is the exhibition of skulls, bones, and, in one location, mummified corpses. Such displays are at odds with Rwandan cultural traditions as well as the dominant Catholic faith.[195] The sociologist Claudine Vidal argues that the exposed remains "constitute a symbolic violence that is extreme in regard to Rwandan representations of death and the survivors' mourning" and that "is linked to the work of forced memorialization done

[191] See Sandra Laville, "Two Years Late and Mired in Controversy: The British Memorial to Rwanda's Past," *The Guardian*, November 13, 2006; James Smith, "Our Memorial to 50,000 Dead Is No Empty Historical Exercise," *The Guardian*, November 21, 2006.
[192] Jens Meierhenrich, "Topographies of Remembering and Forgetting: The Transformation of *Lieux de Mémoire* in Rwanda" in *Remaking Rwanda*, 290-92.
[193] Louis Marie Rugendo, "Murambi: Remembering the Rwandan Genocide," *International Justice Tribune*, April 7, 2008, 3.
[194] Rugendo, "Murambi," 3.
[195] Anna-Maria Brandstetter, "Contested Pasts: The Politics of Remembrance in Post-Genocide Rwanda," Sixth Ortelius Lecture (Wassenaar: Netherlands Institute for Advanced Study, 2010), 10-11.

by the state."[196] Forced memorialization comes in several forms. Some Tutsi survivors are compelled to place the remains of family members at memorials rather than burying them at home in the customary manner.[197] Some Hutu are pressured by local officials to go on arranged visits to the Kigali memorial and museum.[198] As Guyer points out, the memorials "justify a repressive government by presenting a specter of past violence as a permanent future possibility but they also serve as an instrument of repression." On this latter point, she observes that "the traumatic silence that they generate can be difficult to distinguish from the enforced silence that the regime demands and indeed operates as a supplement to it."[199]

Gacaca's Reparations

In the absence of the promised compensation fund, *gacaca* became the only mechanism for financial reparations – in the form of restitution. It also sought to provide some satisfaction (symbolic reparations).

Restitution

Evidence-Gathering

The 9201 cell-level *gacaca* courts were responsible for itemizing and valuing individual victims' losses. Initially, victims had to enumerate their damages in *gacaca*'s public hearings, but that process proved cumbersome and contentious. Some community members publicly accused survivors of inflating their property losses, while survivors sometimes complained that suspects had sold off property to preclude restitution. Others voiced resentment that *gacaca* was only handling genocide-related claims while ignoring property losses blamed on the RPF or returning Tutsi refugees. In 2005, the government delegated the collecting of information to local administrators.

Amicable Settlements

Government policy on *gacaca* trials for property crimes evolved considerably. Initially, trials were to take place for all property offences, unless the parties had reached an amicable settlement before March 15, 2001, the date the first *gacaca* law came into force.[200] Inevitably, that created a disincentive for further settlements. So, the government amended

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[196] Claudine Vidal, "La commémoration du génocide au Rwanda: Violence symbolique, mémorisation forcée et histoire officielle," *Cahiers d'études africaines* 64 (2004).
[197] Interview, Byumba Province 2, September 2006; Meierhenrich, "Topographies of Remembering and Forgetting," 290.
[198] Interview and site visit to Gisozi Memorial Museum, Kigali, July, 2006.
[199] Sara Guyer, "Rwanda's Bones," *Boundary 2* 36, no. 2 (2009), 161-62.
[200] 2001 *Gacaca* Law, art. 51. The manual for judges took a more pragmatic approach. See Departement des Juridictions *Gacaca, Manuel explicatif*, 127.

the *gacaca* law in 2004 to encourage settlement up until the moment of judgment.[201] When the evidence-gathering and indictment phase ended in 2006, there were more than 300,000 people accused solely of property offences. That enormous number of suspects prompted a further amendment to the *gacaca* law in 2007: property crimes were required to go through mediation first and only if that failed would they be tried by *gacaca* courts.[202] At the same time, the government pressed cell-level judges and local authorities to "sensibilise" the population to reach amicable settlements.

The government justified the shift to mediation in terms of restorative justice and reconciliation. The Service National des Juridictions *Gacaca* stated:

> with restitution or reparation, we have not forgotten that one of the objectives of the *gacaca* jurisdictions is reconciliatory justice. That is why, before introducing a demand before the jurisdiction, one must first verify if there is the will to make restitution and pay without the intervention of the *gacaca* jurisdiction. This is because this will show that the authors of these offenses are conscious of what they have done and repent.[203]

In fact, mediated settlements were less a form of restorative justice and more the result of coercion and pragmatism. "[T]he refusal to settle is considered a lack of will to reconcile which must be punished severely."[204] Both sides evinced "a certain realism" about their prospects at trial: "The pillagers know that if they go to trial they will be sentenced to pay back elevated amounts, and the victims know that it is probable that the actual value of the goods will never be paid."[205] A mediation that I attended involved the local official browbeating unhappy parties into settlement agreements.[206]

Trials and Judgments

In the end, *gacaca* dealt with 1,295,384 cases involving property crimes, the majority of which were settled through mediation. The cases that did go to trial were mostly heard by cell-level *gacaca* courts.[207] Trials often grouped together all those accused of pillaging from

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[201] 2004 *Gacaca* Law, art. 51.
[202] 2007 *Gacaca* Law. In contradictory fashion, though, the 2007 law reinstated language limiting the effect of amicable settlements to those made before that law took effect. *Id*., art. 11. That provision appears to have been largely ignored in practice.
[203] Service National des Juridictions *Gacaca*, Poursuite des infractions contre les biens endommages pendant le génocide (August 3, 2006), 3 (French translation by Penal Reform International).
[204] Penal Reform International, *Le jugement des infractions contre les biens*, 76.
[205] Penal Reform International, *Le jugement des infractions contre les biens*, 72.
[206] Byumba Province 2 mediation hearing, September 10, 2007.
[207] Although sector-level courts could hear property offenses committed in conjunction with Category

the same household. One trial I observed involved 28 accused. The Service National des Juridictions *Gacaca* promoted such group trials as a way to assign collective responsibility and assure restitution:

> The co-authors of a property offence who are at liberty must be judged at the same time in order to divide up the restitution. We adopted this strategy . . . because the genocide has been perpetrated *en masse*. If one considers the individual, one risks not realising the restitution, but if one does it collectively, the problem is resolved.[208]

At the end of group trials, *gacaca* courts often divided the restitution award equally among all those found guilty, without taking into account varying degrees of responsibility.[209] A *gacaca* judge told me his court had divided the value of replacing a slaughtered cow equally among all who had eaten its meat.[210] Some courts ordered family members and even neighbors to be collectively responsible for paying restitution. Kristen Doughty reports that *gacaca* officials and judges in her two field sites in 2008 took the position that neighbors would have to pay for a victim's house if no one confessed.[211]

Avocats sans frontières found that "the debates over goods are sometimes more lively and more lengthy than those that concern more serious genocide crimes."[212] That was not surprising given that *gacaca* had become the sole method for financial reparations. Cases involving cattle highlighted the difficulties of rendering justice where so many participated in and benefited from the pillaging.

> S: I would like to know if G didn't eat the meat from stolen cattle.
>
> G: I swear to you that I did not steal cows.
>
> Confessed perpetrator: It is G who pointed out to us where we could find other cows.
>
> [The court then calmed a verbal argument between G and the confessed perpetrator.]
>
> G: Perhaps I ate the meat, but I bought it with my own money.
>
> Judge: Tell us those you saw pillaging.

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2 crimes, they typically transferred the property claims to the lower *gacaca* courts. Avocats sans frontières, *Rapport analytique No. 4*, 19.

[208] Service National des Juridictions *Gacaca*, Poursuite des infractions contre les biens, 3.

[209] Penal Reform International, *Le jugement des infractions contre les biens*, 4, 74-75.

[210] Interview with cell-level *gacaca* judge, Byumba Province 2, August 2006.

[211] Doughty, Contesting Community, 227.

[212] Avocats sans frontières, *Rapport analytique No. 4*, 18. See Avocats sans frontières, *Rapport analytique No. 3*, 39-41; Doughty, Contesting Community, 204.

G: [Says nothing.]

L: The cows were slaughtered very close to G's house. Wasn't he curious to see what was going on there?

G: No, I am innocent.[213]

On a separate occasion, a Rwandan informant wondered aloud whether everyone who had purchased meat during the genocide would be convicted of a property offence in *gacaca*.[214]

The *gacaca* laws provided judges with no clear guidance on how to calculate restitution.[215] The original manual for *gacaca* merely states:

> To determine the sum of money to pay, the court takes several things into account. First, it takes into account the victims' damages. Then, it takes into account the real possibilities of the accused: his wealth and his poverty. Sometimes, it is better to sentence an accused to pay a realistic sum of money each month to the victim. In this case, the court specifies how many months the accused must pay this sum.[216]

One *gacaca* court impressed me with its handling of the issue. To come up with the replacement value for each looted item, the court asked the assembled audience for each item's current value in the community.[217] That trial ended with the acquittal of seven accused and the sentencing of nine who had confessed. The latter were ordered to repay the amounts they admitted stealing (mostly, 15 or 30 kilograms of beans) plus their (equal) share of the other stolen goods ($90). While this amount may seem relatively small, it is worth remembering that per capita income was $512 (in 2009).

