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ARTICLES

MASS JUSTICE FOR MASS ATROCITY: RETHINKING LOCAL JUSTICE AS TRANSITIONAL JUSTICE

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Forgiveness is better than justice.
—Sign held up by a Rwandan genocide detainee[1]

Don't ask me for forgiveness!
—A Rwandan mother whose child was killed during the genocide[2]

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1. Presentation of genocide detainees before the local population that determined whether some should be provisionally released for lack of evidence, in Butare town stadium (Sept. 27, 2002) (author's notes). Interviews or notes done by the author, or in the author's presence, are clearly marked as such. Those not so labeled were done by the author's Rwandan assistants in his absence.

2. Field notes from a *gacaca* session, in Butare Province, Rwanda (Jan. 16, 2003) (on file with author). There are no *gacaca* transcripts. One of the *gacaca* judges takes minutes of the sessions, but these are not publicly available. Audio and video recordings are generally forbidden, and, at one point, a government minister even prohibited observers from taking handwritten notes. *See infra* note 470 and accompanying text. This underscores *gacaca*'s political sensitivity. Consequently, this Article rarely identifies *gacaca* participants or interviewees. Also, it avoids specifying *gacaca* locations for fear of creating problems for local officials, *gacaca* participants, and the author's research assistants. This Article refers to provinces as they existed before the 2006 administrative restructuring.

But I am not at all concerned with a justice that in this particular historical instance could only be hypothetical anyway.

—Jean Amery[3]

For shame is its own veil
For shame is its own veil and veils
The world as much as the face—

—Denis Johnson, *Where the Failed Gods Are Drinking*[4]

INTRODUCTION

Critics of international criminal justice often explicitly or implicitly assume that criminal accountability for genocide, crimes against humanity, and war crimes is better handled at the national level.[5] While this assumption may well hold true for established liberal democracies, it is far more problematic for post-conflict successor regimes. Yet, in their eagerness to critique international justice, legal scholars like Jose Alvarez and Mark Drumbl have rushed to extol the virtues of national and local justice in Rwanda.[6] They have argued that Rwandan justice is better than international justice in promoting accountability, reconciliation, victim satisfaction, collective memory, democratic deliberation, and the rule of law.[7] In like fashion, the U.S. Ambassador-at-Large for War Crimes has favorably contrasted Rwandan local justice with international justice.[8] This Article shows that these views of Rwandan justice are profoundly mistaken.

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3. JEAN AMÉRY, AT THE MIND'S LIMITS: CONTEMPLATIONS BY A SURVIVOR ON AUSCHWITZ AND ITS REALITIES 64 (Sidney Rosenfeld & Stella P. Rosenfeld trans., 1980).

4. DENIS JOHNSON, THE THRONE OF THE THIRD HEAVEN OF THE NATIONS MILLENNIUM GENERAL ASSEMBLY: POEMS COLLECTED AND NEW 225 (1995).

5. José Alvarez makes this assumption explicitly throughout his work. José Alvarez, *Trying Hussein: Between Hubris and Hegemony*, 2 J. OF INT'L CRIM. JUST. 319, 319 (2004) [hereinafter Alvarez, *Trying Hussein*]; *see also* Stephen Holmes, *Why International Justice Limps*, 69 SOC. RES. 1055, 1066 (2002) ("While the Eichmann trial was organized and conducted by a relatively coherent and emotionally engaged national community, Milosevic is being tried by a relatively incoherent and emotionally disengaged international community."). Eric Posner seems to implicitly assume that domestic trials are preferable to international trials. Eric A. Posner, *Political Trials in Domestic and International Law* 72 (U. Chi. Pub. L. Working Paper No. 87, 2005), *available at* http://ssrn.com/abstract=707870 ("By contrast to domestic political trials, we might infer that international political trials are unlikely to succeed because there is no international consensus on the line between legitimate (international) political competition and illegitimate international political competition.").

6. José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 482 (1999) [hereinafter Alvarez, *Crimes of States/Crimes of Hate*]; Mark A. Drumbl, *Punishment, PostGenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1323-24 (2000) [hereinafter Drumbl, *Punishment*].

7. Alvarez, *Crimes of States/Crimes of Hate*, *supra* note 6, at 477, 482; Drumbl, *Punishment*, *supra* note 6, at 1323-25.

8. *The U.N. Criminal Tribunals for Yugoslavia and Rwanda: International Justice or Show of Justice?: Hearing Before the H. Comm. on Int'l. Rel.*, 107th Cong. 21-26 (2002) (statement of Pierre-Richard Prosper, Ambassador-at-Large, War Crimes Issues, Dept. of State), *available at* http://www.amicc.org/docs/Prosper_2_28_02.pdf.

In 2002, Rwanda embarked on the most ambitious experiment in transitional justice ever attempted: mass justice for mass atrocity.[9] While other post-conflict countries have opted for amnesties, truth commissions, selective criminal prosecutions, or some combination thereof, Rwanda decided to put most of the nation on trial. To accomplish this task, the government has adapted a local dispute resolution mechanism (*gacaca*) to try hundreds of thousands of suspected *genocidaires* in approximately nine thousand local communities. In each community, perpetrators, victims, bystanders, and rescuers are supposed to come together once a week to make accusations, hear confessions, try cases, and somehow become better neighbors in the process.[10]

Other societies recovering from mass atrocity[11]—such as Uganda, Mozambique, Sierra Leone, and East Timor—have turned to local justice[12] to provide a mix of accountability and reconciliation.[13] Local mechanisms may have greater legitimacy

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9. This Article uses the term "mass atrocity" rather than "administrative massacre" because the former better captures the participatory, collective nature of the (usually) state-sponsored violence that has characterized many of the post-Cold War, intra-state conflicts, including those in the former Yugoslavia, Rwanda, Sierra Leone, East Timor, northern Uganda, the eastern Democratic Republic of Congo, and Darfur. *See* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 288 (Penguin Books 1994) (1963) (defining administrative massacre). Benjamin Valentino prefers the term "mass killing," which is too narrow because it does not capture ethnic cleansing and mass rape unaccompanied by killings. BENJAMIN A. VALENTINO, FINAL SOLUTIONS: MASS KILLING AND GENOCIDE IN THE TWENTIETH CENTURY 10-15 (2004).

10. The categories of perpetrators, victims, bystanders, and rescuers should be treated as Weberian "ideal-types." *See* Max Weber, *"Objectivity" in Social Science and Social Policy*, *in* THE METHODOLOGY OF THE SOCIAL SCIENCES, 49, 90-112 (Edward A. Shils & Henry A. Finch trans. & eds., 1949) (1904) (discussing use of the ideal-type in sociological methodology). In modern mass atrocities, individuals often inhabit several categories at once. For example, a child soldier is simultaneously a victim and a perpetrator, and, if he saves a family member, also a rescuer.

11. This Article focuses on a distinct subset of transitional justice: successor regimes recovering from mass atrocity. Those states typically face greater challenges in terms of accountability and reconciliation than other post-conflict states or transitional regimes, and their experiences cannot be likened to legal and political transitions in democratic regimes. Eric Posner and Adrian Vermeule have claimed that "transitional justice is continuous with ordinary justice," and thus transitional justice issues "are at most overblown versions of ordinary legal problems." Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 764, 765 (2004). In a footnote, however, they qualified that claim by acknowledging that:

> The stakes of the debate between liberal procedural legalists, on the one hand, and advocates of backward-looking justice, on the other, may be higher in transitional settings than in analogous settings in consolidated democracies. Perhaps because regime transitions are always more vivid and visible to future generations than are moments of ordinary politics, regime transitions create more important social and constitutional precedents.

Id. at 792 n.92.

12. This Article uses the term "local justice" because it is more neutral than the alternatives. The terms "customary law" and "traditional justice" are inherently essentialist, historicizing, and mythopoeic, while the term "popular justice" connotes popularity, which is sometimes lacking. See *infra* notes 40-52 and accompanying text.

13. The term "reconciliation" is vague, but it will be used here for lack of better alternatives. *See* Miklos Biro et al., *Attitudes Toward Justice and Social Reconstruction in Bosnia and Herzegovina and Croatia*, *in* MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 183, 195 (Eric Stover & Harvey M. Weinstein eds., 2004) ("In contemporary literature, there is no empirically validated definition of the process of reconciliation."). David Crocker helpfully distinguished three conceptions of reconciliation, ranging from "thinner" to "thicker": (1) simple coexistence where former enemies live together non-violently; (2) mutual respect as fellow citizens; and (3) mutual forgiveness as promoted by South Africa's

and capacity than devastated formal systems, and they promise local ownership, access, and efficiency.[14] In his 2004 report on transitional justice, U.N. Secretary General Kofi Annan stated that "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."[15]

While a positive step, Annan's pronouncement offered no guidance on three pressing issues. First, how should post-conflict states use local justice? Second, how should the inevitable tension between local practices and international human rights norms be resolved in the extraordinarily complicated setting of post-conflict transitions?[16] Finally, how should local justice relate to international criminal justice?

Truth and Reconciliation Commission ("TRC"). David A. Crocker, *Truth Commissions, Transitional Justice, and Civil Society, in* TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 99, 108 (Robert I. Rotberg & Dennis Thompson eds., 2000) [hereinafter TRUTH V. JUSTICE]. Crocker's middle version of reconciliation corresponds to what Amy Gutmann and Dennis Thompson termed "democratic reciprocity," Amy Gutmann & Dennis Thompson, *The Moral Foundations of Truth Commissions, in* TRUTH V. JUSTICE, *supra*, at 22, 35, and resembles what Mark Osiel called "liberal morality" and "discursive democracy," MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 3, 150, 300 (1997). *See also* Antonia Chayes & Martha Minow, *Introduction* to IMAGINE COEXISTENCE: RESTORING HUMANITY AFTER VIOLENT ETHNIC CONFLICT, at xvii-xx (Antonia Chayes & Martha Minow eds., 2003) [hereinafter IMAGINE COEXISTENCE] ("Coexistence means more than simple peaceful living side by side. As we have conceived it, coexistence involves at least some degree of interaction and cooperation along the lines of ethnic division."); Michael Ignatieff, *Afterword* to *Reflections on Coexistence*, IMAGINE COEXISTENCE at 325, 325 ("When we fail to distinguish clearly between coexistence and reconciliation, we end up sentimentalizing and depoliticizing the processes we are trying to understand.").

14. Jennifer Widner has called for greater attention to rebuilding local justice mechanisms in post-conflict societies:

> In the immediate aftermath of conflict, one of the most important steps is to rebuild neighborhood forums for dispute resolution. These usually stress mediation or arbitration. Without such informal venues, the capacity of any formal judicial system is likely to be overwhelmed. Local forums can help to fill the gap while new judges and lawyers are trained, and gutted courthouses rebuilt. Otherwise, former combatants and traumatized civilians will probably turn away from fledgling institutions, and even resume the resolution of differences on the street.

Jennifer Widner, *Courts and Democracy in Post Conflict Transitions: A Social Scientist's Perspective on the African Case*, 95 AM. J. INT'L L. 64, 65 (2001). Widner further noted that "[t]he cultural milieu of most African societies strengthens the legitimacy of local forums." *Id.*

15. The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, ¶ 36, *delivered to the Security Council and the General Assembly*, U.N. Doc. S/2004/616 (Aug. 3, 2004) [hereinafter Secretary-General's Report].

16. States are permitted to derogate from their international human rights obligations "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed." International Covenant on Civil and Political Rights, art. 4, Dec. 16, 1966, S. Exec. Doc. No. 95-E, 999 U.N.T.S. 171 [hereinafter ICCPR]. In practice, though, post-conflict states are reluctant to invoke Article 4 because of its discouraging effect on the donor investment and private capital needed to rebuild.

Informal dispute resolution mechanisms are not excused from complying with international human rights norms by virtue of their "customary" nature. Human Rights Comm., ICCPR General Comment 13: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14): 13/04/84, at ¶ 4, 21st Sess., U.N. Doc. A/39/40 (Apr. 13, 1984) ("The provisions of [A]rticle 14 apply to all courts and tribunals . . . whether ordinary or specialized."); African Commission on Human and People's Rights, Dakar Declaration, ¶ 4 (Sept. 11, 1999) ("Traditional courts are not exempt from the provisions of the African Charter relating to fair trial.").

A Special Representative of the U.N. Human Rights Commission acknowledged the dilemma posed by

This latter question raises a key concern about the International Criminal Court's ("ICC") so-called complementarity regime: should meaningful, local justice be counted as part of a state's good faith efforts to provide post-conflict accountability, such as would preclude the ICC from asserting jurisdiction?[17]

Several legal scholars worry that an increasingly hegemonic international criminal justice may displace and discourage national justice and reconciliation efforts, such as South African-style truth and reconciliation commissions and *gacaca*-like community courts.[18] At least initially, though, the ICC Prosecutor displayed some deference to local reconciliation processes in northern Uganda.[19]

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gacaca's nonconformity with international human rights norms for fair trials:

> The question facing Rwanda's international partners is relatively simple: 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 likelihood that *gacaca* will fail?

Report of the Special Representative of the Commission on Human Rights on the Situation of Human Rights in Rwanda, U.N. GAOR, 55th Sess., Agenda Item 116(c), at 35, U.N. Doc. A/55/269 (Aug. 4, 2000) (prepared by Michel Moussalli); *see* William A. Schabas, *Justice, Democracy, and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 CRIM. L.F. 523, 532 (1996) [hereinafter Schabas, *Rwanda*] (recognizing that fair trial rights "cannot be guaranteed in the same way in a poor country as in a rich country, despite that admonition in relevant international instruments to the contrary"); PETER UVIN, THE INTRODUCTION OF A MODERNIZED *GACACA* FOR JUDGING SUSPECTS OF PARTICIPATION IN THE GENOCIDE AND THE MASSACRES OF 1994 IN RWANDA 4 (2000), *available at* http://fletcher.tufts.edu/humansecurity/pdf/Boutmans.pdf. Uvin explains:

> 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.

Id. This Article will not deal with the tension between local justice and international human rights norms. Other authors have addressed that issue in the Rwandan context. *See, e.g.*, 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*, 42 J. AFR. L. 143, 144 (2001) (considering Rwandan "government's decision to follow the path of bringing perpetrators to justice at the expense of other ideals"); L. Danielle Tully, *Human Rights Compliance and the Gacaca Jurisdictions in Rwanda*, 26 B.C. INT'L & COMP. L. REV. 385, 385 (2003) (observing that "[s]erious criticism has been voiced over the gacaca jurisdictions, claiming, in part, that they fail to meet Rwanda's due process obligations under the International Covenant on Civil and Political Rights (ICCPR)").

17. Under the doctrine of complementarity, the ICC can only exercise jurisdiction where a state is deemed "unwilling or unable" to investigate or prosecute the crime. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, art. 17, U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute]; WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 66-70 (2001).

18. *See* Alvarez, *Crimes of States/Crimes of Hate*, *supra* note 6, at 477 (asking whether Rwanda's plea-bargains and the South African Truth and Reconciliation Commission's grants of amnesties would be acceptable to the ICC); Drumbl, *Punishment*, *supra* note 6, at 1317 (questioning whether the ICC would consider *gacaca* a good faith prosecution). The Secretary-General's absolutist stance against amnesties would seem to preclude the use of local justice for dealing with crimes of genocide, crimes against humanity, war crimes, and gross human rights abuses. Secretary-General's Report, *supra* note 15, at ¶ 10 ("United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights.").

19. Press Release, Joint Statement by ICC Chief Prosecutor and the Visiting Delegation of Lango,

This Article will focus on the first question—the role of local justice in transitional justice—while deferring the latter two questions for a subsequent article. To begin, the notion of local justice needs to be handled with some care: what passes for harmonious, indigenous customs are more often than not "invented traditions" designed to promote social control and political ideologies.[20] Demystifying local justice enables us to properly evaluate its role in transitional contexts.

Despite the burgeoning literature on transitional justice,[21] scant attention has been paid to local justice mechanisms.[22] The studies that do exist are mostly theoretical, macrolevel assessments of state-initiated mechanisms, rather than empirical, microlevel studies of how those mechanisms are actually functioning at the local level.[23] There is

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Acholi, Iteso and Madi Community Leaders from Northern Uganda (Apr. 16, 2005), *available at* http://www.icc-cpi.int/press/pressreleases/102.html. *But see* Press Release, Amnesty Int'l, Uganda: Government Cannot Prevent the International Criminal Court From Investigating Crimes (Nov. 16, 2004), *available at* http://web.amnesty.org/library/print/ENGAFR590082004 ("Traditional reconciliation measures do not involve judicial determinations of innocence or guilt, effectively ensure that the full truth about crimes will be known or provide victims or their families with full reparations.").

The Prosecutor of the ICC also has praised *gacaca*, suggesting perhaps that states that adopt a *gacaca*-like model might be able to preclude ICC investigations and prosecutions. REPORT OF PROCEEDINGS, COLLOQUIUM OF PROSECUTORS OF INTERNATIONAL CRIMINAL TRIBUNALS ON "THE CHALLENGES OF INTERNATIONAL JUSTICE" 6 (Nov. 2004), http://65.18.216.88/ENGLISH/colloquium04/reports/final_report.pdf.

20. *See generally* THE INVENTION OF TRADITION (Eric Hobsbawm & Terence Ranger eds., 1983) (discussing created traditions generally and in several historical contexts). See *infra* Section II.D for a detailed discussion of reinvented tradition in Rwanda.

21. The most influential overviews of transitional justice are MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998) [MINOW, VENGEANCE AND FORGIVENESS]; STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW (1997); RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000).