Executing Judgment

The 2004 *gacaca* law provided three methods for accomplishing restitution: return of the looted items, monetary payment for those items, or "carrying out the work worth the property to be repaired."[218] In the proceedings described above, the *gacaca* court gave confessed defendants those three options for making restitution for the stolen beans and

[213] Byumba Province 2 *gacaca* trial, August 30, 2006.
[214] Conversation with informant, Byumba Province 2, September 10, 2007.
[215] The Service National des Juridictions *Gacaca* subsequently clarified that restitution of a pregnant cow is limited to one cow, not a cow and a calf. Service National des Juridictions *Gacaca*, "Observations du Service National des Juridictions *Gacaca* au rapport du Penal Reform International sur les infractions contre les biens" (n.d.), 4, attached as appendix to Penal Reform International, *Le jugement des infractions contre les biens*.
[216] Departement des Juridictions *Gacaca*, *Manuel explicatif*, 128.
[217] Byumba Province 2 *gacaca* trial, August 30, 2006.
[218] 2004 *Gacaca* Law, art. 95.

sorghum. Where a convicted person failed to make the ordered restitution, the law provided for the seizure of that person's goods.[219] A Service National des Juridictions *Gacaca* Instruction clarified that judgments could only be executed by local authorities, not by the victims themselves.[220]

Gacaca attempted to strike a balance between the survivors' need for restitution and the perpetrators' ability to pay restitution. For example, to help survivors, "those who have the means are going to pay for those who don't and these last are going to exercise a recovery action [against their co-perpetrators] before the ordinary courts."[221] Yet, the main obstacle to restitution was that the vast majority of perpetrators were indigent. The Service National des Juridictions *Gacaca* issued an instruction in 2007 specifically exempting certain goods from seizure so as not to impoverish perpetrators.[222]

In the trial I observed, those found guilty asked the court if they could begin paying restitution at the end of the year after the harvest. The court gave them to December 25 to repay $50, with the remaining $40 to be paid thereafter. The court also reminded defendants that they could pay that sum by working for the civil party. A local observer told me that there is a standard rate in the community for paid, unskilled labour (300 FRW, or $0.60, per day). The danger of Hutu perpetrators paying restitution through labor is that it may be perceived as a return to pre-colonial and colonial practices under which poor Hutu provided forced labour to Tutsi elites.[223]

A 2012 report on enforcement of civil judgments by the non-governmental Legal Aid Forum found *gacaca*'s judgments "the hardest to enforce in a timely manner."[224] Out of a sample of 983 *gacaca* restitution awards, 113 (11 percent) were fully enforced, 288 (29

[219] 2004 *Gacaca* Law, art. 95.
[220] Service National des Juridictions *Gacaca*, Instruction No. 14/2007 du 30/03/2007 du Secrétaire Exécutif du Service National des Juridictions *Gacaca* concernant le dédommagement des biens endommagés pendant le génocide et d'autres crimes contre l'humanité commis entre le 01 octobre 1990 et le 31 décembre 1994 (2007) (French translation by Penal Reform International).
[221] Service National des Juridictions *Gacaca, Poursuite des infractions contre les biens*, 4.
[222] Service National des Juridictions *Gacaca*, Instruction No. 14/2007 du 30/03/2007 du Secrétaire Exécutif du Service National des Juridictions *Gacaca* concernant le dédommagement des biens endommagés pendant le génocide et d'autres crimes contre l'humanité commis entre le 01 octobre 1990 et le 31 décembre 1994, March 30, 2007, art. 7.
[223] For a description of the *ubureetwa* clientship system, see Newbury, *The Cohesion of Oppression*, 140-43.
[224] Legal Aid Forum, *Monitoring of EDPRS (2008-2012) Indicators in the Justice Sector: Enforcement of Court Judgments and its Impact on Access to Justice in Rwanda* (2012), 69.

percent) were partially enforced, and 582 (59 percent) were not enforced at all.[225] Under Rwandan law, final judgments shall be executed within three months.[226] For the 113 cases of full enforcement, 40 percent were enforced within the mandated three months, another 30 percent between 3 months and a year, 19 percent between one and two years, and 11 percent between two and nine years.[227] Ninety-five percent of *gacaca* judgments go to the executive secretary of the cellule for enforcement.[228] The main reason for delayed enforcement and non-enforcement was the indigence of perpetrators.[229] Inevitably, the poor enforcement of *gacaca*'s restitution awards causes enormous frustration to survivors and survivors' organizations.[230]

Community Service

Most of those convicted by sector-level *gacaca* courts for killings and assaults served a large part of their sentences doing community service (travaux d'intérêt général or TIG). Originally, community service was supposed to consist of non-remunerated labour three days a week to benefit a convicted *génocidaire*'s local community through construction and repair of roads, bridges, and schools.[231] In 2005, however, the Government radically redesigned TIG, creating regional labour camps where those sentenced to community service spend six days a week working for the state (breaking stones for roads, digging anti-erosion trenches, building houses, etc.). While the large labour camps made TIG more manageable and less costly, it undercut the goal of reintegrating convicted *génocidaires* back into their local communities and having their community service indirectly benefit local survivors.[232] As of June 2008, 19,000 persons were performing community service in 47 labour camps, while another 46,000 were doing "TIG in proximity" (i.e. while living in their home

[225] Legal Aid Forum, *Monitoring of EDPRS*, 51, 62, 66. SURF-Survivors Fund surveyed 57 survivors who had been awarded restitution and found that none of those judgments had been fully enforced. IBUKA, "Submission to Parliament of Rwanda on Draft Organic Law Terminating *Gacaca* Courts," 2 n. 4.
[226] Civil Procedure Code, art. 200 quoted in Legal Aid Forum, *Monitoring of EDPRS*, 45.
[227] Legal Aid Forum, *Monitoring of EDPRS*, 62.
[228] Legal Aid Forum, *Monitoring of EDPRS*, 72.
[229] Legal Aid Forum, *Monitoring of EDPRS*, 73.
[230] See, e.g., IBUKA, SURF, REDRESS, et al., "Recommendations for Reparation for Survivors of the 1994 Genocide Against Tutsi," 8; Doughty, Contesting Community, 36, 242.
[231] Presidential Order No. 26/01 of 10/12/2001 Relating to the Substitution of the Penalty of Imprisonment for Community Service (2001), arts. 25, 32.
[232] Penal Reform International, *Community Service (TIG): Areas of Reflection* (2007). See Arrête Présidentiel No. 10/01 du 07/03/2005 déterminant les modalités d'exécution de la peine alternative a l'emprisonnement de travaux d'intérêt général, *Journal Officiel* no. 6 (March 15, 2005), art. 35.

communities).[233] Those sentenced to lengthy periods of TIG were typically assigned to the labor camps so they could complete their sentences more quickly.[234]

The government initially rejected proposals that community service be used to compensate victims.[235] As one justice official explained: "That's how the old Rwandan system was built. It would be bad to introduce that system because it is looked at as a form of forced labour, which can be used as a pretext for bringing animosity."[236] Since 2006, however, community service has been used to build houses for survivors.[237] In 2012, IBUKA pressed the government to have *TIGistes* build more houses for survivors, imprison those who evade TIG, and pay the value of community service into compensation for survivors.[238]

Satisfaction

Having removed the promise of compensation, the 2004 *gacaca* law sought to increase symbolic reparations to survivors by requiring confessed *génocidaire*s to make public apologies and reveal the locations of their victims' remains.[239] For the most part, though, apologies were largely formulaic requests for forgiveness from the victims, the state, and the President. One well-educated Tutsi survivor told me she did not go to *gacaca* because the perpetrators "have no remorse."[240] In some cases, survivors reacted to the lack of remorse by challenging the truthfulness of confessions in the hopes of persuading judges to hand down harsher sentences.

What many genocide survivors seemed to want most, apart from compensation, was to find the remains of their family members and rebury them with dignity.[241] During the genocide, many victims were tossed into pit latrines and anti-erosion ditches or left scattered on hillsides. The 2004 *gacaca* law required *génocidaires* to help locate their victims' remains in order to earn reduced sentences. At a September 2006 *gacaca* trial, the presiding *gacaca*

[233] Remarks of TIG official during site visit to TIG camp as part of the "International Conference on the Impact of Judicial Reforms in Rwanda," Kigali, June 16, 2008.
[234] Remarks of TIG official during site visit to TIG camp as part of the "International Conference on the Impact of Judicial Reforms in Rwanda," Kigali, June 16, 2008.
[235] See Arrête Présidentiel No. 10/01, art. 25.
[236] Alberto Basomingera, Attorney General, Ministry of Justice, Remarks at the CLADHO Conference on *Gacaca*, Kigali, February 14, 2003.
[237] Service National des Juridictions *Gacaca*, "Procès verbal de la réunion des partenaires au processus *gacaca* tenue en date du 03 juillet 2007," July 6, 2007, 3.
[238] IBUKA, "Submission on the Draft Presidential Order Determining the Modalities of Implementation of Community Service," 4-6.
[239] 2004 *Gacaca* Law, art. 54.
[240] Discussion with genocide survivor, Kigali, April 12, 2007.
[241] This is true of many survivors of mass violence elsewhere. See, e.g., Stover, *The Witnesses*, x.

judge took this a step further, telling the accused that he would only be found innocent if the bodies were located."[242] The largest survivors' organization IBUKA credited *gacaca* with helping survivors to locate their dead.[243]

Conclusion

Gacaca raised and then dashed survivors' hopes that they would be meaningfully compensated for their losses and suffering. The failure to create a compensation fund reduced survivors' incentive to participate in *gacaca*. As early as 2003, IBUKA's former president observed that "[t]here are no incentives for survivors [in *gacaca*]: there has not been compensation or reparation."[244] Penal Reform International expressed concern that, without compensation, survivors might sell their silence or testimony in *gacaca*.[245] The absence of a compensation fund and the limited ability of perpetrators to pay restitution meant that *gacaca*'s community service component became the only meaningful way for survivors to get meaningful reparations. But that could be perceived as a return to Hutu doing forced labor for Tutsi.

[242] Kigali 1 *gacaca*, September 2006.
[243] Interview with Benoît Kaboyi, Executive Secretary, IBUKA, Kigali, June 14, 2006.
[244] Antoine Mugesera, Remarks at CLADHO Conference on *Gacaca*, Kigali, February 14, 2003.
[245] Penal Reform International, *Rapport de synthèse de monitoring et de recherché sur la gacaca: Phase pilote janvier 2002-décembre 2004* (2005), 50.