22. To be sure, some legal scholars have called for greater focus on local mechanisms. *See, e.g.*, Neil J. Kritz, *Progress and Humility: The Ongoing Search for Post-Conflict Justice*, *in* POST-CONFLICT JUSTICE 55, 59 (M. Cherif Bassiouni ed., 2002) ("From a pragmatic, political perspective . . . ensuring a form of post-conflict justice that is maximally effective vis-à-vis the local population needs to be a higher priority . . . ."); ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES 319 (2000) (proposing a theory of restitution for international justice that accommodates community standards and local traditions); MINOW, VENGEANCE AND FORGIVENESS, *supra* note 21, at 132-35 (recognizing importance of local context in fashioning responses to mass violence); Alvarez, *Crimes of States/Crimes of Hate*, *supra* note 6, at 370 ("[I]nternational processes for criminal accountability need to encourage and adapt to local processes directed toward the same end . . . ."); Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law,"* 101 MICH. L. REV. 2275, 2336 (2003) (arguing for greater use of local myths, customs, and rituals to promote rule of law in post-conflict transitions); Drumbl, *Punishment*, *supra* note 6, at 1318 (same); Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 611-12 n.137 (2002) [hereinafter Fletcher & Weinstein, *Violence and Social Repair*] ("[T]o date relatively little attention has been paid to the cultural contexts in which criminal accountability for mass atrocities is contemplated.").

23. There are only a few examples of such micro-level studies in the transitional justice literature. Through an excellent series of reports, Penal Reform International has detailed how Rwanda's *gacaca* is functioning in specific communities. *See generally* PENAL REFORM INT'L, RESEARCH REPORT ON GACACA COURTS, GACACA AND RECONCILIATION: KIBUYE CASE STUDY (May 2004), http://www.penalreform.org/download/Gacaca/Rapport%20Kibuye%20II_EN.pdf; PENAL REFORM INT'L, INTERIM REPORT ON RESEARCH ON GACACA JURISDICTIONS AND ITS PREPARATIONS (July-Dec. 2001) [hereinafter PENAL REFORM INT'L, INTERIM REPORT], http://www.penalreform.org/download/Gacaca/Jul-

even less scholarship on post-conflict dispute settlement mechanisms and reconciliation practices initiated at the local level,[24] which, at times, may conflict with those initiated by the state.[25] As Richard Wilson has argued, transitional justice needs to pay greater attention to the politics of successor regimes:

> The study of transitional truth and justice has been too dominated by philosophical discussions abstracted from specific contexts, and we should instead examine how the politics of punishment and the writing of a new official memory are central to state strategies to create a new hegemony in the area of justice and construct the present moment as post-authoritarian when it includes many elements of the past.[26]

Consequently, this Article treats *gacaca* as embedded in historically and culturally specific socio-economic and political contexts.

This Article focuses on *gacaca* for several reasons. First, Rwanda is a key test for transitional justice mechanisms given the scale and brutality of the 1994 genocide, the high degree of popular participation, and the geographical and economic constraints that force perpetrators, bystanders, survivors, and rescuers to live side by side. Second, Rwanda's genocide, while unique, shares important characteristics with other recent

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Dec2001.pdf; PENAL REFORM INT'L, PRI RESEARCH TEAM ON GACACA REPORT III (Apr.-June 2002) [hereinafter PENAL REFORM INT'L, REPORT III], http://www.penalreform.org/download/Gacaca/Apr-Jun2002.pdf; PENAL REFORM INT'L, PRI RESEARCH ON GACACA REPORT, REPORT IV, THE GUILTY PLEA PROCEDURE, CORNERSTONE OF THE RWANDAN JUSTICE SYSTEM (Jan. 2003) [hereinafter PENAL REFORM INT'L, THE GUILTY PLEA PROCEDURE], http://www.penalreform.org/download/Gacaca/Jan2003.pdf; PENAL REFORM INT'L, RESEARCH ON THE GACACA, PRI REPORT V (Sept. 2003) [hereinafter PENAL REFORM INT'L, REPORT V], http://www.penalreform.org/download/Gacaca/september2003.pdf; PENAL REFORM INT'L, RESEARCH REPORT ON THE GACACA REPORT VI, FROM CAMP TO HILL, THE REINTEGRATION OF RELEASED PRISONERS (May 2004) [hereinafter PENAL REFORM INT'L, FROM CAMP TO HILL], http://www.penalreform.org/download/Gacaca/Rapport%20VI_AG.pdf. Richard Wilson has written a superb ethnographic study of two black South African townships, which concluded that the Truth and Reconciliation Commission (TRC) had "fail[ed] to appeal to local moralities and institutions to create the conditions for peace." RICHARD A. WILSON, THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE 207 (2001). In addition, Tim Kelsall has offered an ethnographic perspective on some local hearings conducted by the Sierra Leone Truth and Reconciliation Commission. Tim Kelsall, *Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone*, 27 HUM. RTS. Q. 361 (2005).

24. For an exception, see Alcinda Honwana, *Healing and Social Reintegration in Mozambique and Angola*, *in* ROADS TO RECONCILIATION 83 (Elin Skaar et al. eds., 2005) [hereinafter ROADS TO RECONCILIATION].

25. In southern Ethiopia, for example:

> Government officials would not participate in local rites of reconciliation, involving killing an ox, hanging the fat around the necks of the participants, smearing bodies with blood and making speeches upon the hide. These local rituals would end with a collective washing of hands in the ox's stomach contents and the shooting of guns into the earth, but like in South Africa, they occurred outside the national reconciliation project.

WILSON, *supra* note 23, at 214 (citing Jan Abbink, Presentation at the 5th Biannual European Association of Soual Anthropologists ("EASA") Conference: Violence and the Crisis of Conciliation: Suma, Dizi, and the State in Southwest Ethiopia (Sept. 4-7, 1998)); *see also* MEGAN KOREMAN, THE EXPECTATION OF JUSTICE: FRANCE 1944-1946 (1999) (describing clash of local retributive sentiments and national reconciliation project in post-Vichy France). As both Wilson and Koreman make clear, it is a mistake to assume that local communities are more concerned with reconciliation than retribution. KOREMAN, *supra* at 258-63; WILSON, *supra* note 23, at 156, 208-09.

26. WILSON, *supra* note 23, at xv-xvi.

mass atrocities (like that in Darfur): intrastate conflict, international disinterest, malleable identities, intimate violence, high levels of participation and complicity, and hazy lines of command responsibility.[27] Third, the concurrent criminal proceedings in an international ad hoc tribunal, European courts (employing universal jurisdiction), Rwandan national courts, and local *gacaca* courts offer a fascinating example of legal pluralism and an opportunity to compare different justice mechanisms.[28] Fourth, as will be shown, Rwanda has gone further than any other post-conflict successor regime in adapting local justice.[29] Finally, Rwanda's *gacaca* has been touted as a possible model for future transitional justice efforts—not only by legal scholars,[30] but also by the United Nations and the U.S. Ambassador-at-Large for War Crimes.[31]

Section I describes the general features of local justice and its role in legally pluralistic states. It then examines the intersection between local justice, restorative justice, and transitional justice. Section I concludes by looking at several case studies of how local practices have been employed or adapted after conflict: through reconciliation ceremonies in northern Uganda and Mozambique, and truth and reconciliation commissions in South Africa, Sierra Leone, and East Timor.

Section II examines in detail how Rwanda transformed a local dispute resolution practice into a state project for dispensing post-genocide justice. The Section begins with a brief account of the Rwandan genocide because explanations of mass atrocity

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27. On the similarities and differences between the Rwandan genocide and other mass atrocities in the twentieth and twenty-first centuries, see, for example, VALENTINO, *supra* note 9, at 68-90; Ben Kiernan, *Twentieth Century Genocides: Underlying Ideological Themes from Armenia to East Timor, in* THE SPECTER OF GENOCIDE: MASS MURDER IN HISTORICAL PERSPECTIVE 29-51 (Robert Gellately & Ben Kiernan eds., 2003); Eric D. Weitz, *The Modernity of Genocides: War, Race, and Revolution, in* THE SPECTER OF GENOCIDE: MASS MURDER IN HISTORICAL PERSPECTIVE, *supra*, at 53-73.

28. For an overview of the international, transnational, and national accountability efforts for the Rwandan genocide, see Alison Des Forges & Timothy Longman, *Legal Responses to Genocide in Rwanda, in* MY NEIGHBOR, MY ENEMY, *supra* note 13, at 49-68.

29. See *infra* Section III for an examination of Rwanda's post-genocide system of justice.

30. *See, e.g.*, Aneta Wierzynska, *Consolidating Democracy Through Transitional Justice: Rwanda's Gacaca Courts*, 79 N.Y.U. L. REV. 1934, 1967 (2004) ("[A] mechanism modeled on Rwanda's Gacaca—an indigenous, community-owned, restorative bridge between the people and the new State that fosters local participation and open management of conflict—emerges as an addition to the existing transitional justice menu.").

31. In a 2006 report, two United Nations agencies praised *gacaca* for having "helped bring Rwandan society together to rebuild trust, share the truth about the genocide and provide access to justice to the public." U.N. OFFICE OF THE HIGH REPRESENTATIVE FOR LEAST DEVELOPED COUNTRIES, LANDLOCKED DEVELOPING COUNTRIES AND SMALL ISLAND DEVELOPING STATES & U.N. DEVELOPMENT PROGRAM, GOVERNANCE FOR THE FUTURE: DEMOCRACY AND DEVELOPMENT IN THE LEAST DEVELOPED COUNTRIES 130 (2006). In an interview, US Ambassador Pierre-Richard Prosper stated:

> Is [gacaca] a model for Africa? I think so. . . . I think we have to be not only sensitive to, but take a hard look at indigenous approaches that will help address some of the abuses that have occurred for a couple of reasons.
>
> One, for the sheer numbers, because when we're dealing with war crimes and atrocities, not everyone can be prosecuted through a traditional [formal] system. And two, it's important to have a justice mechanism that the people can relate to. So if it is something that is grassroots in origin the society should be able to accept it as well as accept its outcome.

PanAfrica: Keeping An Eye On War Crimes And Criminals—Ambassador Prosper, Aug. 27, 2002, http://allafrica.com/stories/200208270632.html.

inevitably influence proposals for achieving accountability, reconciliation, and prevention in its aftermath. In particular, this Section will contest the simplistic explanation of the Rwandan genocide as a "crime of hate" involving a million or more perpetrators. The Section then provides an overview of Rwanda's increasingly authoritarian politics, which have set the parameters for accountability and reconciliation. After a brief description of *gacaca*, focusing on the 2004 reforms, the Section describes three structural weaknesses of *gacaca*: the absence of reparations to genocide survivors, the refusal to hear allegations of war crimes committed by the current regime's soldiers, and the inadequate access for female victims of sexual violence. Using empirical and anecdotal data, the Section then explains *gacaca*'s problems in advancing popular participation, truth-telling, and reconciliation. Finally, the Section critiques *gacaca* for promoting collective guilt and responds to legal scholars who have advocated the ascription of collective guilt for mass atrocity.

The Conclusion draws some larger, cautionary lessons about how to adapt local justice in other societies recovering from mass atrocity. Once *gacaca* is seen as state-imposed "informalism" designed to expand the state's reach into local communities, its difficulties start to resemble those encountered in other such state efforts: increased formalism, decreased popular participation, and increased state coercion. The overarching lessons for transitional justice are that successor regimes should resist the temptation to coopt or control local justice and to expand local justice's jurisdiction to reach genocide, crimes against humanity, and war crimes.

I. LOCAL JUSTICE, LEGAL PLURALISM, AND RESTORATIVE JUSTICE

A. *Local Justice and Legal Pluralism*

Broadly speaking, local justice has three key attributes: (1) it focuses on groups rather than individuals, (2) it seeks compromise and community "harmony," and (3) it emphasizes restitution over other forms of punishment.[32] In addition, local justice is

32. *See, e.g.*, JOANNA STEVENS, PENAL REFORM INT'L, TRADITIONAL AND INFORMAL JUSTICE SYSTEMS IN AFRICA, SOUTH ASIA, AND THE CARIBBEAN 5-7, 13 (1999), *available at* http://www.grc-exchange.org/docs/SSAJ13.pdf (noting the salient features of traditional justice systems). Merry defines "popular justice" in similar terms:

> Popular justice is a process for making decisions and compelling compliance to a set of rules that is *relatively* informal in ritual and decorum, nonprofessional in language and personnel, local in scope, and limited in jurisdiction. It typically applies local standards and rules and commonsense forms of reasoning rather than state laws. Dress, demeanor, physical surroundings, and modes of talk are similar to those of the surrounding community. Proceedings are held in the local language. Popular justice forums are local in orientation and organization and nonbureaucratic in modes of taking in and considering cases, keeping records, and using forms. The staff is relatively unstratified and unspecialized. Third parties are typically lay people, usually with a small amount of training, but without long periods of higher education. They are often unpaid. Decisions are produced in a relatively conciliatory, consensual manner rather than imposed. The proceedings are accessible to the ordinary person . . . .
>
> Popular justice forums tend to deal with problems involving small sums of money, interpersonal injuries short of murder, and most aspects of relationships between husbands, wives, and other family members. They tend to serve the lower ranks of society and the less powerful.

Sally Engle Merry, *Sorting Out Popular Justice*, *in* THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF

often characterized by accessibility, economy, and public participation.[33] Local justice is generally less formal than state law, though the degree of informality varies considerably. There is a tendency to romanticize local justice by downplaying its coercive aspects and its function in asserting (or reasserting) social control.[34] Also, as Laura Nader reminds us, "conciliation may lead to conflict as well as to peace; and resolution may lead to injustice as well as justice."[35] Local justice is political justice: the "judicial" elites are neither independent nor impartial, and their discretionary rulings serve community harmony not individualized justice.[36]

Legal pluralism is "generally defined as a situation in which two or more legal systems coexist in the same social field."[37] Initially, the notion of legal pluralism was used to describe the interaction between informal "indigenous" practices and formal

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COMMUNITY MEDIATION IN THE UNITED STATES 31, 32-33 (Sally Engle Merry & Neal Milner eds., 1993) [hereinafter Merry, *Popular Justice*]; *see* Richard L. Abel, *Introduction* to 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE 2 (Richard Abel ed., 1982) (terming same phenomena "informal justice"). Merry distinguishes between popular justice created by the state ("reformist" in liberal democracies or "socialist" in socialist states) and popular justice created in opposition to the state ("communitarian" or "anarchic"). Merry, *Popular Justice*, *supra*, at 40-49.

33. STEVENS, *supra* note 32, at 5-15. Local justice often involves lots of talk and little action because a lengthy discussion is "less disruptive, and more likely to restore harmony, than a narrower discussion resulting in corrective action would." Karen J. Brison, *All Talk and No Action? Saying and Doing in Kwanga Meetings*, *in* ANTHROPOLOGICAL APPROACHES TO POLITICAL BEHAVIOR 106, 126 (Frank McGlynn & Arthur Tuden eds., 1991) (discussing the Kwanga of Papua New Guinea); *see* STEVENS, *supra* note 32, at 7 ("[T]he cultural and socio-economic underpinnings of small face-to-face societies necessitate the avoidance of adversarial proceedings.").

34. *See, e.g.*, LAURA NADER, HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE 297 (1990) (quoting Martin Chanock's observation that "maintaining harmony (with 'forcefulness') loses its patina of egalitarian warmth"); LAUREL L. ROSE, THE POLITICS OF HARMONY: LAND DISPUTE STRATEGIES IN SWAZILAND 192 (1992) [hereinafter ROSE, HARMONY] ("The [Swazi] authorities strategically use ideologies to make people think unity (organic harmony); and if they do not think it, then the authorities use coercive tactics to compel them to behave in a unified manner (control harmony)."); Robert L. Kidder & John A. Hostetler, *Managing Ideologies: Harmony as Ideology in Amish and Japanese Societies*, 24 LAW & SOC'Y REV. 895, 921 (1990) (arguing that emphasis on local harmony over formal law in Japanese and Amish societies is "an aspect of intense ideological activity in both which heretofore has been misconstrued as simply an unusual level of conformity with tradition"); Laura Nader & Elisabetta Grande, *Current Illusions and Delusions About Conflict Management—In Africa and Elsewhere*, 27 LAW & SOC. INQUIRY 573, 589 (2002) ("Nothing is more misleading than the claim of a return to a 'primitive' way of solving conflicts, where the disputes are given back to the people, who harmoniously (i.e., in a conciliatory way) settle them.").

35. NADER, *supra* note 34, at 321. Elsewhere, Nader noted the irony that "harmony ideology" can make a community more, rather than less, litigious. *Id.* at 220; *see* ROSE, HARMONY, *supra* note 34, at 193 ("In land dispute situations, new elites, like traditional elites, use harmony to create an illusion of unity; however, in the process of creating harmony which accords with their individual and group interests, they often produce internal social conflict.").

36. Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 549 (2005) [hereinafter Drumbl, *Collective Violence*] (cautioning that "local dispute resolution entities may institutionalize the power of unaccountable local elites"); Robert Terris & Vera Inoue-Terris, *A Case Study of Third World Jurisprudence—Palestine: Conflict Resolution and Customary Law in a Neopatrimonial Society*, 20 BERKELEY J. INT'L L. 462, 487 (2002) ("The fact that customary law has no clear documented rules, relying instead on decisions of tribal judges who can be swayed by tribal politics and the active intervention of a clan, potentially undermines the just outcome of traditional proceedings.").

37. Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 870 (1988) [hereinafter Merry, *Legal Pluralism*] (internal citations omitted).

colonial (and post-colonial) law. In the 1970s and 1980s, anthropologists and historians increasingly reconceived the relationships between "indigenous" and colonial practices and between informal custom and formal law: they came to see that "the notion of an unchanging custom or even customary law was a myth of the colonial era, while customary law itself was a product of the colonial encounter."[38] In particular, "customary law" often bears the imprint of Christian missionaries, colonial administrators and courts, and an earlier generation of anthropologists.[39]

Following independence, new political elites, like their colonialist predecessors, typically viewed local, "customary" practices as obstacles to state- and nation-building.[40] Some post-colonial states sought to extend their formal authority by coopting existing informal institutions or implanting new ones.[41] For, as Richard Abel noted, state-sponsored "informalism expands the grasp of the state at the expense of other sources of authority that appear to be potential competitors."[42] While Merry has pointed out that such state expansion is often contested, she nevertheless concluded that local justice generally winds up reinforcing existing power relations.[43] India's *nyaya panchayats* (village courts) and *lok adalats* (people's courts) provide well-documented examples of failed state informalism. Wanting to expand access to justice for the poor, promote speedy conciliation, and extend central control, the Indian state tried to replace traditional *panchayats* (village or caste councils) with *nyaya panchayats*.[44] The new

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38. *Id.* at 875 (internal citations omitted); *see* ROSE, HARMONY, *supra* note 34, at 191 (stating that "customary law is not a stable body of rules but rather a body of rules continually undergoing transformations in separate cases"); *see also* Sarah Leah Whitson, *"Neither Fish, Nor Flesh, Nor Good Red Herring"* Lok Adalats*: An Experiment in Informal Dispute Resolution in India*, 15 HASTINGS INT'L & COMP. L. REV. 391, 398-399 (1992) (discussing colonial construction of "indigenous law" in India). *But see* Drumbl, *Collective Violence*, *supra* note 36, at 549 (claiming it is possible to "differentiate between manipulated constructions of the national or local, on the one hand, and the representative or indigenous, on the other").

39. *See, e.g.*, NADER, *supra* note 34, at 296-304, 316 (reviewing literature on how Christianity and colonialism shaped harmony ideology); Peter Fitzpatrick, *Traditionalism and Traditional Law*, 28 J. AFR. L. 20, 24 (1984) (describing how "[t]radition became traditionalism" under colonialism). *Compare* Terence Ranger, *The Invention of Tradition in Colonial Africa*, *in* THE INVENTION OF TRADITION, *supra* note 20, at 211, 250 (arguing that customary law was "invented by colonial codification"), *with* Simon Roberts, *Introduction: Some Notes on "African Customary Law,"* 28 J. AFR. L. 1, 4-5 (1984) (arguing that the "idea of the invented tradition seems to me to imply an impoverished and grossly simplistic understanding of the operation of ideology").

40. Merry, *Legal Pluralism*, *supra* note 37, at 871-72; *see, e.g.*, WILSON, *supra* note 23, at 198; G. Sidney Silliman, *A Political Analysis of the Philippines' Katarungang Pambarangay System of Informal Justice through Mediation*, 19 LAW & SOC'Y REV. 279, 286-91 (1985) (discussing how post-independence Phillipines centralized local dispute resolution).

41. In some cases, though, political elites have fostered legal pluralism in order to increase personal rule and patronage. *See, e.g.*, Terris & Inoue-Terris, *supra* note 36, at 492 (describing how Yasser Arafat encouraged legal pluralism in the Palestinian territories).

42. Abel, *supra* note 32, at 275; *see* Merry, *Legal Pluralism*, *supra* note 37, at 882 ("Government reformers sometimes promote new state judicial institutions with traditional symbolic trappings, claiming to reinstitute traditional law.").

43. Merry, *Popular Justice*, *supra* note 32, at 61.

44. Whitson, *supra* note 38, at 429 ("The N.P.s [*Nyaya panchayats*] thus had two conflicting goals. On the one hand, they were to promote local self-rule, implying the application of local values and traditional customs. On the other hand, they were to promote the laws and values of the new and progressive Indian state.").

institutions "withered away" within ten years "because they represented an unappetizing combination of the formality of official law with the political malleability of village tribunals."[45] In response, the state then created *lok adalats* to hear minor criminal cases, auto accidents, small civil suits, and the like.[46] Those were also unpopular and ineffectual.[47] The creation of local, popular tribunals proved no more successful in self-professedly "revolutionary" regimes: China, Cuba, and Ghana, among others, eventually abandoned or curtailed their people's courts, replacing them with centralized state institutions.[48]

The "customary law" of the colonial and post-colonial state rarely managed to displace all the local justice mechanisms enmeshed in the everyday practices of individuals and groups.[49] At times, local communities resisted the state by interpreting state "customary law" to their own best advantage or by applying their own local practices.[50] At other times, people (re)turned to local justice when state institutions failed or lost their legitimacy.[51]

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45. Marc Galanter & Jayanth K. Krishnan, *"Bread for the Poor": Access to Justice and the Rights of the Needy in India*, 55 HASTINGS L.J. 789, 793 (2004).

46. *Lok Adalats*

> are distinct from traditional *panchayats* in virtually every respect: they operate in the shadow of the official courts; they are staffed by official appointees rather than communal leaders; they apply some diluted version of state law rather than local or caste custom; they arrange compromises instead of imposing fines and penances backed up by the sanction of excommunication.

Id. at 808.

47. Whitson, *supra* note 38, at 391-92.

48. *See* Roger Gocking, *Ghana's Public Tribunals: An Experiment in Revolutionary Justice*, 95 AFR. AFF. 197-98 (1996) (discussing how swiftness and popular responsiveness of public tribunals proved threatening to executive power); Merry, *Popular Justice*, *supra* note 32, at 49-51 (reviewing how socialist popular justice in Communist China wound up reinforcing the existing political and social order); Luis Salas, *The Emergence and Decline of the Cuban Popular Tribunals*, 17 LAW & SOC'Y REV. 587, 601-09 (1983) (describing increasing formalism, bureaucratization, and centralization of Cuban justice system). For an early and overly fulsome description of Mozambique's popular courts, see Albie Sachs, *Changing the Terms of the Debate: A Visit to a Popular Tribunal in Mozambique*, 28 J. AFR. L. 99 (1984).

49. *See* Roberts, *supra* note 39, at 4 (analyzing the degree of colonial domination present in customary law); Gordon R. Woodman, *Legal Pluralism and the Search for Justice*, 40 J. AFR. L. 152, 159 (1996) (distinguishing between "lawyers' customary law" and "popular customary law").

50. Merry, *Legal Pluralism*, *supra* note 37, at 871-72; *see* NADER, *supra* note 34, at 2-3, 7 (discussing how "harmony ideology" and customary law in Mexican villages promoted local solidarity and self-determination vis-à-vis the state); Sally Falk Moore, *Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans About Running "Their Own" Native Courts*, 26 LAW & SOC'Y REV. 11, 12 (1992) (observing "localist opposition" to state centralization); Roberts, *supra* note 39, at 4 (noting that state customary law also provided "qualified autonomy"); DAVID MEARNS, LOOKING BOTH WAYS: MODELS FOR JUSTICE IN EAST TIMOR 37, 39 (2002), *available at* http://www.jsmp.minihub.org/Traditional%20Justice/Reports/Mearns%20Looking%20Both%20Ways%20Report/Mearns%20Looking%20both%20ways.pdf (finding that villagers generally referred disputes to police only after failing to resolve them through local dispute reconciliation methods).

51. *See, e.g.*, Sandra Burman & Wilfried Scharf, *Creating People's Justice: Street Committees and People's Courts in a South African City*, 24 LAW & SOC'Y REV. 693, 735 (1990) (discussing creation of local courts in apartheid South Africa); Terris & Inoue-Terris, *supra* note 36, at 486 (describing how Palestinians increasingly turned to tribal laws as the Palestinian National Authority's legal structures lost authority and legitimacy).

Overall, state efforts to marry formal state systems and informal local systems have generally failed:

> 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 sanctions, and public participation loses its primary importance. . . . Procedural requirements invariably become greater and public participation is curtailed.[52]

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."[53] This sometimes works to the advantage of disputants who can forum-shop: if they are not satisfied with local, "customary" dispute resolution, they can take their conflicts to formal or informal state mechanisms.[54]

Just as many new states sought to modernize and centralize "traditional" dispute resolution mechanisms in the 1960s and 1970s, several Western states, responding to overburdened and insufficiently accessible formal justice structures, developed decentralized alternative dispute resolution ("ADR") mechanisms for civil cases and minor criminal matters.[55] In recent years, some Western donors and policymakers have sought to export modern ADR to "developing" countries. This is a highly problematic exercise:

> The substitution, however partial, of one [Western] dispute resolution technique (centered on the individual) with another (centered on the group), as if the two were perfect substitutes and able to perform the same function independently of the socio-economic context in which they work, is simply inconceivable and may produce disruptive consequences.[56]

One anthropologist advised USAID against implementing an ADR project in post-genocide Rwanda because local dispute resolution mechanisms were already in place, "foreign ADR concepts and approaches cannot easily be transplanted from one cultural

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52. STEVENS, *supra* note 32, at 44. According to Merry, local justice has little hope of resisting encroachments by state law: "Popular justice established in opposition to the state tends to die out or be colonized by state law, while popular justice established by the state itself gradually becomes formalized and incorporated into state law." Merry, *Popular Justice*, *supra* note 32, at 31-32.

53. Philip Parnell, *Village or State? Competitive Legal Systems in a Mexican Judicial District*, *in* THE DISPUTING PROCESS—LAW IN TEN SOCIETIES 315, 349 (Laura Nader & Henry F. Todd Jr., eds., 1978).

54. Merry, *Legal Pluralism*, *supra* note 37, at 882; *see* NADER, *supra* note 34, at 161 ("The very possibility of choice increases the power of the litigants.").

55. *See, e.g.*, NADER, *supra* note 34, at 306-07 (discussing ADR in the United States); Peter S. Adler, *The Future of Alternative Dispute Resolution: Reflections on ADR as a Social Movement*, *in* THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES, *supra* note 32, at 67-87 (same). Laura Nader has critiqued the ADR movement for privileging harmony and inter-personal relations and therefore failing to contest injustice and unequal power relations. Laura Nader, *When Is Popular Justice Popular?*, *in* THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES, *supra* note 32, at 446-49.

56. Elisabetta Grande, *Alternative Dispute Resolution, Africa and the Structure of Law and Power: The Horn in Context*, 43 J. AFR. L. 63, 67 (1999).

context to another," and such transplantation would change the local practices.[57] There is now increasing attention to the need to mix any imported Western ADR with local dispute resolution.[58]

B. *Local Justice and Restorative Justice*

In recent years, local justice mechanisms have gained increasing visibility as part of the restorative justice movement.[59] In contrast to retributive justice,[60] restorative justice emphasizes face-to-face mediation between offenders and victims, where offenders offer atonement and victims reciprocate with forgiveness.[61] Apologies, community service, and other forms of restitution replace incarceration.[62] For John Braithwaite, the movement's leading activist-scholar, the key feature of restorative justice is "reintegrative shaming": "disapproval within a continuum of respect for the offender, disapproval terminated by rituals of forgiveness."[63] Braithwaite is thus careful to distinguish reintegrative shaming from shame sanctions and stigmatization.[64]

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57. LAUREL L. ROSE, USAID, JUSTICE AT THE LOCAL LEVEL: FINDINGS AND RECOMMENDATIONS FOR FUTURE ACTIONS 3-4 (1995) (on file with author) [hereinafter ROSE, JUSTICE].

58. *See, e.g.*, Steven E. Hendrix, *Guatemalan "Justice Centers": The Centerpiece for Advancing Transparency, Efficiency, Due Process, and Access to Justice*, 15 AM. U. INT'L L. REV. 813, 850 (2000) (discussing USAID support for mediation efforts that allow incorporation of some local law); Widner, *supra* note 14, at 71-72 (mentioning experiments in Nigeria and Tanzania); Minh Day, Note, *Alternative Dispute Resolution and Customary Law: Resolving Property Disputes in Post-Conflict Nations, A Case Study of Rwanda*, 16 GEO. IMMIGR. L.J. 235, 238 (arguing that "a hybrid ADR-customary law model is the best mechanism to resolve civil disputes in post-conflict nations"); *see also* Merry, *Popular Justice*, *supra* note 32, at 39 n.10 (describing how legal elites from developing countries sometimes welcome Western ADR).

59. *See, e.g.*, Howard L. Brown, *The Navajo Nation's Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum*, 24 AM. INDIAN L. REV. 297, 301 (2000) (describing how the Peacemaker Division implements customary dispute resolution through ceremonies "in which disputants and community members gather to 'talk things out' with the assistance of a respected community leader, or *naat'aanii* (peacemaker), to reach a consensual settlement") (citation omitted).

60. For discussions of retributive justice, see generally, CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL 136-41 (1996) and Jean Hampton, *The Retributive Idea*, *in* FORGIVENESS AND MERCY 111-61 (Jeffrie G. Murphy & Jean Hampton eds., 1988). For a philosophical discussion of vengeance, see generally TRUDY GOVIER, FORGIVENESS AND REVENGE (2002).

61. John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 4-6 (1999) [hereinafter Braithwaite, *Restorative Justice*]. For an earlier version of Braithwaite's views on reintegrative shaming, see JOHN BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION 54-108 (1989). *See* Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, *in* TRUTH V. JUSTICE, *supra* note 13, at 68, 80 ("[P]roponents of restorative justice tend to privilege forgiveness or reconciliation over punishment, to emphasize the humanity of both victim and offender, and to seek personal and institutional transformation ahead of retribution.") (citation omitted). Many advocates of restorative justice draw on communitarianism and/or Christian doctrine. *See, e.g.*, John Braithwaite & Philip Pettit, *Republican Criminology and Victim Advocacy: Comment*, 28 LAW & SOC'Y REV. 765, 767-68 (1994) (advocating republican theory of criminology); Christa Obold-Eshleman, Note, *Victims' Rights and the Danger of Domestication of the Restorative Justice Paradigm*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 571, 575-80 (2004) (suggesting that both a communal world view and Christian theology favor restorative justice).

62. Braithwaite, *Restorative Justice*, *supra* note 61, at 6.

63. *Id.* at 39.

64. *Id.* at 39-40. Braithwaite has acknowledged that a "profound deficiency" of his earlier work is "that it is just a theory of shaming, with the emotion of shame left undertheorized." *Id.* at 42. But, as Martha

Typically, restorative justice processes are employed where offenders plead guilty to less serious crimes (including juvenile crime, white-collar crime, and sometimes domestic violence).[65] Advocates claim restorative justice is more successful than retributive justice in effecting general deterrence, offender rehabilitation, and victim satisfaction.[66] Yet, as Braithwaite has conceded, none of the optimistic claims for restorative justice have yet been "satisfactorily demonstrated" by empirical research.[67]

Critics have contended that restorative justice unfairly tars legitimate demands for retribution as atavistic vengefulness and thus short-changes victims.[68] For example, Richard Delgado wrote:

> Mediation may disserve victims by pressuring them to forgive offenders before they are psychologically ready to do so . . . . Not every victim will welcome this responsibility. In pressuring the victim to "forgive and move on" and handing him the power of sentencer, VOM [victim-offender mediation] may end up compounding the injury received from the crime itself.[69]

Delgado doubted that most offenders could be morally transformed through mediation:

> Some offenders may, indeed, have a crisis of conscience upon meeting the person she has victimized. But a forty-five minute meeting is unlikely to have a lasting effect if the offender is released to her neighborhood and teenage peer group immediately afterwards. If the offender-victim encounter is brief and perfunctory, and the ensuing punishment demeaning or menial, young offenders will learn to factor the cost of restitution into their practical calculus the next time they are tempted to commit a crime and to parrot what is expected of them when caught.[70]

Nussbaum trenchantly observed:

> [T]he central problem with Braithwaite's account is his failure to make any clear distinction between shame and guilt. He favors punishments that focus on the act rather than the person, and that ask the person to make atonement for an act, as a prelude to being forgiven and reintegrated into the community. He insists that these punishments must be meted out without stigmatization. . . . He insists that malefactors are not to be humiliated, and that we are to separate the act from the person. All this is characteristic of guilt rather than shame.

MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 240-41 (2004). *Compare id.* at 229 ("Shame . . . pertains to a trait or feature of the person, whereas guilt pertains to an act."), *with* NINO, *supra* note 60, at 140 ("[T]here is an essential connection between the retributive view of punishment and the evaluation of people's character.").

65. *See* Braithwaite, *Restorative Justice*, *supra* note 61, at 4-9 (discussing applications of restorative justice to juvenile and white collar criminals).

66. *Id.* at 19-79.

67. *Id.* at 107.

68. Richard Delgado, *Prosecuting Violence: A Colloquy on Race, Community, and Justice*, 52 STAN. L. REV. 751, 761 (2000); *see* WILSON, *supra* note 23, at 97 (arguing that South Africa's TRC unfairly "portray[ed] retributive justice as blood-lust and 'wild justice' and as an affront to democratization and the new constitutional order").

69. Delgado, *supra* note 68, at 762-63 (citations omitted); *see* Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 1 UTAH L. REV. 303, 303 (2003) ("If restorative justice really wants to fully restore victims of crime, then it cannot eliminate punishment.").