CHAPTER 11: RECONCILIATION'S REVENGE

"*Urwagwa ntirukura urwangano mu nda.*"
("Banana beer does not lift hate from the stomach.")
– Rwandan proverb[1]

"As for saying that you will not forgive him, or that you will not do this or that, that is very bad. Whether you like it or not, the law is the law."
– Jean-Marie Mbarushimana, then Prosecutor General of Nyabisindu[2]

Introduction

Reconciliation has usually been invoked to justify amnesties and truth commissions.[3] Rwanda turned that on its head. The RPF appropriated the reconciliation discourse from South Africa's Truth and Reconciliation Commission even as it rejected that model. The RPF then used the language of reconciliation to legitimize maximalist prosecutions.

During the *Urugwiro* meetings in 1998 and 1999, *gacaca*'s advocates averred that it would promote national unity and reconciliation. For one thing, participatory justice would involve all Rwandans in rebuilding the country. For another, maximal accountability would "eradicate the culture of impunity." *Gacaca* was breathtakingly ambitious: "the aim is not only to repair any particular offense, committed by this person or that one, but it is also to eradicate the roots of killings in Rwanda, to rebuild Rwanda."[4] The *Gacaca* laws promised to further reconciliation in three ways: "to eradicate for good the culture of impunity"; promote "the reconstitution of the Rwandese society"; and "provide for penalties . . . to favor [perpetrators'] reintegration into the Rwandese society without hindrance to the people's normal life."[5]

Launching *gacaca* in 2002, President Kagame proclaimed that it would

Uproot the culture of impunity

Unite Rwandans on the basis of justice, which reinforces unity and reconciliation

Demonstrate the capacity of the "Rwandan family" to resolve its own problems[6]

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[1] Crepeau and Bizimana, *Proverbes du Rwanda*, 552.
[2] Quoted in Penal Reform International, *Interim Report*, 23.
[3] For a provocative overview of this development, see Claire Moon, "Healing Past Violence: Traumatic Assumptions and Therapeutic Interventions in War and Reconciliation," *Journal of Human Rights* 8, no. 1 (2009), 71-91.
[4] Office of the President, *Report on the Reflection Meetings*, 63-65.
[5] 2001 *Gacaca* Law, preamble. See 2004 *Gacaca* Law, preamble.
[6] "Speech of President Kagame at the Official Launch of *Gacaca* Jurisdictions," June 18, 2002.

As if that wasn't enough, other RPF leaders promised that truth-telling in *gacaca* would lead to individual and social healing. For example, the executive secretary of the government's National Unity and Reconciliation Commission claimed that "The encouragement of truth telling and confession in return for commutation of a sentence is cathartic and heals."[7]

The RPF burdened *gacaca* with unrealistic expectations. This partly reflected the RPF's ambitious social engineering. But it also reflected the unhappy trend started by the South African Truth and Reconciliation Commission in which transitional justice policymakers over-promise and under-deliver.[8] Reconciliation was simply too much to ask of people, especially survivors, less than 15 years after genocide. Yet, *gacaca* did not just fail to reconcile; it actually made it more difficult in some communities as the uneasy coexistence among neighbors was up-ended by accusations and counter-accusations. That was not unanticipated: as early as 1999, some Rwandan policymakers warned that "carrying out trials of the genocide . . . by *Gacaca* would be the origin of other disputes."[9]

The *gacaca* laws and administration never clarified what reconciliation meant, what was needed to make it happen, or how to measure it. Consequently, reconciliation remained a vague, ritualistic incantation. As discussed in Chapter 2, that partly reflects a deeper problem with transitional justice theory and practice. The RPF's reconciliation and genocide narratives sometimes clashed openly in *gacaca*. In one neighbourhood in Kigali, a government official reassured people that it was acceptable to discuss ethnicity in *gacaca*: "Here, we must not have fear to say that the ethnicity that was targeted during the genocide is that of the Tutsi."[10] By contrast, the Prosecutor General of Nyabisindu, a charismatic Tutsi survivor, told the crowd at a presentation of *sans dossiers* in 2002: "Don't say I'm a survivor and show yourself before everybody. I don't want ethnicity. No Tutsi, no Hutu, no Twa. We are all Rwandans."[11] Yet, the prosecutor did not explain how people could talk openly about genocide without mentioning ethnicity.

Gacaca was supposed to promote reconciliation. As with other transitional justice mechanisms, it might have done so in one of three ways: breaking cycles of violence, healing through truth-telling, or fostering civic trust. This chapter looks at *gacaca*'s impact on each of

[7] Fatuma Ndangiza, "The Impact of *Gacaca* and TIG on the Challenges of Unity and Reconciliation: 14 Years after the Genocide," Power Point presentation, Kigali, June 18, 2008.
[8] See Lydiah K. Bosire, "Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa," *Sur – International Journal on Human Rights* 3, no. 5 (2006), 71-107.
[9] Office of the President, *Report on the Reflection Meetings*, 62-63.
[10] Kigali 1 *gacaca*, 2002.
[11] Prosecutor General's Remarks, Butare Stadium, September 27, 2002.

those three areas in the short-term. It concludes by looking at the role of bystanders and rescuers in promoting reconciliation.

Reconciliation through *Gacaca*?

Breaking Cycles of Violence

There are two ways in which *gacaca* can be seen as breaking cycles of violence. First, as President Kagame proclaimed, *gacaca* would "uproot the culture of impunity" that the RPF sees as contributing to the 1994 genocide. Prosecutor General Martin Ngoga argues that "[t]he failure of previous governments to bring such perpetrators [of mass killings since 1959] to justice allowed the organizers and perpetrators of the 1994 genocide to commit crimes with no fear of punishment."[12] Clark endorses this, writing that "[t]here is little doubt that a culture of impunity before the genocide was a critical factor in enabling the genocide."[13] This claim, however, does not find support in the work of Straus, Fuji, or McDoom. In fact, Straus' interviews with confessed perpetrators demonstrate that only a small percentage had thought about earlier massacres during the genocide.[14] Straus' findings are consistent with the argument that most perpetrators participated for situational – rather than behavioral, cultural, or ideological – reasons.

From the RPF's perspective, *gacaca*'s maximalist prosecutions served both an expressive and a deterrent function. They sent a clear message that there was no more impunity for violence directed at Tutsi. In addition, they may have provided specific and general deterrence against future repetitions of such violence. *Gacaca*'s emphasis on maximalist prosecutions (and reduced sentences) certainly accords with studies showing that deterrence depends on the likelihood rather than the severity of punishment. Interestingly, then, the National Unity and Reconciliation Commission's attitudinal surveys found that a very large majority of respondents viewed *gacaca* as "a form of amnesty for the guilty" and that this view had "rapidly gain[ed] ground as the *gacaca* have unfolded," particularly among survivors and prisoners.[15]

A second way in which *gacaca* may break cycles of violence is by individualizing guilt. A Rwandan employee of Avocats sans frontières captured this notion when he told me: "It is also good for peaceful coexistence when the truly guilty are known. . . . Those Hutu

[12] Ngoga, "The Institutionalization of Impunity," 321.
[13] Clark, *The Gacaca Courts*, 234.
[14] Straus, *The Order of Genocide*, 175.
[15] National Unity and Reconciliation Commission, *Social Cohesion in Rwanda*, 63.

who did nothing . . . are now cleaned of the common feeling of guilt."[16] The problem, however, is that individual (and group) trials of nearly 2 million Hutu quickly took on the appearance of collectivized guilt. That was further reinforced by the fact that *gacaca* did not try war crimes committed against Hutu and that national courts have only convicted two RPF soldiers for committing war crimes. Furthermore, government officials meted out collective punishments (including fines and beatings) against Hutu residents of communities where genocide survivors suffered threats, injury, or property losses (sometimes related to *gacaca* testimony).[17] The head of *gacaca* stated directly that such collective punishments assure safety and security.[18]

It is difficult to credit *gacaca* for the low levels of inter-ethnic violence. As Straus shows, "violence is largely absent when political control is clearly established."[19] With the RPF firmly in control for the foreseeable future, there is no likelihood of widespread ethnic violence. Nevertheless, *gacaca* prompted some low-level, localized violence: judges, suspects, survivors, and witnesses were sometimes threatened and a few hundred killed.[20] Such localized violence often took on an ethnic dimension as many judges, survivors, and prosecution witnesses were Tutsi. Survivors' organizations criticized the government for not assuring security for survivors.[21] Several *gacaca* judges described various forms of intimidation, including the throwing of stones on their roofs at night.[22] One accuser complained that "the last time, I was menaced by this family for the testimony that I have

[16] Interview with Avocats sans frontiers staff, Kigali, July 2006. See Longman and Rutagengwa, "Memory, Identity and Community in Rwanda," 173-74.
[17] Human Rights Watch, *"There Will Be No Trial": Police Killings of Detainees and the Imposition of Collective Punishments* (2007), 27-29; Rettig, "*Gacaca*," 43.
[18] Interview with Domitilla Mukantaganzwa, Executive Secretary, National Service for *Gacaca* Jurisdictions, Kigali, July 2006.
[19] Straus, *Order of Genocide*, 176.
[20] See Human Rights Watch, *Justice Compromised*, 91-92; Human Rights Watch, *"There Will Be No Trial*," 6-9; Phil Clark and Nicola Palmer, *Testifying to Genocide: Victim and Witness Protection in Rwanda* (London: REDRESS, 2012), 23-29; African Rights and REDRESS, *Survivors and Post-Genocide Justice in Rwanda: Their Experience, Perspectives and Hopes* (2008), 6-19; Rettig, "*Gacaca*," 43-44; Edwin Musoni, "Human Rights Body Seeks Revision of Genocide Witness Protection Units," *The New Times*, November 19, 2012; Commission Nationale des Droits de la Personne, *Rapport de la restitution annuelle des resultats du monitoring des juridictions gacaca* (2005), 8-16; LIPRODHOR, *Situation des droits de la personne au Rwanda: Rapport 2003–2004* (2005), 46-48, 50; PAPG, *Les cas d'insécurité des temoins et des rescapés du genocide dans les juridictions gacaca* (2004); Penal Reform International, *Research Report on the Gacaca (Report VI): From Camp to Hill, the Reintegration of Released Prisoners* (2004), 50-54.
[21] Interview with Consolee Mukanyiligira, Executive Secretary, AVEGA-AGAHOZO, Kigali, July 2006.
[22] Interviews with *gacaca* judges, various locations, 2008.