70. Delgado, *supra* note 68, at 765 (citation omitted); *see* Note, *Developments in the Law: Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1967 (1998) [hereinafter *Alternatives to Incarceration*] ("Despite anecdotal evidence to the contrary, however, psychological studies imply that some communitarian

Delgado also argued that victim-offender mediation reinforces existing unequal power relations and sacrifices due process.[71] Importantly, such mediations are private and limited in size,[72] so the public, symbolic, and expressive functions of trials are lost.[73] Braithwaite has acknowledged many of these concerns as legitimate and has called for further empirical research on restorative justice mechanisms.[74]

C. *Local and Restorative Justice in Post-Conflict Transitions*

Even though restorative justice has yet to prove itself in the context of minor, domestic (municipal) crimes, it is now being applied to the worst international crimes: genocide, crimes against humanity, war crimes, torture, apartheid, and other gross human rights abuses.[75] This is partly a response to a lack of capacity and will by national and international criminal justice systems. Proponents sometimes make a much bolder claim: after mass atrocities, restorative justice processes can promote accountability, deterrence, collective memory, truth, reconciliation, and the rule of law more successfully than international and national criminal trials.[76] It is difficult to prove these claims empirically as the most touted mechanisms (the truth commissions in South Africa, East Timor, and Sierra Leone) all benefited from the concurrent threat of criminal investigations and prosecutions.[77] However, restorative justice mechanisms do not appear any more successful at ferreting out the truth, provoking shame, or

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interventions in sentencing will not rehabilitate—and may even intensify the criminality of—most offenders.").

71. Delgado, *supra* note 68, at 760-61. Similarly, the divorce reform movement's emphasis on mediation has often deprived women of the moral high ground while reinforcing their lack of (particularly economic) power vis-à-vis their husbands. *See, e.g.*, MARTHA FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 161-66 (1991) (describing how use of mediation in divorce proceedings disserves women's interests); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549-51 (1991) (discussing disadvantages of mediation for women).

72. *See* Braithwaite, *Restorative Justice*, *supra* note 61, at 39 (identifying studies where average attendance (besides the offender) in various victim-offender mediations in Australia, Canada, New Zealand, and the United States ranged from five to seventy-five people).

73. Delgado, *supra* note 68, at 770. Drumbl missed this larger point when he argued that "[i]t is the public nature of [reintegrative] shaming, as contrasted with the private nature of incarceration, that gives it its power." Drumbl, *Punishment*, *supra* note 6, at 1263 (citation omitted).

74. Braithwaite, *Restorative Justice*, *supra* note 61, at 107.

75. *Cf. Alternatives to Incarceration*, *supra* note 70, at 1966 ("[P]ractitioners and commentators seem to agree that shaming will not have much effect on violent or habitual criminals, persons who lack free will . . . or offenders whose antisocial behaviors is the result of social problems.").

76. *See, e.g.*, Drumbl, *Punishment*, *supra* note 6 at 1253-63 (discussing the potential benefits of restorative justice if applied to perpetrators of the genocide in Rwanda).

77. *See* TOM LODGE, POLITICS IN SOUTH AFRICA 176-204 (2002) (discussing how failure to receive amnesty from the TRC in South Africa could result in criminal prosecution); William A. Schabas, *The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone*, 25 HUM. RTS. Q. 1035, 1035-40 (2003) [hereinafter Schabas, *Truth Commissions and International Courts*] (explaining the relationship between the investigative powers of the TRC and the prosecutorial powers of the Special Court in Sierra Leone); Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor*, 95 AM. J. INT'L L. 952, 953 (2001) (noting that the TRC in East Timor "was designed to complement . . . criminal proceedings").

promoting reconciliation than retributive justice.[78] This Section examines the role of local justice in promoting restorative justice mechanisms in Uganda, Mozambique, South Africa, Sierra Leone, and East Timor.

1. Reconciliation Ceremonies in Northern Uganda and Mozambique

Over the course of its brutal, twenty-year insurgency in northern Uganda, the Lord's Resistance Army ("LRA") has abducted more than twenty thousand children, forcing many of them to serve as combatants, porters, and sex slaves.[79] In an effort to cut those children off from their families and communities, the LRA often compelled them to kill, trample, beat, mutilate, or abduct friends, relatives, and other children.[80] Recently, northern Ugandans have turned to traditional healing rituals and reconciliation ceremonies to reintegrate escaped or captured child soldiers back into the communities they once helped terrorize. An assembly of Acholi chiefs presided over a reconciliation ceremony in April 2005, involving twenty-eight former rebels:

> One after the other, they stuck their bare right feet in a freshly cracked egg, with the lieutenant colonel, who lost his right leg to a bomb, inserting his right crutch in the egg instead. The egg symbolizes innocent life, according to local custom, and by dabbing themselves in it the killers are restoring themselves to the way they used to be. Next, the former fighters brushed against the branch of a *pobo* tree, which symbolically cleansed them. By stepping over a pole, they were welcomed back into the community by [the chiefs].[81]

Northern Uganda is not the only place where traditional healing rituals have been adapted to modern mass atrocities.[82] In many of these conflicts, particularly those involving child soldiers, a sizable number of participants are both victims and perpetrators.[83]

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78. *See, e.g.*, PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 156 (2001) [hereinafter HAYNER, UNSPEAKABLE TRUTHS] (noting how polls showed that the South African TRC had worsened relations between blacks and whites); LODGE, *supra* note 77, at 186 (same); PIERS PIGOU, UNITED NATIONS DEVELOPMENT PROGRAM TIMOR-LESTE, THE COMMUNITY RECONCILIATION PROCESS OF THE COMMISSION FOR RECEPTION, TRUTH AND RECONCILIATION 73 (2004) (concluding that "the quality of the disclosures was often very limited" in community hearings of East Timor's Truth and Reconciliation Commission); Fletcher & Weinstein, *Violence and Social Repair*, *supra* note 22, at 638 (concluding that the impact of truth commissions on reconciliation was "no more apparent than that of trials"); Leigh Payne, *In Search of Remorse: Confessions by Perpetrators of Past State Violence*, BROWN J. WORLD AFF. 2004, at 115, 116 (assessing truth commissions and finding that even when perpetrators make rare shows of remorse, it "is often undermined by the language of justification, excuse, and victimhood"); *cf.* JOHN M. CONLEY & WILLIAM M. O'BARR, JUST WORDS: LAW, LANGUAGE, AND POWER 84 (2005) ("If we accuse someone, the likelihood is that he or she will deflect the accusation, rather than accepting blame.").

79. HUMAN RIGHTS WATCH, ABDUCTED AND ABUSED: RENEWED CONFLICT IN NORTHERN UGANDA 17-18 (2003). Between June 2002 and May 2003, the LRA abducted approximately 8400 children, *id.* at 4, some as young as nine or ten, *id.* at 18 (quoting an eyewitness).

80. *Id.* at 21-24.

81. Marc Lacey, *Victims of Uganda Atrocities Choose a Path of Forgiveness*, N.Y. TIMES, Apr. 18, 2005, at A1.

82. *See, e.g.*, Fletcher & Weinstein, *Violence and Social Repair*, *supra* note 22, at 635 (discussing community reburials of Ndebele massacre victims in Zimbabwe).

83. *See* Beth K. Dougherty, *Searching for Answers: Sierra Leone's Truth and Reconciliation*

Following a vicious sixteen-year civil war that left almost a million civilians dead, Mozambique eschewed state accountability mechanisms both for political and cultural reasons.[84] Instead, local communities conducted their own ceremonies using *curandeiros* (traditional healers) to reintegrate returning soldiers and rebels. An anthropologist described the beliefs underlying the Mozambican rituals:

> After the war, when fighters and refugees return home, they are believed to be potential contaminators of the social body. The spirits of the dead, which might haunt them, can disrupt life in their families and villages. Therefore, the cleansing process is seen as a fundamental condition for collective protection against pollution and for the social reintegration of war-affected people into society.[85]

The Mozambican ceremonies, like those in northern Uganda, did not involve truth-telling or confessions about past atrocities. As Priscilla Hayner argued, "Where this reflects a broad consensus, a policy of reconciliation through silence should be acceptable and accepted by the international community."[86]

2. South Africa's Truth and Reconciliation Commission

In sharp contrast to northern Uganda and Mozambique, post-apartheid South Africa adopted a national policy of reconciliation through truth-telling in its Truth and

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Commission, AFR. STUD. Q., Fall 2004, at 39, 50 (discussing reintegration of child soldiers in Sierra Leone); Fletcher & Weinstein, *Violence and Social Repair*, *supra* note 22, at 612 n.137 (noting that prosecution of child soldiers in Sierra Leone would contradict local values); Lacey, *supra* note 81, at A1 (stating that northern Ugandan victims support traditional reconciliation because "the line between victim and killer is too blurred"); William A. Schabas, *The Sierra Leone Truth and Reconciliation Commission*, *in* ROADS TO RECONCILIATION, *supra* note 24, at 129, 146 [hereinafter Schabas, *The Sierra Leone Truth and Reconciliation Commission*] (pointing out that the Sierra Leone Special Prosecutor has publicly declined to prosecute former child soldiers). On child soldiers generally, see JIMMIE BRIGGS, INNOCENTS LOST: WHEN CHILD SOLDIERS GO TO WAR (2005); P. W. SINGER, CHILDREN AT WAR (2005).

84. For overviews of the Mozambican conflict, see, for example, WILLIAM FINNEGAN, A COMPLICATED WAR: THE HARROWING OF MOZAMBIQUE (1992) and HAYNER, UNSPEAKABLE TRUTHS, *supra* note 78, at 189 (noting Mozambican conflict was political, not ethnic, and that it divided families).

85. Honwana, *supra* note 24, at 92 (citation omitted). For further descriptions of Mozambican ceremonies, see HAYNER, UNSPEAKABLE TRUTHS, *supra* note 78, at 192-95; Honwana, *supra* note 24, at 93-97 and Helena Cobban, *The Legacies of Collective Violence: The Rwandan Genocide and the Limits of the Law*, BOSTON REV., Apr.-May 2002, at 24-27.

86. HAYNER, UNSPEAKABLE TRUTHS, *supra* note 78, at 200. But Hayner acknowledged that determinations of broad consensus are difficult in post-conflict societies. *Id*; *see also* ROSALIND SHAW, UNITED STATES INSTITUTE OF PEACE, RETHINKING TRUTH AND RECONCIALATION COMMISSIONS: LESSONS FROM SIERRA LEONE 7-9 (Feb. 2005) [hereinafter SHAW, RETHINKING TRUTH AND RECONCIALATION COMMISSIONS], *available at* http://www.usip.org/pubs/specialreports/srl130.html (describing how many Sierra Leoneans choose "social forgetting" as "a refusal to reproduce the violence by talking about it publicly"); Craig Etcheson, *The Limits of Reconciliation in Cambodia's Communes*, *in* ROADS TO RECONCILIATION, *supra* note 24, at 201, 203 (concluding on basis of ethnographic research that Cambodian communities may prefer voluntary amnesia); Tuomas Forsberg, *The Philosophy and Practice of Dealing with the Past: Some Conceptual and Normative Issues*, *in* BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT 57, 68 (Nigel Biggar ed., 2001) ("[M]uch of postwar democracy was constructed on a foundation of forgetting.") (internal quotations and citation omitted); Charles S. Maier, *Doing History, Doing Justice: The Narrative of the Historian and of the Truth Commission*, *in* TRUTH V. JUSTICE, *supra* note 13, at 261, 274 ("[I]t is not certain that justice makes a better foundation for stable democracy than amnesia.").

Reconciliation Commission ("TRC"). While sometimes portrayed as an example of African restorative justice, the South African TRC was a novel, political mechanism that differed considerably from local, African dispute resolution. Given the hype surrounding the TRC, it is easy to forget that it started as a backroom political deal between the African National Congress ("ANC") and the National Party ("NP") to grant amnesty to perpetrators of gross human rights abuses (which was defined narrowly so as to exclude lawful enforcement of apartheid).[87] Unlike earlier truth commissions in Latin America, however, the TRC only granted individualized amnesties in exchange for public truth-telling. Those seeking amnesty also had to demonstrate that their crimes were politically motivated.[88] Importantly, amnesties precluded both criminal prosecutions by the state and civil lawsuits by the victims or their families.[89]

Archbishop Desmond Tutu's charismatic leadership helped transform the TRC into a showcase for restorative justice. In particular, he linked restorative and local justice by promoting the TRC as a triumph of African restorative justice over Western retributive justice.[90] Such binary categories are simplistic at best. Claims that particular cultural traditions promote harmony are not merely essentialist, they often serve modern political interests.[91] As the legal anthropologist Sally Falk Moore has argued, the "sentimental version" of African harmony is "a mixture of African self-idealization and colonial/anthropological political theory."[92] In fact, the TRC's restorative justice differed fundamentally from African local justice in its emphasis on reconciliation *between individuals* (victims and perpetrators), rather than reconciliation

87. WILSON, *supra* note 23, at 8 (noting that ANC and NP struck the deal on amnesty without consulting victims and without any democratic deliberation). Wilson also pointed out "[b]ehind amnesty for individuals was the less obvious program of indemnifying the state itself." *Id.* at 24. For a concise overview of the TRC, see LODGE, *supra* note 77, at 176-204. For an uncritical, first-hand account by a psychiatrist involved in the TRC, see PUMLA GOBODA-MADIKIZELA, A HUMAN BEING DIED THAT NIGHT: A SOUTH AFRICAN STORY OF FORGIVENESS (2003).

88. WILSON, *supra* note 23, at 23.

89. *Id.* at 23-24.

90. MINOW, VENGEANCE AND FORGIVENESS, *supra* note 21, at 81. Archbishop Tutu stated: "Retributive justice is largely Western. The African understanding is far more restorative . . . ." *Id.* For critical discussion of the TRC and ANC's invocation of *ubuntu*, see LODGE, *supra* note 77, at 178-79, 230-40. *But see* Brooks, *supra* note 22, at 2335-36 (arguing for the success of *ubuntu* norms in post-apartheid South Africa).

91. *See* WILSON, *supra* note 23, at 11-13 (describing the use of *ubuntu* to advance political ends). As Wilson noted, these binary oppositions excluded an important middle ground in South African politics: "the pursuit of legal retribution as a possible route to reconciliation itself." *Id.* at 11.

92. Moore, *supra* note 50, at 32-33. Based on her fieldwork among the Chagga of northern Tanzania, Moore observed: "What appears to be equilibrium from the outside is often a temporary moment of agreement in which a dominant segment of the group has prevailed and everyone recognizes that predominance and acquiesces in all public behavior. This is what often gives the appearance of unanimity to collective decisionmaking." *Id.* at 33 (citation omitted).

of the larger group.[93] In African local justice, the wrongdoer's group typically pays restitution to the victim's group.[94]

Under Archbishop Tutu's influence, the TRC often portrayed Christian forgiveness as incumbent on victims, regardless of whether the perpetrator atoned.[95] Indeed, the TRC did not require expressions of remorse as a condition for granting amnesty to perpetrators.[96] Initially, the TRC tried to pressure victims into public displays of forgiveness:

> For the first six months of the Human Rights Violations hearings around the country, Commissioners specifically pressed those testifying to forgive the perpetrators then and there. After hearing each testimony, they asked as a matter of course, "Do you forgive the offender?" This question was seen as fairly outrageous by numerous observers . . . and just as many victims, and was occasionally met with such a hostile response that it eventually had to be abandoned.[97]

As Martha Minow rightly observed:

> Where the violations are brutal, severe, and intimate, it can be a new assault to expect the victims to forgive . . . . Fundamentally, forgiveness must remain a choice by individuals; the power to forgive must be inextricable from the power to choose not to do so. It cannot be ordered or pressured.[98]

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93. *Compare* Joe Hudson & Burt Galaway, *An Introduction to Restorative Justice*, *in* LAW IN SOCIETY 332, 333 (Nick Larsen & Brian Burtch eds., 1999) (stating that under restorative justice "crime is viewed primarily as a conflict between individuals"), *with* Grande, *supra* note 56, at 64 (describing African dispute resolution process as "only incidentally individual").

94. Grande, *supra* note 56, at 64.

95. *See* Frank Ferrari, *Forgiving the Unforgivable: An Interview with Archbishop Desmond Tutu*, COMMONWEAL, Sept. 12, 1997, at 13, 13 (quoting Archbishop Tutu, who characterized as holy the readiness of some victims to forgive without first hearing the perpetrators atone); WILSON, *supra* note 23, at 120 (criticizing Tutu's conception of forgiveness which places an unconditional obligation on victims to forgive). Despite its claims to be victim-centered, a key TRC member acknowledged:

> The Commission failed in a number of ways to meet the needs of victims. It has been justly criticized for failing to prioritize counseling, to adequately inform victims of the findings of the Commission, or to publicly promote the need for reparations. The government, in turn, has failed to respond to the recommendations made by the Commission concerning reparations. The net result is that those who suffered most during the apartheid years have been asked to suffer yet again.

Charles Villa-Vicencio, *Restorative Justice in Social Context: The South African Truth and Reconciliation Commission*, *in* BURYING THE PAST, *supra* note 86, at 207, 217.

96. Villa-Vicencio, *supra* note 95, at 210 (defending TRC's policy because contrition would have been difficult to impose and might have precluded disclosures from some unrepentant perpetrators).

97. WILSON, *supra* note 23, at 119. One TRC member also admitted that meetings between victims and perpetrators were largely symbolic: "It is not natural—only through great effort, and only with TRC prodding does it happen." Hugo van der Merwe, *National and Community Reconciliation: Competing Agendas in the South African Truth and Reconciliation Commission*, *in* BURYING THE PAST, *supra* note 86, at 85, 93 (internal quotations and citation omitted).