made here."[23] One person who accused others in *gacaca* stated he was afraid of being poisoned. The *gacaca* president rebuked him for frightening people and told him to inform the judges if anybody threatened him.[24] Sudden illnesses and deaths were sometimes blamed on poisonings and linked to *gacaca*, generating a vicious cycle of rumors.[25] As the National Unity and Reconciliation Commission reported in 2008:

> Significant majorities of genocide survivors (82%) and prisoners (54%) say they feel threatened during the *gacaca*, and large shares of all groups also believe that *inyangamugayo* as well as defense and prosecution witnesses will be subject to retribution during or after the *gacaca* proceedings. This feeling of insecurity during the *gacaca* is particularly pronounced among female survivors.[26]

The same survey also found that "25% [of survivors] do not believe that they will be able to cohabitate peacefully with even those perpetrators who confessed; and 20% of survivors reject even the notion that they might feel safer after the end of *gacaca*, indicating that their sense of insecurity is permanent."[27]

Truth-Telling and Healing

Gacaca was meant to produce reconciliation through truth-telling. Yet, as discussed in Chapter 9, there were real obstacles to truth-telling in *gacaca*. In addition, many Rwandans thought witnesses did not tell the truth.[28] Such attitudes clearly limited *gacaca*'s ability to contribute to reconciliation. Even in the absence of truth-telling, *gacaca* might arguably have promoted reconciliation through public narratives of repentance and forgiveness. Yet, I heard very little of either repentance or forgiveness in the *gacaca* sessions I attended. That was partly cultural, as Rwandans consider it shameful to express emotion in public.[29]
When *génocidaires* confessed their actions, they rarely explained their motivations and described themselves as lacking agency. Perpetrators frequently showed little remorse. During one *gacaca* session, a confessed killer remarked, "if God wants, then people die." In

[23] Butare 1 *gacaca*, September 2002.
[24] Byumba 2 *gacaca*, November 6, 2002.
[25] In one district, the Mayor reportedly held a meeting where he mentioned that a list of survivors to be poisoned was circulating. In the same district a man was allegedly poisoned after he had threatened to falsely accuse another in *gacaca* for pillaging. Interview, Kigali, February 28, 2003.
[26] National Unity and Reconciliation Commission, *Social Cohesion in Rwanda*, 6. For more detail, see *id*. at 74-76.
[27] National Unity and Reconciliation Commission, *Social Cohesion in Rwanda*, 7.
[28] National Unity and Reconciliation Commission, *Social Cohesion in Rwanda*, 2-3.
[29] Overdulve, "Fonction de la langue et de la communication au Rwanda," 279-80, 282.

response to a question from the audience, he became testy: "I've already confessed what I did, so I don't understand what other things you want from me. I have confessed something that isn't good, but I ask the family to have the courage to forgive me."[30] Klaas de Jonge, an anthropologist who monitored *gacaca* for several years with Penal Reform International, stated: "The 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."[31] As *gacaca* progressed, the government tried to make perpetrator confessions more meaningful for reconciliation. Although the 2004 law required those pleading guilty to make public apologies, it could not compel sincerity: many perpetrators made "formulaic" apologies that asked for forgiveness from the Rwandan people and President Kagame.[32]

Not surprisingly, survivors often responded publicly to confessions with anger, resignation, or silence rather than forgiveness.[33] At the start of *gacaca*, a Rwandan psychologist had noted that "Confessions and seeking forgiveness do not remove fears and anger – they can even increase them."[34] One survivor in a *gacaca* session asked, "How can one pardon these people who lie?"[35] After hearing a confession, the mother of a child who was killed responded angrily, "Don't ask me for forgiveness."[36] Survivors often challenged confessions as untruthful or incomplete, sometimes persuading judges to hand down maximum sentences. Rettig estimated that judges found confessions incomplete in nearly 40 percent of the trials that he observed in Sovu over a ten-month period.[37]

Overall, testimonial practices in *gacaca* did not appear to promote reconciliation, at least in the short term. An attitudinal survey conducted by the National Unity and Reconciliation Commission found that

> A majority of genocide survivors also feels that public testimony during the *gacaca* aggravates tensions between families (76%) and that the families of those found guilty of crimes of genocide will always feel resentful (66%).

[30] Byumba 1 *gacaca*, October 2002.
[31] Interview with Klaas de Jonge, Kigali, September 2002.
[32] *See* Avocats Sans Frontiéres, *Rapport Analytique 2005*, 10; Penal Reform International, *Report IV, The Guilty Plea Procedure, Cornerstone of the Rwandan Justice System* (2003), 23; Karekezi, et al., "Localizing Justice," 79.
[33] See Avocats sans frontières, *Rapport Analytique 2005*, 10.
[34] Remarks of Simon Gasibirege, Professor, National University of Rwanda, at CLADHO Conference on *Gacaca*, Kigali, February 14, 2003.
[35] Remarks at "International Conference on the Tutsi Genocide and Reconstruction of Knowledge," Kigali, July 23, 2008.
[36] Butare *gacaca*, January 2003.
[37] Rettig, "*Gacaca*," 39.

> Prisoners, reject the latter argument (63%), but agree that testimony during *gacaca* aggravates tensions (71%).[38]

Those findings contest Clark's assertion that "[m]any everyday Rwandans also believe that greater unity is a likely outcome of this dialogue at *gacaca*."[39] Furthermore, a psychosocial study of *gacaca* found that both victims and perpetrators "manifested a considerable increase in fear, sadness, and anxiety" and victims experienced "a sharp increase" in reporting symptoms of post-traumatic stress.[40]

Did *Gacaca* Produce Dialogic Truth and Healing?

Early on, some scholars predicted *gacaca* would carve out participatory, democratic space in which dialogic truths and reconciliation could emerge.[41] This, however, overlooks the distinction between a government's "invited spaces" and "popular spaces."[42] Andrea Cornwall cautions that some "invited spaces have been translated onto institutional landscapes in which entrenched relations of dependency, fear, and disprivilege undermine the possibility for the kind of deliberative decision making they are to foster."[43] This was the case with *gacaca* as described in Chapters 4 and 9.

Clark insists that *gacaca* produced dialogic truth, restorative justice, and reconciliation but his own evidence often suggests otherwise.[44] He states

> my research indicates a high level of public deliberation and debate during many *gacaca* hearings and . . . a strong desire among all groups in Rwandan society . . . to engage in truth-telling and truth-hearing through *gacaca*.[45]

Yet, he heavily qualifies, and even undermines, his argument in three crucial respects. First, Clark intermittently acknowledges that "Many Rwandans, especially genocide survivors, are wary of truth-telling at *gacaca*."[46] Second, he admits that "Between these three periods [the

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[38] National Unity and Reconciliation Commission, *Social Cohesion in Rwanda*, 2-3.
[39] Clark, "Hybridity, Holism, and 'Traditional' Justice," 50.
[40] Rimé et al., "The Impact of *Gacaca* Tribunals in Rwanda," 703.
[41] See, e.g., Aneta Wierzynska, "Consolidating Democracy through Transitional Justice: Rwanda's *Gacaca* Courts," *New York University Law Review* 79, no. 5 (2004), 1962; Maya Goldstein Bolocan, "Rwandan *Gacaca*: An Experiment in Transitional Justice," *Journal of Dispute Resolution* 2, no. 2 (2004), 382.
[42] Andrea Cornwall, "Introduction: New Democratic Spaces? The Politics and Dynamics of Institutionalized Participation," *IDS Bulletin* 35, no. 2 (2004).
[43] Cornwall, "Introduction: New Democratic Spaces?" 2. See Andrea Cornwall, "Deliberating Democracy: Scenes from a Brazilian Municipal Health Council," IDS Working Paper No. 292 (2007).
[44] See, e.g., Clark, *The Gacaca Courts*, 148, 213, 216-17, 219.
[45] Clark, *The Gacaca Courts*, 213; Clark, "Hybridity, Holism, and 'Traditional' Justice," 55-58.
[46] Clark, *The Gacaca Courts*, 195; see *id*. at 140, 143, 149, 190-99, 209-12.

start of *gacaca*, the beginning of the trial phase, and Category 1 trials], however, the population in the observed jurisdictions participated much less during hearings, both in terms of attendees and the quality of the communal discussions."[47] Third, he recognizes that "much of the truth-telling during hearings has become perfunctory, limiting the communal dialogue possible through *gacaca*."[48]

Clark claims "that *gacaca* has proven effective as a mode of restorative justice in many communities."[49] Yet, he undercuts his claim in several ways. He fleetingly admits that *gacaca*'s outcome has been more retributive and its process less negotiated.[50] He also briefly acknowledges that "the population's interpretations of justice largely mirror the government's views, emphasizing the importance of retributive and deterrent, rather than restorative, justice."[51] Similarly, he notes that the desire of genocide survivors for retribution undoes *gacaca*'s potential for restorative justice:

> Because many survivors believe that perpetrators have not received the degree of punishment they deserve, their sense of trust in *gacaca* and in those with whom they interact during hearings has decreased. Without this popular confidence, *gacaca* in some communities has struggled to achieve restorative justice.[52]

Clark further claims that *gacaca* "can produce reconciliatory results" through promoting dialogue and restorative justice.[53] As he later elaborates:

> *Gacaca* creates a space in which individuals have begun discussing genocide-related issues, especially the sources of their conflicts, with a view towards rebuilding their fractured relations. As suspects are encouraged to confess their crimes publicly and apologize to their victims, survivors who often feel great anger and resentment towards suspects may now feel that they are ready to engage with them.[54]

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[47] Clark, *The Gacaca Courts*, 148.
[48] Clark, *The Gacaca Courts*, 216. Clark blames this on three factors: fatigue, the legal complexity of Category 1 cases, and the government's "enforced speeding up of many trials." *Id.* at 214-16.
[49] Clark, *The Gacaca Courts*, 250.
[50] Clark, *The Gacaca Courts*, 255.
[51] Clark, *The Gacaca Courts*, 242.
[52] Clark, *The Gacaca Courts*, 255; see *id*. at 242.
[53] Clark, *The Gacaca Courts*, 168.
[54] Clark, *The Gacaca Courts*, 340.