98. Martha Minow, *Breaking the Cycles of Hatred*, *in* BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR 14, 18 (Nancy L. Rosenbaum ed., 2002) [hereinafter Minow, *Breaking the Cycles of Hatred*]; *see* Heidi Grunebaum, *Talking to Ourselves "Among the Innocent Dead": On Reconciliation, Forgiveness, and Mourning*, 117 PUBLICATIONS OF MOD. LANGUAGE ASS'N OF AM. 306, 307-08 (2002) (arguing the moral dignity of nonforgiveness and criticizing the TRC for closing off public expressions of nonforgiveness); *see also* AMÉRY, *supra* note 3, at 62-81 (defending resentment by Holocaust survivors on moral grounds); JEFFRIE G. MURPHY, GETTING EVEN: FORGIVENESS AND ITS LIMITS 19 (2003) (contending that

In contrast to the TRC, Braithwaite and many other restorative justice advocates view the offender's remorse as a necessary precondition for the victim's forgiveness.[99] In local justice, too, forgiveness is often conditioned on restitution.[100]

In its public hearings on human rights violations, the TRC sought to portray emotional scenes of individual forgiveness in the hope of spurring national healing.[101] Yet, most modern restorative justice practices function at the level of "microcommunities," that is, families and schools. After assessing several empirical studies, Braithwaite concluded that "the evidence of restorative justice restoring communities is of very small accomplishments of microcommunity building and of modest numbers of community members going away overwhelmingly satisfied with the justice in which they have participated."[102] Consequently, he cautions "it would be optimistic to expect that restorative justice could ever have sufficient impacts in restoring microcommunities to cause a shift in the macro impact of community on the crime rate."[103] Such optimism is even less warranted in post-conflict societies.

The TRC either ignored or shied away from local justice in the black townships even though its authorizing statute provided that such mechanisms "shall be applied, where appropriate, to facilitate reconciliation and redress for victims."[104] In its final recommendations, the TRC called for an end to local courts which it labeled "repressive."[105] Criticizing the TRC's approach to local justice, Wilson stated that:

> [T]he TRC should be seen as part of a continuous history of state efforts to centralize and reduce legal pluralism and to transform local notions of justice. For those committed to community justice, however, the TRC was just one more state institution with little legitimacy. The language of

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resentment, within limits, promotes "self-respect, self-defense, and respect for the moral order").

99. *See* Braithwaite & Pettit, *supra* note 61, at 772 (noting the importance of "a remorse that will be accepted by victims to have an authenticity which justifies acceptance of apology-forgiveness"). Though, as Delgado noted, victims may be pressured to offer forgiveness before they are ready to do so in response to insincere, superficial expressions of remorse. Delgado, *supra* note 68, at 762-63. This concern is heightened after mass atrocity. *See* Dean Ajdukovic & Dinka Corkalo, *Trust and Betrayal in War*, *in* MY NEIGHBOR, MY ENEMY, *supra* note 13, at 287, 300 ("Namely, the perpetrator must have confidence that the victim will respond with forgiveness and readiness to open a new chapter in their relationships. The victim must have confidence that the perpetrator who asks for forgiveness is sincere, and not manipulative.").

100. *See* STEVENS, *supra* note 32, at 13-15 (stating that an accused may be forgiven after supplying food and/or drink to the victim).

101. WILSON, *supra* note 23, at 21. One of the TRC's legacies is the problematic tendency to conflate individual and national healing. *See id.* (criticizing the idea that nations have collective psyches); *see also* Brandon Hamber, *Does the Truth Heal? A Psychological Perspective on Political Strategies for Dealing with the Legacy of Political Violence*, *in* BURYING THE PAST, *supra* note 86, at 131, 136-38 (expressing doubt that individual healing can be equated with collective healing); HAYNER, UNSPEAKABLE TRUTHS, *supra* note 78, at 155 (arguing for distinction between national/political reconciliation and individual/personal reconciliation). *But see* Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 127, 127 (Autumn 1996) [hereinafter Kritz, *Coming to Terms with Atrocities*] ("In responding to such trauma, groups and nations tend to function similarly to individuals.").

102. Braithwaite, *Restorative Justice*, *supra* note 61, at 38.

103. *Id.* at 36 (citation omitted).

104. PROMOTION OF NATIONAL UNITY AND RECONCILIATION ACT No. 34 of 1995 § 11(g).

105. WILSON, *supra* note 23, at 175. Wilson acknowledged that some local community courts were repressive. *Id.*

> vengeance prevalent among urban Africans undermines national attempts to centralize justice using moral injunctions to reconcile and forgive. . . .
>
> Overall, the TRC missed innumerable opportunities to engage with local justice structures, however difficult that may have been. Nevertheless it was vital to have tried, since local courts (as we saw in Boipatong) mediate the conflicts of the apartheid era and therefore facilitate a situation where adversaries do not gun each other down in the street in broad daylight (as happens in neighboring Sharpeville).[106]

The TRC's "top-down notion of reconciliation"[107] not only excluded local dispute resolution mechanisms, but it also left out local stakeholders, civil society organizations, and communities.[108]

3. Sierra Leone's Truth and Reconciliation Commission

The 1999 Lomé Peace Agreement ("Peace Agreement") sought to end Sierra Leone's vicious civil war by promising a blanket amnesty to perpetrators of crimes against humanity and war crimes, including the top leadership of the rebel Revolutionary United Front ("RUF"), whose trademark terror tactic was hacking arms and legs off civilians.[109] Instead of criminal prosecutions, the Peace Agreement called for a truth and reconciliation commission.[110] Nevertheless, the RUF quickly violated the accords and resumed the civil war (which finally ended in 2001).[111] In response to the renewed human rights abuses, the U.N. and Sierra Leone carved out an exception to the amnesty: they created a mixed national-international tribunal, the Special Court for Sierra Leone, to try those "persons who bear the greatest responsibility" for crimes committed since 1991 (when the RUF invaded Sierra Leone).[112]

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106. *Id.* at 213-14; *see id.* at 176-87 (describing revenge killings and culture of impunity in Sharpeville); *see also* Hamber, *supra* note 101, at 140-41 (stating that TRC focused more on relations between state and citizens and less on inter-communal violence).

107. van der Merwe, *supra* note 97, at 86.

108. *See id.* at 95 (noting exclusion of stakeholders and communities); *see also* LODGE, *supra* note 77, at 189 (discussing failure of the TRC to use mental health services offered by various NGOs).

109. Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, art. IX, July 7, 1999, http://www.sierra-leone.org/lomeaccord.html. The U.N. Secretary-General's Special Representative drafted a last-minute, handwritten reservation to the amnesty provision, which stated that it could not be applied to crimes against humanity and war crimes. Schabas, *Truth Commissions and International Courts*, *supra* note 77, at 1036. For background on the conflict in Sierra Leone, see HUMAN RIGHTS WATCH, GETTING AWAY WITH MURDER, MUTILATION, RAPE: NEW TESTIMONY FROM SIERRA LEONE (1999); HUMAN RIGHTS WATCH, "WE'LL KILL YOU IF YOU CRY": SEXUAL VIOLENCE IN THE SIERRA LEONE CONFLICT (2003); PAUL RICHARDS, FIGHTING FOR THE RAIN FOREST: WAR, YOUTH & RESOURCES IN SIERRA LEONE (1996); William Reno, *Sierra Leone: Warfare in a Post-State Society*, *in* STATE FAILURE AND STATE WEAKNESS IN A TIME OF TERROR 71 (Robert I. Rotberg ed., 2003).

110. Peace Agreement Between the Government of Sierra Leone and the RUF of Sierra Leone, arts. VI.2(ix), XXVI, July 7, 1999, http://www.sierra-leone.org/lomeaccord.html.

111. See BBC News, *Timeline: Sierra Leone, A Chronology of Key Events*, http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1065898.stm (last updated Dec. 15, 2005), for a summary of key events in the civil war in Sierra Leone.

112. The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, Delivered to the Security Council*, annex, at 15, U.N. Doc. S/2000/915, (Oct. 4, 2000). See S.C. Res. 1315, ¶ 1, U.N. Doc. S/RES/2000/1315 (Aug. 14, 2000) for the Security Council's request for the

The Sierra Leone Truth and Reconciliation Commission ("Commission"), which began its work in mid-2002, collected more than eight thousand statements and held local hearings from April through August 2003.[113] Due to funding problems, the Commission only held a week of local hearings in each of the country's twelve urban district capitals and left most reconciliation efforts to local communities.[114]

The Commission's statute authorized it 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."[115] Traditional leaders were involved in some of the district hearings outside Freetown and some closing ceremonies involved traditional rites of forgiveness.[116] In general, though, the Commission largely eschewed local rituals of swearing, cleansing, and purification, which may have limited its ability to induce confessions and effect reconciliation.[117]

Furthermore, the Commission's emphasis on truth-telling was at odds with socio-cultural norms in Sierra Leone:

> Indirectness, evasiveness, and secrecy have been valorized in a political-economic context in which individuals shift between economic activities and geographical locations and in which they seek to maintain an open ended and adaptable stance to powerful patrons.[118]

According to the anthropologist Rosalind Shaw, "[T]he TRC set itself in opposition to widespread local practices of social reconstruction as forgetting by valorizing verbally discursive remembering as the only road to reconciliation and peace."[119] Not surprisingly, then, the TRC's district hearings often failed to elicit detailed, truthful confessions from former combatants. However, the TRC and local communities considered vague expressions of regret sufficient as long as former combatants displayed humility toward the community during the hearings.[120] That led one observer to note that the TRC's rituals "may be more important to reconciliation than truth."[121]

Secretary-General to negotiate the creation of the Special Court. For critical appraisals of the Special Court, see generally THIERRY CRUVELLIER, THE SPECIAL COURT FOR SIERRA LEONE: THE FIRST EIGHTEEN MONTHS (2004); INT'L CRISIS GROUP, THE SPECIAL COURT FOR SIERRA LEONE: PROMISES AND PITFALLS OF A "NEW MODEL" (2003). For an argument that hybrid tribunals are better in terms of legitimacy, capacity-building, and norm-penetration than either international or domestic tribunals, see generally Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295-96 (2003).

113. HAYNER, UNSPEAKABLE TRUTHS, *supra* note 78, at 3.

114. Dougherty, *supra* note 83, at 43-44.

115. The Truth and Reconciliation Commission Act of 2000, § 7(2).

116. HAYNER, UNSPEAKABLE TRUTHS, *supra* note 78, at 5; Dougherty, *supra* note 83, at 46.

117. Kelsall, *supra* note 23, at 385.

118. *Id.* at 383.

119. SHAW, RETHINKING TRUTH AND RECONCILIATION COMMISSIONS, *supra* note 86, at 12.

120. *Id.* at 11; Kelsall, *supra* note 23, at 380-89 (describing TRC hearings in Tonkolili district); Rosalind Shaw, Transitional Subjectivities: Reconciling Ex-Combatants in Northern Sierra Leone 18-22 (unpublished manuscript on file with author) (discussing TRC hearing in Bombali district).

121. Kelsall, *supra* note 23, at 361. *See also* Fletcher & Weinstein, *Violence and Social Repair*, *supra* note 22, at 625-26 (arguing for public community rituals after mass violence); Kimberly Theidon, *"How We Learned to Kill Our Brother"?: Memory, Morality and Reconciliation in Peru*, 29 BULL. INST. FR. ETUDES

4. East Timor's Truth and Reconciliation Commission

By comparison to South Africa and Sierra Leone, East Timor's Truth and Reconciliation Commission did a better job promoting local-level dispute resolution and incorporating local practices. After an overwhelming majority of East Timorese voted for independence from Indonesia in a U.N. sponsored referendum in August 1999, Indonesian-backed militias went on the rampage, killing at least 528 people,[122] creating over half a million refugees and internally displaced persons,[123] and destroying much of the country's infrastructure.[124] In the aftermath, the U.N. Transitional Administration in East Timor ("UNTAET")[125] established a truth and reconciliation commission (Commission for Reception, Truth and Reconciliation, or "CAVR") to hear less serious crimes: "theft, minor assault, arson (other than that resulting in death or injury), the killing of livestock or destruction of crops . . . ."[126] Unlike South Africa's TRC, the CAVR granted amnesty only for lesser offenses and then only after a public showing of remorse.[127] The CAVR established the innovative Community Reconciliation Process ("CRP") to hold local truth and reconciliation hearings designed, in part, to encourage the repatriation and reintegration of approximately one hundred thousand East Timorese refugees (including former militia members) then in West Timor.[128]

ANDINES 539, 550-52 (2000) [hereinafter Theidon, *Memory, Morality and Reconciliation*] (discussing sacramental characteristic of reconciliation rituals after mass violence in Peru's highlands).

122. COMMISSION FOR RECEPTION, TRUTH AND RECONCILIATION IN EAST TIMOR, CHEGA! [ENOUGH!]: FINAL REPORT, Part 7.2, at 248, 264-93 (2005) [hereinafter CAVR], *available at* http://www.ictj.org/en/news/features/846.html.

123. *Id.* at 3.

124. *See* Dickinson, *supra* note 112, at 298-99 (noting devastation to East Timor's infrastructure); Suzannah Linton, *Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor*, 25 MELB. U. L. REV. 122, 129 (2001) (describing murder, looting, arson, and forced relocations).

125. The Security Council established the United Nations Transitional Administration in East Timor [UNTAET] under Chapter VII authority in October 1999. S.C. Res. 1272, pmbl., ¶ 1, U.N. Doc. S/RES/1272 (Oct. 25, 1999). For discussions of the UNTAET's activities in East Timor, see Linton, *supra* note 124, at 132-33; SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING 63-64, 135-45 (2004).

126. UNTAET, Reg. No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, Sched. 1, UNTAET/REG/2001/10 (July 13, 2001) [hereinafter UNTAET Reg. No. 2001/10]. A mixed national-international tribunal (the Special Panel for Serious Crimes, or SPSC) prosecuted "serious crimes," which included genocide, crimes against humanity, war crimes, murder, attempted murder, torture, and sexual offences. UNTAET, Reg. No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, § 1.3, UNTAET/REG/2000/15 (June 6, 2000). When it closed in May 2005, the SPSC had tried only 87 of 440 indicted suspects because most (339) were located outside the court's jurisdiction. Press Release, Judicial System Monitoring Programme, The Special Panels for Serious Crimes Hear their Final Case (May 12, 2005). For critical assessments of the SPSC, see DAVID COHEN, EAST-WEST CENTER, SEEKING JUSTICE ON THE CHEAP: IS THE EAST TIMOR TRIBUNAL REALLY A MODEL FOR THE FUTURE? (2002); OPEN SOCIETY JUSTICE INITIATIVE & COALITION FOR INT'L JUSTICE, UNFULFILLED PROMISES: ACHIEVING JUSTICE FOR CRIMES AGAINST HUMANITY IN EAST TIMOR 34-45 (2004).

127. CAVR, *supra* note 122, Part 9, at 2, 19-20; Stahn, *supra* note 77, at 963-64.

128. UNTAET Reg. No. 2001/10, *supra* note 126, §§ 22-33. One of CAVR's explicit objectives was "supporting the reception and reintegration of individuals who have caused harm to their communities through the commission of minor criminal offences and other harmful acts through the facilitation of community based mechanisms for reconciliation." UNTAET Reg. No. 2001/10, *supra* note 126, § 3.1(h). This "elite-driven

Nearly three-quarters of CRP hearings involved adaptations of a local dispute resolution practice, *nahe biti boot*, named for the unfolding of a large woven mat (*biti boot*) where disputants and community notables would resolve differences.[129] CRP hearings often began with prayers or customary incantations.[130] At the end of the hearings, perpetrators signed a Community Reconciliation Agreement ("CRA") detailing the Acts of Reconciliation that had been agreed on: "community service; reparation; public apology; and/or other act[s] of contrition."[131] Agreements were generally followed by reconciliation ceremonies that entailed chewing betel-nut, sacrificing small animals, and celebratory feasting.[132] Importantly, "local ritual, administrative and religious figures attend and participate in the reconciliation ceremonies, vesting legitimacy in proceedings in local terms."[133]

Nonetheless, CRP hearings varied considerably from local practice. First, they dealt only with minor crimes committed in the context of widespread political violence. They did not hear murder and rape cases, and, most significantly, they could not hear land disputes.[134] Second, the composition of the CRP panels differed significantly from that of *nahe biti boot*, particularly through the inclusion of women.[135] Third, they "varied from local compensatory norms in placing an emphasis on restorative labor in

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reconciliation" focused on bringing together pro-independence and anti-independence factions because "it [was] feared that the refugees in West Timor might seek to destabilize East Timor in the years to come." Dionisio Babo-Soares, *Nahe Biti: Grassroots Reconciliation in East Timor*, *in* ROADS TO RECONCILIATION, *supra* note 24, at 227. Thus, the CRP "was not designed as an individual reconciliation process between victim and deponents." JUDICIAL SYSTEM MONITORING PROGRAMME, UNFULFILLED EXPECTATIONS: COMMUNITY VIEWS ON CAVR'S COMMUNITY RECONCILIATION PROCESS 8 (2004) [hereinafter JSMP, UNFULFILLED EXPECTATIONS]. The CRP succeeded beyond expectations: 1541 perpetrators—541 more than anticipated—requested CRP hearings and 1371 of those completed the hearings. CAVR, *supra* note 122, Part 9, at 29.

129. CAVR, *supra* note 122, Part 9, at 7, 27; *see* Babo-Soares, *supra* note 128, at 233, 235-37, 240 (describing the philosophy of *nahe biti*). For further descriptions of local justice both before and after the 1999 violence, see generally CAVR, *supra* note 122, Part 9, at 5-8; TANJA HOHE & ROD NIXON, UNITED STATES INSTITUTE OF PEACE, RECONCILING JUSTICE: 'TRADITIONAL' LAW AND STATE JUDICIARY IN EAST TIMOR 11-27, 43-62, 65-69 (2003); MEARNS, *supra* note 50, at 19-22, 28-55; PIGOU, *supra* note 78, at 24-32.

130. CAVR, *supra* note 122, Part 9, at 18, 23-24; PIGOU, *supra* note 78, at 64.

131. UNTAET Reg. No. 2001/10, *supra* note 126, § 27.7. Most CRAs simply involved an apology. *See* PIGOU, *supra* note 78, at 56 (assessing reported CRAs from August 2002 to November 2003). The Agreements received legal imprimatur from the formal justice system: district courts registered the Agreements, thereby making them court orders. UNTAET Reg. No. 2001/10, *supra* note 126, § 28.2. This had the effect of legitimizing both the formal and informal systems. Once a deponent fully complied with the Agreement's obligations, he received immunity from criminal and civil liability for his confessed actions. *Id.* §§ 32.1-32.2.

132. CAVR, *supra* note 122, Part 9, at 23-24; JSMP, UNFULFILLED EXPECTATIONS, *supra* note 128, at 11; *see* PIGOU, *supra* note 78, at 75 (describing a local ceremony where blemishes in chicken entrails were interpreted as meaning that some deponents had failed to tell the whole truth and would have to live with the consequences).

133. HOHE & NIXON, *supra* note 129, at 55.

134. UNTAET Reg. No. 2001/10, *supra* note 126, § 38.2.

135. PIGOU, *supra* note 78, at 45.

place of an exchange of cattle or other material wealth."[136] Finally, the CRP's community agreements bound individuals, whereas *nahe biti boot* binds families.[137]

III. LESSONS FROM RWANDA

Where East Timor and, to a lesser extent, Sierra Leone adapted local dispute resolution practices to their truth and reconciliation commissions, Rwanda did something radically different, transforming a largely moribund local dispute resolution mechanism into a highly formal system for meting out (largely retributive) criminal justice.

A. Toward Understanding the 1994 Genocide

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 religion, live together, and often intermarry.[138] Contrary to stereotype, many Hutu and Tutsi cannot be distinguished by physical appearance, which is why the Belgian colonial government, post-independence Hutu regimes, and *genocidaires* relied so heavily on identity cards.[139] In pre-colonial times, Hutu and Tutsi were somewhat fluid identities based largely on socio-political status and economic activity.[140] The German and Belgian colonialists, however, treated Hutu and

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136. HOHE & NIXON, *supra* note 129, at 48.

137. PIGOU, *supra* note 78, at 31-32; CAVR, *supra* note 122, Part 9, at 8.

138. Out of convention, Hutu and Tutsi will be described here as ethnic groups. It is commonly estimated that Hutu make up 85%, Tutsi 14%, and the indigenous Twa forest people less than 0.5% of Rwanda's 8.4 million people, though, for political reasons, the 2002 census did not consider ethnicity. *See* U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2005 (2006) [hereinafter U.S. DEP'T OF STATE 2006], *available at* http://www.state.gov/g/drl/rls/hrrpt/2005/61587.htm (estimating 8.4 million people by the end of 2005); NAT'L CENSUS SERV., A SYNTHESIS OF THE ANALYSES OF THE 2002 CENSUS OF RWANDA 3 (2005) (on file with author) (calculating a total population of 8,128,553 as of early 2002). Rwanda is one of the most densely populated countries in Africa. *Id.* at 5 (calculating 378 people per square kilometer of habitable surface area).

Rwanda is a patrilineal society in which children take the ethnicity of the father. There is a contentious historiographical debate about the origins and content of differences between Hutu and Tutsi. MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA 41 (2001); *see* JOHAN POTTIER, RE-IMAGINING RWANDA: CONFLICT, SURVIVAL AND DISINFORMATION IN THE LATE TWENTIETH CENTURY 110-23 (2002) (discussing the politicized rewriting of ethnic history after the genocide); *see also* LIISA H. MALKKI, PURITY AND EXILE: VIOLENCE, MEMORY, AND NATIONAL COSMOLOGY AMONG HUTU REFUGEES IN TANZANIA 153-96 (1995) (discussing creation of identity and collective memory among Burundian Hutu refugees in Tanzanian refugee camp). The United Nations International Criminal Tribunal for Rwanda ("ICTR") found that "the Tutsi . . . constitute[d] a stable and permanent group and were identified as such by all." Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 702 (Sept. 2, 1998), *available at* http://65.18.216.88/ENGLISH/cases/Akayesu/judgement/akay001.htm. *But see* NIGEL ELTRINGHAM, ACCOUNTING FOR HORROR: POST-GENOCIDE DEBATES IN RWANDA 27-33 (2004) (criticizing *Akayesu*'s definition of ethnicity).

139. Villia Jefremovas, *Acts of Human Kindness: Tutsi, Hutu and the Genocide*, 23 ISSUE: J. OPINION 28 (1995).

140. Tutsi were mostly pastoralists, while Hutu were mostly cultivators. Identity was strongly linked to clans and lineages, which contained both Hutu and Tutsi. CATHARINE NEWBURY, THE COHESION OF OPPRESSION: CLIENTSHIP AND ETHNICITY IN RWANDA 1860-1960 11 (1988); JAN VANSINA, ANTECEDENTS TO

Tutsi as fixed, racial identities and viewed the Tutsi as racially superior "Hamites" who supposedly came from Ethiopia.[141] The post-colonial Hutu regimes[142] further instrumentalized ethnic identities.[143]

In October 1990, the Rwandan Patriotic Front ("RPF"), a rebel movement dominated by Rwandan Tutsi refugees in Uganda, attacked the country and set off a civil war that lasted four years.[144] Rwandan President Juvenal Habyarimana came under increasing international and internal pressure to share power with newly created opposition parties and the RPF in the context of a severe economic downturn.[145] In

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MODERN RWANDA: THE NYIGINYA KINGDOM 134-39 (2004).

141. JEAN-PIERRE CHRÉTIEN, THE GREAT LAKES OF AFRICA: TWO THOUSAND YEARS OF HISTORY 281-88 (Scott Straus trans., 2003); *see* MAMDANI, *supra* note 138, at 76-102 (discussing racialization and the "Hamitic hypothesis"). The Belgians imposed a system of ethnic identity cards and favored the Tutsi elite who had governed the pre-colonial kingdom. In 1959, Belgian colonialists 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. *See generally* RENE LEMARCHAND, RWANDA AND BURUNDI 118-196 (1970) (describing the 1959 "social revolution"); MAMDANI, *supra* note 138, at 103-31 (same).

142. Despite claims to represent the Hutu majority, the post-independence, neo-patrimonial regimes discriminated among Hutu: Gregoire Kayibanda's First Republic favored Hutu from central and southern Rwanda, while Juvenal Habyarimana's Second Republic benefited Hutu in the northwest (particularly Gisenyi province). ALISON DES FORGES, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 40-41, 46-47 (1999) [hereinafter DES FORGES, LEAVE NONE TO TELL THE STORY]; GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 85-86 (2d ed. 1999).

143. MAMDANI, *supra* note 138, at 132-57. Mamdani's linkage of the genocide to colonialism has been quite influential. *See, e.g.*, Adrien Katherine Wing & Mark Richard Johnson, *The Promise of a Post-Genocide Constitution: Healing Rwandan Spirit Injuries*, 7 MICH. J. RACE & L. 247, 259 (2002) (noting Mamdani's hypothesis that "colonialists essentially racialized the Tutsis"). For critiques of Mamdani, see Jeffrey Herbst, *The Unanswered Question: Attempting to Explain the Rwandan Genocide*, 80 FOREIGN AFF., May-June 2001, at 125-26 (noting lack of empirical evidence and lack of attention to local differences); Rene Lemarchand, *Review Article: A History of Genocide in Rwanda*, 43 J. AFR. HIST. 307-11 (2002) (contesting Mamdani's theory that the genocide was a Fanonian revolt of Hutu natives against Tutsi settlers); Paul J. Magnarella, *Book Review*, 40 J. MODERN AFR. STUD., Sept. 2002, at 515-17 (criticizing Mamdani for failing to explain why Hutu murdered Hutu during the genocide).

144. Several authors have stressed the role of the RPF and civil war in the genocide. *See, e.g.*, MAMDANI, *supra* note 138, at 185-96; SCOTT A. STRAUS, THE ORDER OF GENOCIDE: RACE, POWER, AND WAR IN RWANDA ch. 6 (forthcoming 2006) (on file with author) (finding interviewed perpetrators often rationalized the violence against Tusti civilians in terms of revenge and self-defense against the RPF); Alan J. Kuperman, *Provoking Genocide: A Revised History of the Rwandan Patriotic Front*, 6 J. GENOCIDE RES. 61, 61-62 (Mar. 2004) (making the controversial claim that the RPF knowingly provoked the Hutu government into massive retaliation against Tutsi civilians). Like other twentieth century genocides, the Rwandan genocide occurred in the context of war. Robert Melson, *Modern Genocide in Rwanda: Ideology, Revolution, War, and Mass Murder in an African State*, *in* THE SPECTER OF GENOCIDE: MASS MURDER IN HISTORICAL PERSPECTIVE, *supra* note 27, at 326. As Christopher Browning observed, "War is the most conducive environment in which governments can adopt 'atrocity by policy' and encounter few difficulties in implementing it." CHRISTOPHER R. BROWNING, ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND 162 (1992). Rwandans themselves often identify the war as an important causal factor in the genocide. Timothy Longman & Theoneste Rutagengwa, *Memory, Identity and Community in Rwanda*, *in* MY NEIGHBOR, MY ENEMY, *supra* note 13, at 162, 172.

145. Catharine Newbury, *Background to Genocide: Rwanda*, 23 ISSUE: J. OPINION 12, 15 (1995). While democratization played an important causal role in the Rwandan genocide, Michael Mann pushes this too far. He argues that Rwanda "exemplifies" his thesis that "murderous ethnic cleansing is the dark side of democracy." MICHAEL MANN, THE DARK SIDE OF DEMOCRACY: EXPLAINING ETHNIC CLEANSING 473 (2005).

response, President Habyarimana and Hutu extremists sought to unify a Hutu population riven by regional and political differences under the banner of Hutu Power.[146] The government incited massacres of Tutsi in 1991, 1992, and 1993 while some Hutu extremists in the government and military began planning to massacre Tutsi.[147]

On April 6, 1994, President Habyarimana was returning from a regional peace summit in Tanzania when unknown assailants shot down his plane over Kigali, killing all on board.[148] Within a few hours, Hutu extremists seized control of the Rwandan government and military and launched the genocide.[149] The extremists incited genocide by deploying racist stereotypes of Tutsi as supposed Ethiopians who wanted to reimpose a feudal monarchy and by stoking fears among Hutu peasants that the RPF (and, by extension, all Tutsi) would dispossess Hutu of their land.[150] Using hate media, they portrayed Tutsi civilians as a "fifth column" of the RPF.[151] By the time the

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146. DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 111-16, 137-40; PRUNIER, *supra* note 142, at 108-10, 128-30, 154, 186-90.

147. There is a debate among scholars, as well as among prosecutors and defense counsel at the ICTR, over the extent to which the genocide was planned in advance. For the leading expositions of the genocide as a planned conspiracy, see DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 96-116, 127-29, 137-40, 180-81; LINDA MELVERN, CONSPIRACY TO GENOCIDE 19-47 (2004). Straus offers a nuanced reinterpretation, arguing that the hardliners engaged in contingency planning for a resumption of war in an atmosphere of paranoia. STRAUS, *supra* note 144, at 251.

148. It remains unclear whether Habyarimana was assassinated by Hutu extremists or by the RPF. DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 181-85; PRUNIER, *supra* note 142, at 213-29. In March 2004, *Le Monde* reported that a French investigating magistrate found that the RPF shot down the plane. Stephen Smith, *L'enquête sur l'attentat qui fit basculer le Rwanda dans le genocide* [Investigation of the attack that tipped Rwanda into genocide], LE MONDE (Fr.), Mar. 10, 2004, at 2; *see also* LIEUTENANT ABDUL JOSHUA RUZIBIZA, RWANDA: L'HISTOIRE SECRETE 241-52 (2005) (contending the RPF killed Habyarimana). Even if the RPF did assassinate Habyarimana, that would not lessen the criminal or moral responsibility of the *genocidaires*, but it might reduce some of the RPF's moral stock.

149. *See generally* DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 185-201 (discussing the launching of the genocide); MELVERN, CONSPIRACY TO GENOCIDE, *supra* note 147, at 133-62 (same). One of the remarkable features of the Rwandan genocide is the absence of a charismatic leader: not only is there no Hitler or Pol Pot, there is also no central figure. While Colonel Theoneste Bagasora was the key strategist at the start of the genocide, his role and influence seems to have diminished over the course of the genocide. This shifting and fragmented responsibility makes it difficult to neatly apportion criminal liability and command responsibility.

150. DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 74-78. As Straus convincingly demonstrated, the micro-level dynamics of the genocide followed a similar pattern in different communities:

> 1) assassination, the war, and the killings destabilized local authority; 2) a space of opportunity opened at the local level; 3) national hardliners meanwhile launched violence and made that violence a new basis for authority; 4) a struggle for local dominance ensued; 5) in some areas, locals advocating killing quickly took over while in other areas the process was much slower; and 6) in all locations, once the balance tipped toward those willing to promote violence, mass mobilization and mass killing quickly followed.

STRAUS, *supra* note 144, at 3.36. Overall, Straus concluded 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." *Id.* at 3.37.

151. *See generally* Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment, ¶¶ 69-78 (Dec. 3, 2003), *available at* http://65.18.216.88/ENGLISH/cases/Ngeze.index.htm (discussing use of hate media); DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 248-60

genocide ended in July 1994, soldiers, police, militia groups, and civilians had slaughtered an estimated five hundred thousand to one million Tutsi.[152] Thousands of Hutu were also killed, including political opponents of the genocide, suspected RPF collaborators, rescuers of Tutsi, those who were mistaken for Tutsi, and victims of opportunistic intra-Hutu violence.[153] The Rwandan genocide was marked by its speed, low-tech brutality, and large-scale participation.[154]

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.[155] By coming to power militarily, rather than through a political accommodation with the prior regime, the RPF was in a position to impose "victor's justice" on its defeated opponents.[156]

(same); ARTICLE 19, BROADCASTING GENOCIDE: CENSORSHIP, PROPAGANDA & STATE-SPONSORED VIOLENCE IN RWANDA 1990-1994 62-83 (1996) (same); JEAN-PIERRE CHRETIEN ET AL., RWANDA: LES MEDIAS DU GENOCIDE [THE MEDIA OF GENOCIDE] 78-80 (1995) (same).

152. Human Rights Watch estimated 507,000 genocide victims. DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 15. For a discussion of the difficulties in ascertaining the number of genocide victims, see *id.* at 15-16. The Rwandan government's official count of genocide victims during the period from April to December 1994 is 927,118, with approximately ninety-four percent having been killed on the basis of their Tutsi ethnicity. MINISTÈRE DE L'ADMINISTRATION LOCALE, DE L'INFORMATION ET DES AFFAIRES SOCIALES, DÉNOMBREMENT DES VICTIMES DU GENOCIDE, FINAL REPORT [MINISTRY OF LOCAL ADMINISTRATION, INFORMATION, AND SOCIAL AFFAIRS, FINAL REPORT ON THE COUNT OF GENOCIDE VICTIMS] 24 (2002) [hereinafter DÉNOMBREMENT]. The official victim count appears inflated and the government did not describe its methodology. According to Filip Reyntjens, the government's figures are contradicted by demographic data that Tutsi numbered well under one million before the genocide and by the fact that over 200,000 Tutsi survived the genocide. Filip Reyntjens, *Rwanda, Ten Years On: From Genocide to Dictatorship*, 103 AFR. AFF. 177, 178 n.1 (2004) [hereinafter Reyntjens, *Rwanda, Ten Years On*]; *see also* DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 15 (citing estimate of 657,000 Tutsi before the genocide).

153. Estimates for the number of Hutu killed during the genocide range from 10,000 to 56,000. *See* PRUNIER, *supra* note 142, at 265 (estimating 10,000 to 30,000 Hutu victims); DÉNOMBREMENT, *supra* note 152, at 24 (stating that approximately six percent of the 927,118 victims, or 55,627, were Hutu).

154. The best single account of the Rwandan genocide is DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, which combines the international, national, and local perspectives. Using available (albeit incomplete) data, Straus has mapped the onset of the genocide by date and intensity in different communities. He showed that the genocide was far from monolithic and that the most statistically significant variables for the start of the violence were the degree of support for the assassinated president's ruling party and proximity to RPF positions—not ethnic diversity or land shortages. STRAUS, *supra* note 144, at 2.26-2.27.

155. MICHAEL BARNETT, EYEWITNESS TO GENOCIDE: THE UNITED NATIONS AND RWANDA 132-52 (2002); ROMEO DALLAIRE, SHAKE HANDS WITH THE DEVIL 98-522 (2003); DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 690-91; PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES 149-151 (1998); LINDA MELVERN, A PEOPLE BETRAYED: THE ROLE OF THE WEST IN RWANDA'S GENOCIDE 137-49 (2000); SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 346-48 (2002). Alan J. Kuperman has taken a contrarian position, arguing that the United Nations and western countries could not have stopped the genocide. ALAN J. KUPERMAN, THE LIMITS OF HUMANITARIAN INTERVENTION: GENOCIDE IN RWANDA 100-08 (2001). *But cf.* Alison Des Forges, *Alas, We Knew*, FOREIGN AFF. 141, 141-42 (May-June 2000) (criticizing Kuperman). *But see* Alan J. Kuperman, *Kuperman Replies*, FOREIGN AFF. 142, 142-44 (May-June 2000) (responding to Des Forges).