Yet, Clark does not offer any examples of survivors who actually became "ready to engage" with perpetrators as a result of dialogue in *gacaca*.[55]

Civic Trust

As discussed above, civic trust has both a horizontal and vertical dimension: trust between groups and trust in political institutions. Such trust is manifested as sufficient toleration of ethnic and political difference to allow for democratic dissensus. Obviously, the RPF's authoritarian governance and reconciliation ideology do not permit much political dissensus. Indeed, the National Unity and Reconciliation Commission defines reconciliation as a "consensus practice of citizens."[56] Still, it may be that *gacaca* has fostered some space for civic trust.

Many Hutu and Tutsi have had difficulty seeing past their own notions of collective victimization to comprehend the suffering of the other group. Consequently, *gacaca* was often perceived through an ethnic lens. Some Tutsi survivors saw it as a disguised amnesty for those who had killed their family members. A representative of AVEGA, the leading organization of women genocide survivors, told a public gathering: "*Gacaca* is for liberating the prisoners. It's a sort of hidden amnesty."[57] One survivor scoffed at the notion of participating in *gacaca*, calling it "a deal between the government and the baHutu."[58] Meanwhile, some Hutu saw *gacaca*, and particularly, its exclusion of RPF war crimes, as an expression of victor's justice or a mechanism for imposing collective guilt on Hutu. Some argued that *gacaca* elicited false confessions from innocent people grown weary of being unjustly detained for many years. Surprisingly, the Service National des Juridictions *Gacaca* acknowledged such (ethnicized) perceptions as early as 2004:

> There are those who have responded that the genocide survivors are not satisfied with *gacaca* because the sentences that it envisages do not reflect the gravity of crimes of genocide. Equally, the perpetrators who are now freed do

[55] Clark, *The Gacaca Courts*, 312-25. He only provides quotes from two *gacaca* judges in 2003. *Id*. at 317.
[56] National Unity and Reconciliation Commission, "The National Policy on Unity and Reconciliation" (2007) quoted in National Unity and Reconciliation Commission, *Rwanda Reconciliation Barometer* (2010), 19.
[57] AVEGA reprepresentative, Coexistence Network meeting, Kigali, July 23, 2002. For similar view, see Jean Baptiste Kayigamba, "Without Justice, No Reconciliation: A Survivor's Experience of Genocide" in Clark and Kaufman, *After Genocide*, 41.
[58] Interview, Kigali, February 1, 2003.

not appreciate *gacaca* because in the course of proceedings, their roles might be revealed.[59]

It is difficult to gauge how much those attitudes may have changed over time given the paucity of both national- and local-level opinion surveys.

National Surveys

Since 2005, when *gacaca* was extended nationwide, the government's National Unity and Reconciliation Commission has published two large-scale opinion surveys – one in 2008 (covering 2005 to 2007) and the other in 2010 – that measured inter-personal trust and trust in government, among other things. It is difficult to measure civic trust in contemporary Rwanda. To its credit, the Commission acknowledged several obstacles in gathering reliable data for its 2010 survey. This is worth quoting at some length:

> Both citizens and local leaders are regularly sensitized and exposed to government programming and policies, including through assessments that often result in rewards to the best performers. In addition to this sense of competition, none of the local leaders would like his entity to be seen as niche [sic] of bad opinions. . . . Many local leaders . . . appeared to anticipate responses that local citizens would give to the RRB [Rwanda Reconciliation Barometer] and therefore attempted to prepare those living in the sampled *umudugudu*, or to secure an active role in determining which households would be visited.
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> * * *
>
> Fieldworkers remarked on a tendency amongst citizens to agree to participate only when assured that local leaders had been informed and granted consent for the research to take place in advance. In some instances, this even required a formal introduction of the interviewers to citizens by local leaders. . . . such direct involvement of local leaders in the research process could in some instances have impacted on citizen perceptions of the independence of the research team.
>
> . . . respondents were generally hesitant to respond frankly to questions related to ethnicity. Many research participants told fieldworkers that referring to ethnic groups, such as Hutu, Tutsi or Twa, is "currently forbidden" by

[59] Service National des Juridictions *Gacaca*, 2004.

> government. Fieldworkers also detected significant reluctance to respond to questions related to government institutions and public policies, including those of the *gacaca* courts, the TIG [community service], and national reconciliation policy and land redistributions. Some research participants were also under the impression that they themselves were being evaluated or tested on their knowledge and compliance with government policies.[60]

This passage speaks to the methodological difficulties of doing research in Rwanda, especially the danger that attitudinal surveys may wind up measuring respondents' capacity to ventriloquize widespread government propaganda. But it also highlights how ordinary Rwandans are fearful of expressing anything that could be interpreted as criticism of, or non-compliance, with state policies. That may say more about the state of trust between citizens and the state than the actual findings of the 2010 survey.

With respect to inter-personal trust, the 2008 report found that "Feelings of distrust have been growing . . . from 49% in 2005 to 58% in 2007."[61] It also found *gacaca* having a mixed effect on inter-personal trust:

> Seventy-three percent of survivors believe that they will be able to coexist harmoniously with prisoners who have confessed in the future and 71% believe that the families of those convicted of crimes of genocide and families of the victims will be able to reconcile, even though 46% of survivors also feel that it would be naïve to trust prisoners in the future.
>
> . . . Despite these hopes for future reconciliation, other statements indicate that large obstacles remain and will continue to pose challenges to community cohesion. A majority of genocide survivors also feels that public testimony during the *gacaca* aggravates tensions between families (76%) and that the families of those found guilty of crimes of genocide will always feel resentful

[60] National Unity and Reconciliation Commission, *Rwanda Reconciliation Barometer*, 31-32. The Reconciliation Barometer was conducted just two months before the 2010 presidential elections, which, as the report admits, increased participants' reluctance to give forthright responses. *Id*. at 30.
[61] National Unity and Reconciliation Commission, *Social Cohesion in Rwanda*, 2. Curiously, survivors and detainees did "not seem to have stronger feelings of distrust than the general population." *Id*. at 29. However, survivors were more skeptical that Rwandans could work together. *Id*. at 30-31.

> (66%). Prisoners, reject the latter argument (63%), but agree that testimony during *gacaca* aggravates tensions (71%).[62]

That report prompted a Rwandan participant at a 2008 conference to publicly challenge *Gacaca*'s Executive Secretary: "Are we rehabilitating our society really? . . . [The NURC study] showed that *gacaca* is the number two cause of conflict after the ideology of genocide."[63]

The 2008 report also revealed high levels of support for the central government, though that was partly called into question by fairly low levels of civic engagement.[64] Trust in *gacaca* was variable:

> While large numbers of the general population (92%) believe that the *inyangamugayo* are honest and respect the truth, only 69% of survivors and 32% of prisoners share that opinion. For both groups, survivors and prisoners, trust in the *inyangamugayo* has dropped significantly since 2005.[65]

Overall, the 2008 report found *gacaca*'s short-term effect on civic trust to be decidedly mixed.

The National Unity and Reconciliation Commission sought to measure inter-ethnic trust for the 2010 Rwanda Reconciliation Barometer. Thirty-one percent of respondents agreed with the statement that "Rwandans still judge each other on the basis of ethnic stereotypes." Genocide survivors were more likely to agree with this statement (39 percent) than those sentenced to TIG (18 percent). Twenty-five percent expressed agreement with the position that "It is difficult for me or my family to trust Rwandans who found themselves on the other side of the conflict during the genocide." Again, genocide survivors were more likely to share that view (38 percent) than *TIGistes* (21 percent). Large majorities of all respondents expressed comfort with inter-ethnic contact and interactions.[66] Still, 35 percent of respondents agreed with the view that "I have no choice but to reconcile with others in my community."[67]

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[62] National Unity and Reconciliation Commission, *Social Cohesion in Rwanda*, 6. For more detail of these findings, see *id*. at 67-73. Regional variation in inter-personal trust may have been attributable to different experiences of the genocide and its aftermath. *Id*. at 33.
[63] Remarks at "International Conference on the Tutsi Genocide and Reconstruction of Knowledge," Kigali, July 23, 2008.
[64] National Unity and Reconciliation Commission, *Social Cohesion in Rwanda*, 2-3.
[65] National Unity and Reconciliation Commission, *Social Cohesion in Rwanda*, 5. See id. at 59-61.
[66] National Unity and Reconciliation Commission, *Rwanda Reconciliation Barometer*, 72-73, 75-86.
[67] National Unity and Reconciliation Commission, *Rwanda Reconciliation Barometer*, 62, 71.

The Reconciliation Barometer also found overwhelming trust in political leaders and institutions. Ninety-one percent of respondents agreed with the statement that "I can trust this country's leaders to do what is in my best interest" and another 82 percent agreed with the statement that "The country's leaders care about all people in Rwanda equally."[68] Ninety percent expressed trust in the justice system, with 83 percent agreeing that *gacaca* judges were impartial.[69]

In 2006, a group of social psychologists conducted a nationwide study of victims and perpetrators who had participated in *gacaca*. They deliberately limited themselves to looking at individual emotions and inter-ethnic relations.[70] The study found that participants in *gacaca*: "strengthen[ed] [their] self-definition in 'non-ethnic' terms"; "favored a personalization or individuated perception of members of the outgroup"; and "expressed more positive stereotypes of outgroup members."[71] The authors of the study recognized that its reliance on self-reporting made some measures susceptible to "the intrusion of experimental, social, or even political demands."[72] Another cause for concern is that the authors misunderstood *gacaca* as a truth and reconciliation commission in which "punishments were limited to social works."[73]

Local Studies

There are surprisingly few in-depth studies of how *gacaca* affected local community dynamics.[74] Max Rettig conducted ten months of ethnographic fieldwork in Sovu in southern Rwanda. As part of that, he conducted two opinion surveys (the first in November-December 2006 and the second in May 2007) that allowed him to capture changing attitudes as *gacaca* courts issued convictions and acquittals.[75] Given the political sensitivity around ethnicity, Rettig uses the categories "survivor/returnee" and "non-survivor/non-returnee."[76] The surveys revealed a marginal increase in perceptions of "distrust among neighbors" with a larger increase in perceptions of "conflicts over housing and/or land" (across both categories)

[68] National Unity and Reconciliation Commission, *Rwanda Reconciliation Barometer*, 40. At the same time, a third of respondents felt they "have very little say in the important public decisions that affect my life." *Id*. at 41.
[69] National Unity and Reconciliation Commission, *Rwanda Reconciliation Barometer*, 43.
[70] Rimé et al., "The Impact of *Gacaca* Tribunals in Rwanda," 705.
[71] Rimé et al., "The Impact of *Gacaca* Tribunals in Rwanda," 703-04.
[72] Rimé et al., "The Impact of *Gacaca* Tribunals in Rwanda," 704-05.
[73] Rimé et al., "The Impact of *Gacaca* Tribunals in Rwanda," 698.
[74] The most notable exception is Anne Aghion's astonishing quartet of documentaries filmed in one community over a nine-year period.
[75] Rettig, "*Gacaca*," 27-28, 35.
[76] These can be used as rough proxies for Tutsi and Hutu, respectively.

over the six-month period. More revealingly, there was a marked gap in perceptions between the two groups: in both surveys, a higher proportion of "survivors/returnees" thought that "distrust among neighbors" and "conflicts over housing and/or land" had worsened.[77] But approximately 80 percent in both groups felt that theft had gotten worse. As for vertical trust, the surveys showed high – and increasing – levels of agreement with the statement "I have confidence in the *gacaca* courts" (from 84 percent to 94 percent). Between the two surveys, however, 13 percent of survivors/returnees shifted from "strongly agree[ing]" to "agree[ing]." When Rettig supplemented his survey data with more qualitative data from interviews and focus groups in the community, he discovered that "*Gacaca* is fueling – or at least exposing – conflict, resentment, and ethnic disunity."[78]

Other researchers also found that *gacaca* proceedings heightened fear, suspicion, and tension in local communities.[79] After the genocide, it was hard enough for survivors, perpetrators, bystanders, and rescuers to remain living together in small communities, bound together by mutual impoverishment, but that *modus vivendi* was disrupted by accusations and counter-accusations in *gacaca*.[80] In several communities, social relations suffered as *gacaca* progressed. At some pre-trial sessions I attended, Tutsi survivors sat apart from their Hutu neighbors.[81] That separation was formalized at the trial phase when survivors often sat together on benches reserved for civil parties.

Dissensus and Intolerance

Civic trust means permitting dissensus and fostering political toleration. Yet, the RPF regime and *gacaca* judges have been intolerant of criticism directed against *gacaca*, particularly by political figures and journalists. In 2005, police interrogated Dr. Théoneste Niyitegeka, a former presidential aspirant, after he criticized *gacaca* in an interview with the

[77] Rettig, "*Gacaca*," 38.
[78] Rettig, "*Gacaca*," 29. For the survey data quoted in this paragraph, see *id*. at 37-38.
[79] See LIPRODHOR, *Situation des droits de la personne au Rwanda: Rapport 2003–2004*, 110; Penal Reform International, *Research on the Gacaca (Report V)*, 24-25; Burnet, "The Injustice of Local Justice," 186–88; Bert Ingelaere, "Does the Truth Pass Across the Fire Without Burning?" 22–24.
[80] Susanne Buckley-Zistel describes how her Rwandans respondents in 2003-4 were "choosing amnesia" and "pretending peace" in order to live together in a context of mutual distrust. Susanne Buckley-Zistel, "We Are Pretending Peace: Local Memory and the Absence of Social Transformation and Reconciliation in Rwanda" in Clark and Kaufman, *After Genocide*, 129-31, 136-38; Susanne Buckley-Zistel, "Remembering to Forget: Chosen Amnesia as a Strategy for Local Coexistence in Post-Genocide Rwanda," *Africa* 76, no. 2 (2006), 133-34, 139-42, 145.
[81] Other observers reported the same. Penal Reform International, *The Guilty Plea Procedure*, 36; Arthur Molenaar, *Gacaca*: Grassroots Justice after Genocide: The Key to Reconciliation in Rwanda? (graduation thesis, University of Amsterdam, 2004), 83-86.

Voice of America. They also tried to get him to publicly retract his criticisms.[82] Bernard Ntaganda, the head of the PS-Imberakuri opposition party, was arrested in mid-2010, just ahead of the presidential elections, on charges of breaching state security and "harboring divisionism." As evidence, the indictment cited Ntaganda's public criticism of *gacaca*:

> "There are groups of extremists in the *Gacaca*." . . . By tarnishing the *Gacaca* on personal feelings, he can bring Rwandan people to lose confidence in the authority of [the] State and its institutions, which can lead to unrest and confrontations.
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> "In *Gacaca*, Rwandans are punished according to their appearance." Here he wants people to consider that there is no justice, that laws are not followed in the *Gacaca*, only the appearance of the accused person counts. This lie can lead to strife between Rwandans who can now conclude that some people are not punished while others are pursued only because of their appearance.[83]

Ntaganda was convicted of breaching state security and harboring division, and sentenced to four years in prison.[84]

When Jean Léonard Rugambage, a Rwandan journalist, exposed corruption by *gacaca* courts in one locality, he was suddenly arrested on genocide charges by one of those courts, even though he had served with the army in a different province during the genocide. Challenging the proceedings before the sector *gacaca*, he was sentenced to 12 months for contempt and intimidation and later placed in Category 1. A *gacaca* appeal court overturned his contempt conviction in July 2006, but kept him in pre-trial detention on the genocide charge. A few days later, after the intervention of the Service National des Juridictions *Gacaca*, the cell *gacaca* ordered his provisional liberation, acknowledging that his initial arrest had been arbitrary. While Rugambage was eventually freed, it took eleven months and then only after an extraordinary (and perhaps extra-legal) intervention by the Service

[82] Human Rights Watch, *Justice Compromised*, 98.
[83] National Public Prosecution Authority, Indictment, RONPJ 0696/10/KGL/NM/RB, August 6, 2010, 3-4.
[84] The Rwandan Supreme Court upheld that conviction and sentence in early 2012. Human Rights Watch, "Rwanda: Opposition Leader's Sentence Upheld," April 27, 2012.

National des Juridictions *Gacaca*, which might have not acted had his case not received considerable attention from human rights NGOs and donors.[85]

Bystanders, Rescuers, and Reconciliation

Mass atrocity is often made possible by the mass of bystanders. As discussed in earlier chapters, legal theorists and Rwandan policymakers have sought to make bystanders legally and morally culpable. *Gacaca* went further than any other transitional justice mechanism in holding bystanders to account: by prosecuting over 1.3 million cases of (often opportunistic) theft during the genocide; by defining accomplice liability broadly; and by imposing a duty of rescue. That strategy resulted in the imposition of collective guilt on the Hutu majority. The government might have forestalled that by doing more to acknowledge, commemorate, and perhaps reward Hutu rescuers.

Bystanders and Reconciliation

For Larry May, *gacaca*'s prosecution of bystanders is essential to achieving reconciliation in post-genocide Rwanda. May defines reconciliation as trust rooted in human rights and the rule of law (particularly equality before the law). There are two components to his notion of political reconciliation: an "understanding of the respect due to one another that is the hallmark of a society where rights are respected" and an understanding that "sees oneself, and others, as agents who are not passive in the face of disrespect."[86] For May, reconciliation requires that "the people who were bystanders in the past [must] no longer see themselves as passive concerning future possibilities of stopping or preventing violence."[87] He goes on to argue that "bystanders play two very important roles in building or rebuilding the rule of law":

> First, examining and criticizing the role of bystanders can signal that members of a society are respected when they come to the aid of their compatriots who are in danger. Second, when bystanders who do not aid their compatriots are criticized, morally or legally for their failures, the rule of law is also

[85] Interviews with Jean Léonard Rugambage and Human Rights Watch's representative, Kigali, Rwanda, 2006; Human Rights Watch, *Justice Compromised*, 102-03; Committee to Protect Journalists, "Rwandan Journalist Freed After 11 Months in Jail," July 31, 2006; U.S. Embassy Cable, "Journalist Freed by *Gacaca* Authorities," August 11, 2006 (available on Wikileaks site). Rugambage was murdered in 2010. Committee to Protect Journalists, "Editor of Censored Rwandan Newspaper is Assassinated," June 25, 2010.
[86] May, *After War Ends*, 86.
[87] May, *After War Ends*, 87.