156. *See* Stef Vandeginste, *Rwanda: Dealing with Genocide and Crimes Against Humanity in the Context of Armed Conflict and Failed Political Transition*, *in* BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT, *supra* note 86, at 223, 226-46 [hereinafter Vandeginste, *Rwanda: Dealing with Genocide*] (noting lack of political power-sharing in post-genocide Rwanda by comparison with post-

The Rwandan genocide was neither an atavistic outbreak of recurrent African "tribalism" nor a spectacular instance of state failure. 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 (1959-1964, 1973, 1990-1993, and the 1994 genocide).[157] The genocide resulted not from state failure, but, rather, from a *coup d'etat* where extremists captured a centralized, hierarchical state structure, which they then used to implement the genocide.[158]

In an influential article, Jose Alvarez made a simplistic dichotomy between "crimes of state" and "crimes of hate,"[159] wrongly called Rwanda a "failed state,"[160] and incorrectly characterized the genocide as "crime[s] of hate."[161] First, the label "crimes of hate" suggests that Rwanda's genocidal violence was largely irrational,[162]

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apartheid South Africa).

157. The first major round of modern ethnic violence between Hutu and Tutsi occurred in the context of the independence struggle from 1959 to 1963 and was instigated, in part, by the Belgian colonialists. Approximately 400,000 Tutsi fled the violence and became refugees in neighboring countries. Gérard Prunier, *The Rwandan Patriotic Front, in* AFRICAN GUERRILLAS 119, 121 n.11 (Christopher Clapham ed. 1998) [hereinafter Prunier, *The Rwandan Patriotic Front*]. Under the First Republic (1962-1973), the government engaged in periodic pogroms against Tutsi, often in response to incursions from Tutsi guerrillas who sought to reinstate the Tutsi monarchy. President Juvenal Habyarimana came to power in a 1973 military coup, promising to end the violence between Hutu and Tutsi that Kayibanda fomented that year to shore up his 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 (including racialized quotas), there was no ethnic violence against Tutsi until October 1990, when the RPF attacked the country. DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 41-49; STRAUS, *supra* note 144, at 7.1-7.35 (reviewing historical patterns of violence). *But see* Wierzynska, *supra* note 30, at 1940 & n.35 (asserting incorrectly that "[r]ecurring violence has marked the entire duration of Rwanda's independence"); Allison Corey & Sandra F. Joireman, *Retributive Justice: The Gacaca Courts in Rwanda*, 103 AFR. AFF. 73, 77 (2004) (stating wrongly that "successive waves of massacres continued against Tutsi groups throughout the 1970s and 1980s (including especially violent mass killings in 1975)").

158. *See, e.g.*, Alison Des Forges, *The Ideology of Genocide*, 23 ISSUE: J. OPINION 44 (1995); STRAUS, *supra* note 144, at 8.6.

159. Alvarez, *Crimes of States/Crimes of Hate*, *supra* note 6, at 367-69. Alvarez is nonetheless right to point up the need for less state-centric accounts of mass atrocity.

160. *Id.* at 438.

161. Alvarez contended that atrocities in the Balkans and Rwanda "are prototypical crimes of hate—that is, particularly virulent forms of intergroup violence with only sporadic, incidental interstate dimensions." *Id.* at 378. In fact, the Rwandan genocide had several important interstate dimensions: (1) the RPF invasion, which was launched from Uganda; (2) the failure of the United Nations and international community to enforce peace accords and prevent genocide; (3) the early, targeted killing of ten Belgian peacekeepers that had the desired effect of triggering the international community's withdrawal from Rwanda; and (4) French support for the genocidal forces and France's humanitarian intervention which enabled the top *genocidaires* to flee to Zaire, thus destabilizing the Great Lakes region for years afterwards. *See, e.g.*, MAMDANI, *supra* note 138, at 159-84 (analyzing the regional, interstate politics that contributed to the genocide); POWER, *supra* note 155, at 329-89 (describing the international community's role).

162. Alvarez, *Crimes of States/Crimes of Hate*, *supra* note 6, at 378-83, 396. Other authors have also stressed the irrational aspect of the genocide. *See, e.g.*, Cobban, *supra* note 85, at para. 99 (describing the genocide as "the blood orgy of those terrifyingly irrational weeks"); Drumbl, *Collective Violence*, *supra* note 36, at 591 ("Do genocidal fanatics make cost-benefit analyses prior to initiating violence?"). In fact, Rwandan *genocidaires* often treated killing as routinized work rather than as part of a frenzied or carnivalesque orgy of violence. *See* JEAN HATZFELD, MACHETE SEASON: THE KILLERS IN RWANDA SPEAK 226-34 (Linda Coverdale

when, in fact, much of it served rational political ends at the local and state level.[163] Second, the term "crimes of hate" does not capture the extent to which some perpetrators took opportunistic advantage of the genocide and war to settle personal scores and local conflicts that had little to do with anti-Tutsi ideology or ethnic hatred.[164] Third, perpetrators of mass atrocity are far more likely to dehumanise their victims than to hate them.[165] Finally, and most importantly, individuals commit ethnic violence for many factors other than what Alvarez calls "the prevalence of endemic ethnic hatred":[166] dehumanisation, fear, material greed, group conformity, political opportunism, or, more likely, some toxic combination thereof.[167]

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trans. 2005) (describing the killings as work); *see generally* SCOTT STRAUS & ROBERT LYONS, INTIMATE ENEMY: IMAGES AND VOICES OF THE RWANDAN GENOCIDE (2006) (same).

163. Mass atrocity is typically committed by rational actors acting instrumentally. *See, e.g.*, VALENTINO, *supra* note 9, at 69 ("My research . . . also suggests that perpetrators may view mass killing as a rational way to counter threats or implement certain types of ideologies."); Helen Fein, *Patrons, Prevention and Punishment of Genocide: Observations on Bosnia and Rwanda, in* THE PREVENTION OF GENOCIDE: RWANDA AND YUGOSLAVIA RECONSIDERED 5 (Helen Fein ed. 1994) ("Genocide is preventable because it is usually a rational act: that is, the perpetrators calculate the likelihood of success, given their values and objectives.").

On the rationality of genocidal violence at the macro-level in Rwanda, see, for example, DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 1; Rene Lemarchand, *Rwanda: The Rationality of Genocide*, 23 ISSUE: J. OPINION 8-11 (1995). On the rationality of violence at the local level, see DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 303-594 (describing the genocide in local communities in Butare and Gikongoro prefectures); STRAUS, *supra* note 144, at 6.14-6.15 ("By the perpetrators' logic, killing Tutsis would deplete the rebel ranks; stymie infiltration; and deter the rebels."); Timothy Longman, *Genocide and Socio-Political Change: Massacres in Two Rwandan Villages*, 23 ISSUE: J. OPINION 19 (1995) [hereinafter Longman, *Genocide and Socio-Political Change*] (finding that Hutu elite in one community organized a mob to kill local Tutsi "to reestablish their authority both by presenting themselves as defenders of Hutu interests and by demonstrating their capacity to wield coercive force"); Omar McDoom, Rwanda's Ordinary Killers: Interpreting Popular Participation in the Rwandan Genocide 10-11 (2005), *available at* http://www.crisisstates.com/download/wp/wp77.pdf (describing how non-state actors used genocidal violence to wrest power from local officials in two communities in southern Rwanda).

In other contexts, mob violence and terroristic acts, which first appeared atavistic and irrational, often turned out to have a political logic of their own. *See, e.g.*, ALAIN CORBIN, THE VILLAGE OF CANNIBALS: RAGE AND MURDER IN FRANCE, 1870, at 118-19 (Arthur Goldhammer trans. 1992) (describing the local political understandings that lay behind a village's public torture and murder of a nobleman); RICHARDS, *supra* note 109, at xx (stating that "hand cutting, throat slitting and other acts of terror [in Sierra Leone] became rational ways of achieving intended strategic outcomes.").

164. *See* MARIE BÉATRICE UMUTESI, SURVIVING THE SLAUGHTER: THE ORDEAL OF A RWANDAN REFUGEE IN ZAIRE 53-55, 60-61 (Julia Emerson trans. 2004) (describing how Hutu militia men targeted other Hutu); Catherine André & Jean-Phillipe Platteau, *Land Relations Under Unbearable Stress: Rwanda Caught in the Malthusian Trap*, 34 J. ECON. BEHAV. & ORG. 1, 1-3 (1998) (describing economic reasons why Hutu killed fellow Hutu in a community in northwest Rwanda where there were very few Tutsi); *see also* Stathis N. Kalyvas, *The Ontology of "Political Violence": Action and Identity in Civil Wars*, 1 PERSPS. ON POL. 475, 475-76 (2003) (stressing the need to distinguish micro-level violence and its motivations in analyzing civil wars).

165. *See, e.g.*, Fletcher & Weinstein, *Violence and Social Repair*, *supra* note 22, at 616.

166. Alvarez, *Crimes of States/Crimes of Hate*, *supra* note 6, at 378. Alvarez's claim resembles the controversial "Goldhagen thesis," which explains the Holocaust by postulating that ordinary Germans subscribed to an eliminationist anti-Semitism. *See* DANIEL JONAH GOLDHAGEN: HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST 27-48 (1996) (explaining the underlying causes of German eliminationist anti-Semitism); VALENTINO, *supra* note 9, at 46-60 (critiquing Goldhagen). Many Rwandans, including perpetrators, do not attribute the genocidal violence to ethnic hatred or anti-Tutsi ideology. Longman & Rutagengwa, *supra* note 144, at 169; *see* HATZFELD, *supra* note 162, at 216-21

In a study of some 220 low-level, convicted, confessed killers, Scott Straus found that "*intra-ethnic coercion* [among Hutu] appears to have been a . . . greater determinant of genocidal participation than was inter-ethnic enmity."[168] Of course, the tangle of motivations, as well as duress, among low-level perpetrators makes it more difficult to secure convictions for genocide, which requires the specific special intent "to destroy, in whole or in part, a national, ethnical, racial, or religious group."[169]

(relating views of several convicted killers); STRAUS & LYONS, *supra* note 162, at 39-96 (same).

167. MANN, *supra* note 145, at 26-30 (discussing the wide range of perpetrator motives in mass killings); VALENTINO, *supra* note 9, at 39-46 (emphasizing selection effects and situational pressures in accounting for perpetrator motives). Perpetrator motivations also vary over time. STRAUS, *supra* note 144, at 1.28 ("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."); *see* VALENTINO, *supra* note 9, at 75 ("Ethnic mass killing has deeper roots in perpetrators' fears than in their hatreds."); Fletcher & Weinstein, *Violence and Social Repair*, *supra* note 22, at 607-11 (summarizing social psychology literature on the role that "diffusion of responsibility, power of authority, dehumanization of others, the presence of allies, and the condition of anonymity" play in group violence); Jody Halpern & Harvey Weinstein, *Empathy and Rehumanization after Mass Violence*, *in* MY NEIGHBOR, MY ENEMY, *supra* note 13, at 303, 305 (agreeing with Herbert Kelman and Lee Hamilton's emphasis on dehumanization, routinization, and authorization). In his path-breaking study of how ordinary police reservists came to commit genocide during the Holocaust, Browning emphasized the role of group conformity.

> 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.

BROWNING, *supra* note 144, at 162, 184-85 ("Distancing, not frenzy and brutalisation, is one of the keys to the behavior of Reserve Police Battalion 101. War and negative racial stereotyping were two mutually reinforcing factors in this distancing."); JAN GROSS, NEIGHBORS: THE DESTRUCTION OF THE JEWISH COMMUNITY OF JEDWABNE (2000) (documenting how Polish peasants massacred their Jewish neighbors largely for personal gain during wartime).

168. STRAUS, *supra* note 144, at 5.32. Also, as another Rwanda scholar observed, the spatial dynamics of the genocide undermines the "ethnic hatred" hypothesis:

> If the 'ethnic violence' and 'ancient hatreds' arguments are to be born out, then the center of the old [Tutsi] kingdom, the *prefectures* of Butare and Gitarama should have shown the greatest degree of violence. However, this was the area that most strongly resisted the orders to kill during the first weeks of the genocide. Nor did it have any ethnic or political clashes in the 1991-1993 period . . . It took until April 18, 1994 for the killings to start and, in the end, the Interahamwe and presidential guards had to be brought in from Kigali and the north to force people to kill.

VILLIA JEFREMOVAS, BRICKYARDS TO GRAVEYARDS: FROM PRODUCTION TO GENOCIDE IN RWANDA 118 (2002); *see also* Timothy Longman, *Placing Genocide in Context: Research Priorities for the Rwandan Genocide*, 6 J. GENOCIDE RES. 29, 36 (2004) [hereinafter Longman, *Placing Genocide in Context*] (noting lack of empirical evidence about whether ordinary people subscribed to anti-Tutsi ideologies); Michele D. Wagner, *All the Bourgmestre's Men: Making Sense of Genocide in Rwanda*, 45 AFR. TODAY 25 (1998) (finding that relations with the mayor were more important than ethnic identity in explaining violence in one district); *see generally* Lee Ann Fujii, The Power of Local Ties: Mechanisms of Mass Participation in the Rwandan Genocide (Nov. 17, 2005) (paper presented at the Annual Meeting of the African Studies Association) (on file with author) (finding that social relations explain participation better than ethnicity for two local communities).

169. Convention on the Prevention and Punishment of the Crime of Genocide (1951) 78 U.N.T.S. 277, art. 2. *See* Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1796 (2005) [hereinafter Osiel, *Banality of Good*] ("Among subordinates, mixed motives are likely, in a way that the mens rea for genocide does not readily accommodate."). This suggests that crimes against humanity may be a more effective legal tool for successfully prosecuting lower-level perpetrators of mass atrocity. *Cf.* Beth van Schaack, *Darfur and the Rhetoric of Genocide*, 26 WHITTIER L. REV. 1101, 1101-03

One of the most troubling and perplexing features of the Rwandan genocide is the high rate of participation by ordinary people. Several authors allege that millions of Hutu participated in genocide, with some going so far as to suggest that a majority was involved.[170] Yet, that approach fails to make moral and legal distinctions among different types of participation, lumping together those who killed with those who merely looted, and those who acted willingly with those who acted under duress.[171] Indeed, there were many in the latter category:

> 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.[172]

Based on careful, empirical work, one scholar estimated that 175,000 to 210,000 perpetrators were responsible for most of the killing—an enormous number, to be sure, but not one that justifies collective guilt.[173]

(2005) (describing the benefits of attaining convictions for crimes against humanity, rather than genocide).

170. *See, e.g.*, GOUREVITCH, *supra* note 155, at 244 (citing an estimate of three million perpetrators from a government source); MAMDANI, *supra* note 138, at 266 ("Rwanda's key dilemma is how to build a democracy that can incorporate a *guilty majority* alongside an aggrieved and *fearful minority* in a single political community."); Alvarez, *Crimes of States/Crimes of Hate*, *supra* note 6, at 467 (claiming millions were involved); Brooks, *supra* note 22, at 2327 (contending that Hutu leaders "succeeded in dramatically shifting the normative commitment of several million Rwandan Hutus"); Cobban, *supra* note 85, at para. 99 (suggesting "the great mass of the Hutu people" were involved in the genocide); Drumbl, *Punishment*, *supra* note 6, at 1250 (estimating up to a million participants and even more who acquiesced); William A. Schabas, *Genocide Trials and Gacaca Courts*, 3 J. INT'L CRIM. JUST. 879, 894 (2005) [hereinafter Schabas, *Genocide Trials and Gacaca Courts*] ("[T]he vast majority of the population appear to fall into the perpetrator camp."). In 1999, Des Forges had already decried the ascription of collective guilt to the Hutu: "The unexamined and incorrect assumption that all Hutu killed Tutsi, or at least actively participated in the genocide in some way, has become increasingly common both among Rwandans and outsiders." DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 736. See *infra* Section III.F.4 and accompanying text for a discussion on collective guilt.

171. *See* Des Forges & Longman, *supra* note 28, at 50 (noting that participation was widespread but not uniform). Specifically, Des Forges and Longman found that

> [i]n contrast to many other 'administrative massacres,' the Rwandan genocide involved a far larger percentage of the population, yet the emphasis of some authors on popular participation fails to take account of the varieties of participation, as well as the extent of official pressure needed to obtain such a high level of mobilization.

Id. Drumbl at one point acknowledged six types of individual involvement in the genocide, ranging from "zealous participation" to "active opposition." Drumbl, *Punishment*, *supra* note 6, at 1246. He put the number of zealous participants in the hundreds of thousands. *Id.* at 1246. He further asserted that there may have been as many as a million who participated or who aided and abetted. *Id.* at 1250. He then stated that "[a]n even larger number of people acquiesced in the face of genocide." *Id.* According to Drumbl, then, approximately one-third of all Hutu (presumably the vast majority of adult men) are criminally responsible and/or morally culpable.

172. Des Forges & Longman, *supra* note 28, at 51. See STRAUS, *supra* note 144, at 5.28-.41 for a detailed discussion of duress on low-level perpetrators. Relying on Gourevitch, Drumbl discounted the idea that many Hutu were coerced into participating in the genocide. Drumbl, *Punishment*, *supra* note 6, at 1247-48.