> strengthened by this additional showing of respect for those who were in danger.[88]

Yet, May clearly prefers legal prosecution to the softer option of moral criticism: he hails Rwanda's *gacaca* as a "noble experiment" that offers "guidance about how trials can be reformed" to support reconciliation.[89]

May's argument is deeply flawed. First, he completely misunderstands how *gacaca* works. He mistakenly states that *gacaca*'s sentences "were not terribly severe." He wrongly says that "tribal elders" run the *gacaca* while "[t]he villagers were the ones to vote on whether the defendants were guilty and what form of sentence the punishment should take."[90] Second, those misunderstandings enable May to minimize the procedural unfairness of *gacaca* trials:

> I worry about the diminished rights of the accused and the lack of judicial training for both judges and jury members in the *gacaca* trials. But my worries are considerably lessened given that the penalties meted out by the *gacaca* courts have been relatively minor infringements on the liberty of those that have been convicted.[91]

Third, he never confronts the contradiction between his defense of *gacaca*'s procedural unfairness and his claim that *gacaca* will promote the rule of law. Fourth, he completely ignores *gacaca*'s substantive unfairness – that it does not treat Hutu victims of RPF war crimes with equal respect or equality before the law. Fifth, he overlooks the fact that *gacaca* trials were not conducted within "a society where rights are respected." Sixth, he does not address concerns about whether *gacaca* imposed collective guilt on Hutu nor what that would mean for his account of political reconciliation. Finally, May never explains why prosecuting bystanders is a better option for reconciliation than commemorating rescuers.

Rescuers and Reconciliation

While transitional justice and international criminal justice are now addressing the bystander, they have paid scant attention to his opposite number, the rescuer. This seems particularly short-sighted if we want to identify the situational factors that favor rescuers. The abortive Bosnian truth commission had planned to document rescuers. At the time, this was

[88] May, *After War Ends*, 106. This suggests that May would support a legal duty of rescue (or Good Samaritan laws) in post-conflict states.
[89] May, *After War Ends*, 107, 119.
[90] May, *After War Ends*, 114-15.
[91] May, *After War Ends*, 116.

praised as "a powerful complement to the process of determining individual criminal accountability: together, they comprise the two sides of the same coin of rejecting collective blame."[92] More recently, Ron Dudai has argued that transitional justice should commemorate rescuers in order to promote reconciliation and to shame bystanders.

> In both cases the rescuers are invoked to de-homogenize collective groups. However, where promoting reconciliation is the focus, the main audience consists of members of the victim group and the rescuers are used to counter the notion that the other group are all perpetrators; where the focus is on bystanders, however, the main audience consists of members of the group in whose name the atrocities were carried out and the rescuer is used to counter alibis for inaction.[93]

Still, as Dudai notes, there is the danger that rescuers can be seen as the extraordinary exceptions that prove collective guilt.[94]

In explaining and judging mass violence, there is often a reductionist tendency to categorize individuals as perpetrators, victims, bystanders, or rescuers. Yet, the reality is far murkier: individuals often inhabit several positions concurrently or successively. The Rwandan genocide often saw such moral shape-shifting: those like Jean-Paul Akayesu (the former mayor of Taba and the first person convicted of genocide by the ICTR) who began by saving Tutsi and then, under pressure, turned to killing; others like Omar Serushago and Georges Rutaganda (local *Interahamwe* leaders) who saved Tutsi family and friends while eagerly slaughtering Tutsi strangers; or the old man I saw testify in southern Rwanda about how he had killed his Tutsi wife to save himself. How then do we make the necessary legal/moral distinctions while taking into account situational factors and fluid identities in what Primo Levi famously called "the grey zone"? One (imperfect) way is to distinguish between acts and actors.[95] Rescuers can be defined as non-perpetrators who engaged in rescue acts to try to save family, friends, or strangers. While rescuers may have engaged in bystanding acts (depending on situational factors), they can be distinguished from bystanders who never performed rescue acts.

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[92] Neil J. Kritz and Jakob Finci, "A Truth and Reconciliation Commission in Bosnia and Herzegovina: An Idea Whose Time Has Come," *International Law Forum* 3, no. 1 (2001), 53.
[93] Ron Dudai, "'Rescues for Humanity': Rescuers, Mass Atrocities, and Transitional Justice," *Human Rights Quarterly* 34, no. 1 (2012), 27 n.142.
[94] Dudai, "'Rescues for Humanity,'" 24-25.
[95] See Fujii, *Killing Neighbors*, 130-31.

There were many rescuers ("*intwali*") during the genocide. As Sibomana observes, "How could Tutsi have survived if Hutu hadn't provided them with a hiding place and food?"[96] Yet, the RPF has largely written Hutu democrats and rescuers out of its genocide, transitional justice, and reconciliation narratives. At first, the RPF only recognized those it called "Hutu moderates." That expression was highly problematic for, as Eltringham observes, "The phrase 'Hutu moderates' is . . . solely an epitaph and may imply that the only 'moderate' (or 'anti-genocide') Hutu are dead."[97] As of 2006, there appeared to be no living Hutu on the list of national heroes.[98] There were several reasons for the RPF's unwillingness to recognize living Hutu democrats and rescuers. The RPF maintains a tight monopoly over the moral credit for saving Tutsi. It rarely acknowledges that UN peacekeeping forces, France's Operation Turquoise, and Hutu rescuers also saved Tutsi lives. Also, high-profile Hutu democrats and rescuers are seen as a potential political threat to the RPF. This explains the RPF's vigorous efforts to sully the reputations of democrats (e.g. Faustin Twagiramungu) and rescuers (e.g. Laurien Ntezimana, Dr. Leonard Hitimana**,** Colonel Leonidas Rusatira and Paul Rusesabagina) by accusing them of complicity in genocide or harbouring genocide ideology.[99] In addition, Hutu democrats and rescuers complicate the efforts at imposing collective guilt on the Hutu majority. Finally, rescuers are essentially dissident figures living under a regime that prefers conformity.[100]

Over the past 13 years, international experts and NGOs have encouraged the RPF to memorialize Hutu rescuers as a way of promoting reconciliation. In 2001, a US State Department adviser in the Prosecutor General's Office wrote a memo recommending that Rwanda follow Israel's example of commemorating the Righteous Gentiles.[101] In 2002, African Rights, which has close links to the RPF and the main survivors' organization, published *Tribute to Courage*, a compendium of rescuer testimonies. Ervin Staub, the social psychologist of genocide, recommended acknowledgment of Hutu rescuers during the annual

[96] Sibomana, *Hope for Rwanda*, 67.
[97] Eltringham, *Accounting for Horror*, 75. Valerie Rosoux, "The Figure of the Righteous Individual in Rwanda," *International Social Science Journal* 58, no. 189 (2006), 497.
[98] Valerie Rosoux, "The Figure of the Righteous Individual in Rwanda," *International Social Science Journal* 58, no. 189 (2006), 497.
[99] On Ntezimana, see Human Rights Watch, "Rwanda: Activists in Detention," January 31, 2002. On Rusesabagina and Hitimana, see Waldorf, "Revisiting Hotel Rwanda," 114-18. On Rusatira, see Cruvellier, *Court of Remorse*, 145-50.
[100] Penal Reform International, *The Righteous: Between Oblivion and Reconciliation* (2004), 35-36; Rosoux, "The Figure of the Righteous Individual," 497-98.
[101] Letter from Pierre St. Hilaire to Antoine Mugesera, President of IBUKA, February 19, 2002.

genocide commemorations as a way of "humanizing 'the other,' in this case giving Hutu a more human image in the eyes of Tutsis."[102] In 2004, Aegis Trust opened the Gisozi genocide memorial, which includes information on rescuers.[103] Penal Reform International called on the government to go beyond "merely symbolic recognition" of rescuers and use them as "role models" for *gacaca*, reconciliation, and democratization.[104] It also pointed to the celebration of rescuers in Burundi and Israel. The Hamburg Institute for Social Research held a conference in 2009 with representatives of the government and survivors' associations that looked at rescuers as a "model for rebuilding Rwandan society."[105] IBUKA, the main survivors' association, has occasionally honored rescuers.[106]

Beginning in 2004, the RPF has taken halting steps to commemorate rescuers. In his speech that year commemorating the tenth anniversary of the genocide, President Kagame gave: "[a] very special tribute to those men and women who showed enormous courage, risked their lives to rescue their neighbors and friends. . . . You are our reason for hope."[107] That tribute was subsequently undermined by the President's sustained, vitriolic attacks on Rwanda's most famous Hutu rescuer, Paul Rusesabagina, who is credited with saving more than 1,200 at the Hotel des Milles Collines.[108] The government and survivors' associations followed up on those attacks by identifying other Hutu rescuers as the "real heroes."[109] In 2004, the government required *gacaca* courts to gather information about rescuers as part of the information collection phase. The Senate Commission on Genocide Ideology subsequently stated that the government was compiling a "database" to "identify . . . the people killed for having refused to kill innocent people or people who hid Tutsis."[110]

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[102] Ervin Staub, "Preventing Violence and Generating Humane Values: Healing and Reconciliation in Rwanda," *International Review of the Red Cross* 85, no. 852 (2003), 795.
[103] Kigali Memorial Centre and Aegis Trust, *Jenoside: Kigali Memorial Centre*, 30-31.
[104] Penal Reform International, *The Righteous*, 32-37.
[105] Hamburg Institute for Social Research, "Conference: Silent Heros: The Rescuers and Their Actions as a Model for Rebuilding Rwandan Society," available at http://www.his-online.de/en/events/conference-program-silent-heros/.
[106] Irene V. Nambi, "IBUKA Honors Genocide Saviors," *The New Times*, July 20, 2009.
[107] Quoted in Penal Reform International, *The Righteous*, 31.
[108] Muhereza Kyamutetera, "Kagame Lambasts Hotel Rwanda Movie Hero," *The Monitor*, April 3, 2006; Terry George, "Smearing a Hero," *The Washington Post*, May 10, 2006. For an overview of the RPF's treatment of rescuers, see Waldorf, "Revisiting Hotel Rwanda."
[109] Alfred Ndahiro and Privat Rutazibwa, *Hotel Rwanda or the Tutsi Genocide as Seen by Hollywood* (Paris: L'Harmattan, 2008), 77-78. Ndahiro was a public relations adviser to President Kagame.
[110] Rwandan Senate, *Genocide Ideology and Strategies for its Eradication* (2006). The Genocide Archive Rwanda has posted several rescuer testimonies at http://www.genocidearchiverwanda.org.rw/index.php/Category:Rescuer_Testimonies.

Local rescuers have sometimes been falsely accused of genocide participation – something that appeatred to increase with *gacaca*. They have been accused by Hutu to prevent them giving inconvenient testimony, accused by Tutsi for not having saved more people, and accused by both Hutu and Tutsi over conflicts that had nothing to do with the genocide.[111] Hutu rescuers are sometimes convicted based on the fact that the Tutsi under their care were discovered and killed. The 2004 *Gacaca* Law made that easier by permitting *gacaca* courts to convict persons for failure to render assistance to persons in need.

Conclusion

By airing narratives of inter-ethnic violence, *gacaca* was supposed to promote a national reconciliation that transcended ethnicity. That was a tall order, and so it is hardly surprising that *gacaca* fell short. This chapter has argued that transitional justice mechanisms are better off aiming for a more attainable and more measurable goal: the fostering of civic trust among citizens and between citizens and the state. There are few empirical studies of civic trust in Rwanda and questions about their methodological reliability. Still, they suggest that *gacaca* has not had much positive impact on civic trust. This probably had less to do with *gacaca* itself and more to do with the authoritarian political context in which *gacaca* operated.

[111] Penal Reform International, *The Righteous*, 22-29.

CHAPTER 12: CONCLUSION

"We look forward to the start of another chapter in our nation's development."
– President Paul Kagame[1]

President Kagame brought *gacaca* to a close on June 18, 2012, exactly ten years to the day he had launched it. In that time, *gacaca* had achieved something unprecedented in transitional justice – mass justice for mass atrocity. The figures are simply astonishing. *Gacaca* processed 1.8 million cass involving over a million suspects. The number of genocide suspects languishing in lengthy pre-trial detention dropped from 120,000 to practically zero. The carceral population stabilized at around 35,000 prisoners. Tens of thousands of convicted *génocidaires* were sentenced to community service doing public works.

Much had changed in those ten years. The *Inkiko Gacaca* billboards were long gone, replaced by consumer ads more suited to Rwanda's rising prosperity. Kagame and the RPF had altered Rwanda's appearance, map, language, administration, education, health, agriculture, and even its customs. The country had been through two presidential elections. It had signed a peace accord with the Congo. Yet, some things remained stubbornly the same: Kagame was still president, the regime still authoritarian, the military still meddling in eastern Congo, and genocide survivors still waiting on compensation.

At the closing ceremony, President Kagame gave a measured speech. Acknowledging *gacaca*'s "imperfections," he stated that "[we are] largely satisfied that we have achieved most of what we set out to do." He recognized that "*gacaca* courts … have not resolved all problems" but made clear it was time to close the "chapter" on post-genocide justice. President Kagame's speech touches on several issues addressed by this dissertation: the reach of the accountability norm, the challenging of the Nuremberg model, and the assessing of *gacaca*.[2]

President Kagame repeatedly invoked the norm of accountability for atrocity throughout his short speech. He embraced accountability's goals to "provide redress for victims, hold perpetrators accountable for their crimes, and restore harmony." He endorsed the claim that accountability leads to reconciliation: "When truth came out in

[1] President Paul Kagame, "Speech at the Official Closing of the *Gacaca* Courts," June 18, 2002.
[2] President Paul Kagame, "Speech at the Official Closing of the *Gacaca* Courts," June 18, 2002.

court . . . [it] prepared the ground for the restoration of social harmony." He also claimed that *gacaca* had been necessary measure to prevent impunity or further violence:

> We had three choices: first was the more dangerous path of revenge, or secondly, grant general amnesty, both of which would have led to further anarchy and destruction. But we chose the third and more difficult course of dealing with the matter decisively…[3]

Here, President Kagame justifies *gacaca* using the language of human rights. This doesn't strike me as a cynical ploy or a "hijacking" of norms. Rather, it points up something more interesting and perhaps more troubling. Illiberal states also may internalize the norm of accountability. But just like liberal states, they are apt to apply this norm selectively – to the crimes of others rather than to their own.[4]

President Kagame presented *gacaca* as if it had been the only way to achieve accountability. In fact, there were other options, but those were rejected, either out of hand (a truth and reconciliation commission) or after a trial period (exemplary prosecutions in national courts). That's because the RPF wasn't just after accountability, it was after *maximal* accountability. Kagame makes this point obliquely in his speech: "Given the magnitude of the problem, including the numbers involved and limited resources at our disposal, conventional justice as we know it could not deliver *the results that we sought*." What mix of norms and politics prompted the RPF to choose maximal accountability in the first place and to stick with that choice in the face of mounting costs? We don't know the full story but we do know what made that choice possible: the RPF's unconditional military victory and international support.

President Kagame stated "there could have been no better alternative" to *gacaca*. He also claimed that *gacaca*'s critics "offered no viable alternatives that could deliver the results we needed." He was right about that. Human rights organizations proposed changes – not alternatives – to *gacaca*. They tacitly supported the RPF's quest for widespread accountability even as they publicly worried about its selectivity (victor's justice) and methods (unfair trials). Yet, there was a viable alternative to *gacaca*: exemplary prosecutions in national courts for "those most responsible" and community-level truth commissions for everyone else. That was

[3] President Paul Kagame, "Speech at the Official Closing of the *Gacaca* Courts," June 18, 2002.
[4] See Bass, *Stay the Hand of Vengeance*, 30-31.

essentially what a group of Rwandan experts proposed back in 1996 when asked whether customary *gacaca* could be used for genocide crimes. And that was essentially what East Timor did after the mass violence in 1999.

Several challenges to the viability of that alternative can be, and were, made, but none are particularly convincing. The most common objection, which is repeated in President Kagame's speech, was that the conventional courts could not cope with the 120,000 genocide suspects in detention.[5] Hence, the exemplary prosecutions alternative would have meant releasing (not amnestying) most of those detainees. A second, and related objection, is that exemplary prosecutions cannot achieve accountability where such large numbers participated in genocide, which is the crime of crimes. Yet, *gacaca* defined participation broadly and prosecuted those crimes as ordinary crimes – not as genocide. The third objection is that widespread accountability was necessary to end the culture of impunity that had contributed to the genocide. However, there is little evidence that past impunity was a causal factor of the 1994 genocide. Even if one accepts President Kagame's argument that *gacaca* was the only viable option, there were other ways it could have been implemented. For instance, *gacaca* could have focused on the cases of the existing 120,000 genocide detainees rather than opening the floodgates to accusations against another 880,000 or so.

Gacaca represented a new form of accountability which challenged the prevailing models of internationalized tribunals and truth commissions. In his closing speech, President Kagame couldn't resist taking a swipe at international justice:

> the value and effectiveness of *gacaca* will be measured against the record of other courts, principally the International Criminal Tribunal for Rwanda (ICTR). The ICTR has tried about sixty cases, cost about 1.7 billion dollars and left justice wanting. Yet, at significantly less cost, the *gacaca* process has had the highest impact in terms of cases handled, and has delivered justice and reconciliation at a much higher scale.

[5] Of course, that problem was largely of the RPF's own making. No other post-conflict state has arrested so many people on so little evidence. In addition, the RPF rejected various offers of assistance to speed up trials in the national courts.

He also noted that *gacaca* was a "reaffirmation of our ability to find our own answers to seemingly intractable questions."[6]

Gacaca fundamentally challenged the prevailing Nuremberg model applied at the ICTR. That liberal-legalist model emphasizes retributive justice, individual criminal responsibility, and cosmopolitan values. By contrast, *gacaca* was illiberal legalism in that it involved an authoritarian state holding less-than-fair trials to further rule by law. *Gacaca* offered a mix of retributive and restorative justice though it became increasingly retributive over time. *Gacaca* promoted collective political responsibility by making participation a civic duty but also had the effect of imposing collective guilt on the Hutu majority. *Gacaca* was communitarian in three ways: it applied the Rwandan penal code rather than "humanity's law"[7]; it was a Rwandan solution to a Rwandan problem; and it was shaped by local communities.

President Kagame framed *gacaca*'s achievements in the discourse of peace-building, state-building, and accountability: he described the *gacaca* era as "a period when we sought to reunite our nation, inspire confidence in the administration of justice and hold each other accountable for our actions." He went on to say:

> *Gacaca* has served us very well, and even exceeded our expectations. It challenged every Rwandan into introspection and soul-searching that resulted in truth-telling, national healing, reconciliation and justice. And it worked because Rwandans largely believed in it.

Throughout the speech, he attributed *gacaca*'s success to the fact that it was popular justice: "*Gacaca* has been justice literally administered by and in the name of the people." And he commended "Rwandans for their full participation."[8]

This dissertation sought to evaluate *gacaca* largely in terms of the transitional justice goals adopted by President Kagame. It found *gacaca* had difficulty meeting those for a number of key reasons. First, truth, justice, and reconciliation were never clearly defined and rarely measured. Second, *gacaca* generated an outpouring of accusations that multiplied the number of genocide suspects almost ten-fold. That caused trials to be done more hastily with less fairness and less restorative process. Third, many Rwandans had to be coerced into attending *gacaca* but

[6] President Paul Kagame, "Speech at the Official Closing of the *Gacaca* Courts," June 18, 2002.
[7] See Ruti Teitel, *Humanity's Law* (Oxford: Oxford University Press, 2011).
[8] President Paul Kagame, "Speech at the Official Closing of the *Gacaca* Courts," June 18, 2002.

still did not speak up. Fourth, *gacaca* wound up imposing collective guilt for the genocide on the Hutu majority while providing impunity for war crimes and crimes against humanity committed by Tutsi soldiers. Finally, *gacaca* never delivered meaningful reparations (i.e. compensation) to genocide survivors.

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