173. Scott Straus, *How Many Perpetrators Were There in the Rwandan Genocide? An Estimate*, 6 J. GENOCIDE RES. 85, 94 (2004). As Valentino has pointed out, mass killings only require a small number of

In explaining large-scale participation in the genocide, several authors fall back on Rwanda's authoritarian political culture, which supposedly instilled habits of obedience in the population.[174] The current government also portrays the genocide in terms of an unenlightened peasantry slavishly following the commands of a bad leadership.[175] However, this thesis fails to acknowledge, let alone explain, numerous instances of disobedience and resistance to state authority under a succession of regimes.[176] During Habyarimana's one-party state, for example, peasants uprooted state-owned coffee bushes as the world price of coffee fell in the late 1980s.[177] In 1994, many individuals and some communities resisted the genocide.[178] Even those who participated in the genocide sometimes resisted the genocidal government's calls to bury the rotting corpses.[179] As Christopher Browning made clear in the context of the Holocaust, it is critical to distinguish between obedience to authority and group conformity.[180]

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dedicated killers. VALENTINO, *supra* note 9, at 39.

174. *See, e.g.*, PRUNIER, *supra* note 142, at 141 ("Rwandese political tradition . . . is one of systematic, centralised and unconditional obedience to authority."); René Lemarchand, *Disconnecting the Threads: Rwanda and the Holocaust Reconsidered*, 4 J. GENOCIDE RES. 499, 513 (2002) [hereinafter Lemarchand, *Disconnecting the Threads*], *available at* http://www.ideajournal.com/articles.php?sup=11 (arguing that a "culture of obedience cannot be dismissed out of hand"); Wierzynska, *supra* note 30, at 1942-43 (citing Prunier).

175. *See, e.g.*, MINISTRY OF LOCAL GOVERNANCE, COMMUNITY DEVELOPMENT AND SOCIAL AFFAIRS, CIVIC EDUCATION HANDBOOK 23 (2004) (on file with author). For example, the governor of Kigali-Ngali province Aloysie Inyumba, told a group of genocide detainees who were about to be provisionally released: "You should pause and think about where the bad leadership of the past brought us. Those leaders lied to you; they made you do things that were bad." Mary Kimani, *Rwanda Begins Presidential Directive for Release of Genocide Suspects*, INTERNEWS (Jan. 12, 2003).

176. *See* Longman, *Placing Genocide in Context*, *supra* note 168, at 37 ("Rwanda also has a long tradition of rebellion, often religiously inspired."); Alison Des Forges, *"The Drum is Greater than the Shout": The 1912 rebellion in Northern Rwanda*, *in* BANDITRY, REBELLION AND SOCIAL PROTEST IN AFRICA 311, 317-20 (Donald Crummey ed., 1986) (describing resistance and rebellion against German colonial authorities and king in the early twentieth century).

177. Newbury, *supra* note 145, at 14 (estimating that farmers destroyed 300,000 coffee trees so they could grow food instead); *see also* Longman, *Genocide and Socio-Political Change*, *supra* note 163, at 19 (describing how peasants burned several woods in one community in protest against local elites).

178. *See, e.g.*, Prosecutor v. Bagilishema, Case No. ICTR 95-1A-T, Judgment, ¶ VI (June 7, 2001), *available at* http://65.18.216.88/ENGLISH/cases/Bagilishema/judgement/index.htm (acquitting mayor who saved some Tutsi during the genocide); AFRICAN RIGHTS, TRIBUTE TO COURAGE (2002) (profiling rescuers of Tutsi); PENAL REFORM INT'L, REPORT ON MONITORING AND RESEARCH ON THE *GACACA*: THE RIGHTEOUS: BETWEEN OBLIVION AND RECONCILIATION? EXAMPLE OF THE PROVINCE OF KIBUYE (2004) [hereinafter PENAL REFORM INT'L, THE RIGHTEOUS] (discussing rescuers of Tutsi); STRAUS, *supra* note 144, at 3.5-3.7 (same); John M. Janzen, *Historical Consciousness and a 'Prise de Conscience' in Genocidal Rwanda*, 13 J. AFR. CULTURAL STUD. 153, 158 (2000) (explaining absence of genocidal killing in Giti commune).

179. *See* AFRICAN RIGHTS, THE HISTORY OF THE GENOCIDE IN SECTOR GISHAMVU: A COLLECTIVE ACCOUNT 5 (2003) (discussing how people in Gishamvu commune refused to bury the bodies despite inducements and threats from genocidal officials).

180. BROWNING, *supra* note 144, at 174 ("[Stanley] Milgram himself notes that people far more frequently invoke authority than conformity to explain their behavior, for only the former seems to absolve them of personal responsibility."); *see* DANIELLE DE LAME, A HILL AMONG A THOUSAND: TRANSFORMATIONS AND RUPTURES IN RURAL RWANDA 474 (2005) (calling Rwanda a "conformist country"); Samantha Power, *Rwanda: The Two Faces of Justice*, N.Y. REV. OF BOOKS, Jan. 16, 2003, at 49 [hereinafter Power, *Two Faces of Justice*] ("The Rwandan genocide was a conformist crime."). *But cf.* Lemarchand, *Disconnecting the Threads*, *supra* note 174, at 513 (conflating conformity and obedience in discussing Rwandan culture).

B. *The Politics of Reconciliation*

Rwanda does not fit the teleological transitional justice paradigm,[181] in which a successor regime is presumed to be democratizing.[182] With roots in Uganda's non-party system,[183] the RPF is ideologically wedded to a de facto one-party state, though under the guise of multi-party democracy.[184] The RPF's authoritarianism stems from two main sources: (1) a democratic centralism rooted in its history as a well-disciplined guerrilla movement and vanguard nationalist party,[185] and (2) its understandable fear of majoritarian democracy in a country where Hutu constitute an overwhelming majority.[186]

Since 1994, the RPF has silenced, arrested, exiled, or marginalized Hutu opponents,[187] often accusing them of being "*génocidaires*" or ethnic "divisionists."[188]

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181. *See, e.g.*, Posner & Vermeule, *supra* note 11, at 768 & n.13 (defining transitional justice as "a political and economic transition that is consistent with liberal and democratic commitments" and "not express[ing] an opinion on whether transitional justice can be achieved for other kinds of transitions"). For a critique of the teleological assumptions underlying transitional justice theories, see generally Thomas Carothers, *The End of the Transition Paradigm*, 13 J. OF DEMOCRACY 5 (2002).

182. Filip Reyntjens & Stef Vandeginste, *Rwanda: An Atypical Transition*, *in* ROADS TO RECONCILIATION, *supra* note 24, at 101, 103. Rwanda neatly fits the "dominant-power politics" model where the "state's main assets . . . are gradually put in the direct service of the ruling party." Carothers, *supra* note 181, at 12. *See also* JEFREMOVAS, *supra* note 168, at 124 (arguing that the RPF regime "has reproduced the pattern of clientalism, political exclusion, double language, and corruption of the previous regimes, acting with the same brutal disregard for the needs of the majority of the population as the previous regimes."). For a comprehensive overview of Rwandan political developments through late 2003, see Reyntjens, *Rwanda, Ten Years On*, *supra* note 152, and for developments through 2004, see FRONT LINE, RWANDA: DISAPPEARANCES, ARRESTS, THREATS, INTIMIDATION AND CO-OPTION OF HUMAN RIGHTS DEFENDERS 2001-2004, at 7-30 (2005) [hereinafter FRONT LINE], *available at* http://www.frontlinedefenders.org/pdfs/1965_Front%20Line%20Rwanda%20Report.pdf.

183. *See* HUMAN RIGHTS WATCH, HOSTILE TO DEMOCRACY: THE MOVEMENT SYSTEM AND POLITICAL REPRESSION IN UGANDA (1999), *available at* http://www.hrw.org/reports/1999/uganda (explaining how Uganda's non-party system operated).

184. While formally recognizing a multi-party system, the Constitution forbids political pluralism: parties cannot be based on race, ethnicity, region, religion, or "any other division which may give rise to discrimination." RWANDA CONST. art. 54. Parties also "must constantly reflect the unity of the people of Rwanda." *Id.*; *see also* INT'L CRISIS GROUP, RWANDA AT THE END OF THE TRANSITION: A NECESSARY POLITICAL LIBERALIZATION 4 (2002) [hereinafter INT'L CRISIS GROUP, RWANDA] (quoting President Kagame's 1995 statement that multipartyism would result in "dividing people who are already divided"). Most importantly, the Constitution severs the links between political parties and their grassroots base by only permitting party offices at the national and provincial level. *Id.* art. 52. During the 2003 elections, the RPF circumvented that provision, as well as limitations on political campaigning, arguing that it is a "family" or movement rather than a political party. HUMAN RIGHTS WATCH, PREPARING FOR ELECTIONS 2-3 (2003).

185. A report for USAID's Office of Democracy and Governance noted that "the principle of democratic centralism is followed in RPF decision-making." TIMOTHY LONGMAN ET AL., RWANDAN DEMOCRACY AND GOVERNANCE ASSESSMENT 24 (2002), *available at* http://www.rwanda1.com/images/Docs/Rwanda%20Democracy%20and%20Governance%20Assessment.pdf; *see* INT'L CRISIS GROUP, RWANDA, *supra* note 184, at 10-11. See Prunier, *The Rwandan Patriotic Front*, *supra* note 157, at 123-33 for a history of the RPF.

186. See HUMAN RIGHTS WATCH, PREPARING FOR ELECTIONS, *supra* note 184, at 4 for a discussion of how the RPF leadership feared the Hutu majority would elect a Hutu president in the 2003 elections as had happened in Burundi in 1993. See MAMDANI, *supra* note 138, at 274 for the view that "the [Tutsi] minority sees democracy as an agenda for completing the genocide."

187. "Whether killed in the genocide by Hutu Power supporters, or later politically marginalized by the

In advance of the 2003 presidential and parliamentary elections (the first since the genocide), the RPF banned three opposition parties and coopted the remaining ones.[189] Not content to leave anything to chance, the RPF resorted to fraud and intimidation to ensure electoral victory: President Paul Kagame won ninety-five percent of the vote and the RPF seventy-six percent.[190] Since the elections, the RPF has grown increasingly intolerant of political dissent, independent media, and civil society.[191]

RPF, the moderate Hutu have been the great losers of the civil war." Prunier, *The Rwandan Patriotic Front*, *supra* note 157, at 133 n.46. In 1995, three prominent Hutu political leaders resigned or were fired: Prime Minister Faustin Twagiramungu (from the Mouvement Démocratique Republicain, "MDR"), Interior Minister Seth Sendashonga (from the RPF), and Justice Minister Alphonse Nkubito. Twagiramungu and Sendashonga left Rwanda, and Sendashonga was assassinated in Nairobi in 1998 after trying to create an opposition movement in exile. Former President Pasteur Bizimungu, a Hutu member of the RPF, resigned in 2000 and attempted to create a new political party, which was immediately banned. He was arrested in 2002 and, after a show trial in 2004, he was sentenced to fifteen years for incitement against the state and other crimes (the Supreme Court affirmed that sentence in early 2006). After former Prime Minister Celestin Rwigema fled to the United States in 2000, the Rwandan government accused him of genocide. The government arrested the secretary-general of the MDR party in 2002 and has held him in pre-trial detention ever since. After a 2003 parliamentary report accused forty-six individuals of collaborating with the MDR to promote genocidal ideology, the former Minister of Defense and the army's parliamentary representative fled the country. Shortly, thereafter, five individuals disappeared, including an MDR parliamentarian and the former vice-president of the Supreme Court. The charges against the MDR parliamentarian were particularly baseless: he was well-known for having saved Tutsi during the 1994 genocide and for testifying as a prosecution witness at the ICTR. *See* INT'L CRISIS GROUP, RWANDA, *supra* note 184, at 28-29 (listing forty political elites, both Hutu and Tutsi, who had fled Rwanda by late 2002); HUMAN RIGHTS WATCH, PREPARING FOR ELECTIONS, *supra* note 184, at 7-9, 12-13 (explaining the ways in which the RPF has attempted to silence its opponents); Reyntjens, *Rwanda, Ten Years On*, *supra* note 152, at 180-81 (same).

188. In early 2002, the government passed a criminal law punishing "divisionism," which it broadly defined as any "speech, written statement or action that causes conflict that causes an uprising that may degenerate into strife among people." LAW NO. 47/2001 OF 18/12/2001 INSTITUTING PUNISHMENT FOR OFFENCES OF DISCRIMINATION AND SECTARIANISM, art. 1, *in* JOURNAL OFFICIEL NO. 4, Feb. 15, 2002 (on file with author). The ban on divisionism subsequently gained constitutional imprimatur: the 2003 Constitution provides that "[p]ropagation of ethnic, regional, racial, or discrimination *or any other form of division* is punishable by law." RWANDA CONST. art. 33 (emphasis added). Similarly, the Constitution criminalizes "[r]evisionism, negationism and trivialisation of genocide" without defining those terms. *Id.* art. 13. Since 2002, prosecutors, police, and government officials have used vague charges of divisionism and negationism to criminalize and suppress perceived political dissent, human rights defenders, and the independent media. FRONT LINE, *supra* note 182, at 12-13, 46; HUMAN RIGHTS WATCH, PREPARING FOR ELECTIONS, *supra* note 184, at 4-7.

189. When former President Bizimungu formed the PDR-Ubuyanja party in 2001, the government banned it. Shortly before the 2003 elections, the government effectively banned the MDR, a member of the national unity government since 1994, on grounds that it was promoting ethnic divisionism. HUMAN RIGHTS WATCH, PREPARING FOR ELECTIONS, *supra* note 184, at 4-8, 13. The government subsequently refused to accredit the Alliance for Democracy, Equality and Progress ("ADEP-Mizero"), a political party created by some former MDR members. MISSION D'OBSERVATION ELECTORALE DE L'UNION EUROPEENNE, RAPPORT FINAL, RWANDA, ELECTION PRESIDENTIELLE 25 AOUT 2003, ELECTIONS LEGISLATIVES 29 ET 30 SEPTEMBRE [FINAL REPORT, RWANDA'S PRESIDENTIAL ELECTION OF AUGUST 25, 2003 AND LEGISLATIVE ELECTIONS OF SEPTEMBER 29-39, 2003] 16-17 (2003) [hereinafter EU OBSERVER MISSION], http://europa.eu.int/comm/external_relations/human_rights/eu_election_ass_observ/rwanda/index.htm. All the legal political parties backed the RPF candidate (President Kagame) for the presidency and four of the seven parties joined the RPF in a coalition for the parliamentary elections. *Id.* at 18, 23.

190. *See* EU OBSERVER MISSION, *supra* note 189, at 4, 28-40 (documenting fraud, coercion, and lack of transparency in presidential and parliamentary elections); *see also* Press Release, Int'l Foundation for Election

The RPF not only targeted Hutu opponents, it also politically marginalized the Tutsi survivors.[192] At first, this seems surprising given that the RPF derives much of its moral and political legitimacy from having halted the genocide. But the RPF's Anglophone Tutsi leaders, who grew up in exile in Uganda and Tanzania, have an uneasy relationship with the Francophone Tutsi survivor community.[193] Until 2000, Tutsi survivors publicly voiced their disagreement with the RPF over several issues. First, they opposed the reintegration of suspected *génocidaires* into the government and military.[194] Second, some of their associations objected to the government's policy of publicly displaying skulls, bones, and corpses at genocide memorial sites, in violation of Rwandan religious and cultural traditions.[195] Third, Tutsi survivors' organizations publicly disagreed with the government over how to commemorate the genocide.[196] Finally, Tutsi survivors complained about the lack of reparations.[197]

In 2000, the RPF accused prominent Tutsi elites of corruption or plotting the return of the Tutsi king from exile.[198] Some fled, others were arrested, and one was

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Systems, IFES Statement on Rwanda's Legislative Elections 2 (Oct. 4, 2003) (noting the provisional presidential election results showed no nullified ballots for Kigali-Ngali province, even though IFES observers had witnessed recording of nullified ballots). In a recent article, Schabas appeared to take the election results at face value: "It has always been expected that as some form of democracy or majority rule took over in Rwanda, there would be no heart for further prosecutions. But that is not what seems to be happening." Schabas, *Genocide Trials and Gacaca Courts*, *supra* note 170, at 894.

191. FRONT LINE, *supra* note 182, at 19-30, 47-50, 74-79, 84-94.

192. For that reason, it is simplistic and misleading to label the RPF government a Tutsi regime. *E.g.*, Alana Erin Tiemessen, *After Arusha: Gacaca Justice in Post-Genocide Rwanda*, 8 AFR. STUD. Q. 57, 63 (2004) (calling the regime a "Tutsi ethnocracy").

193. The Anglophone Tutsi returnees sometimes treat the survivors as a source of shame. Reyntjens, *Rwanda, Ten Years On* *supra* note 152, at 180. Prunier also noted that Tutsi survivors of the genocide have been accused of being collaborators by returning Tutsi. PRUNIER, *supra* note 142, at 358-59. During the genocide, the RPF sometimes placed its own military and political victory ahead of rescuing Tutsi. When Romeo Dallaire, the head of the U.N. peace-keeping mission in Rwanda, asked Paul Kagame about massacres of the Tutsi, Kagame replied, "If the [Tutsi] refugees have to be killed for the cause, they will be considered as having been part of the sacrifice." DALLAIRE, *supra* note 155, at 358.

194. The RPF has reintegrated several high-profile members of the former government and military, including some who fought Rwanda for many years from the eastern Democratic Republic of Congo. *See, e.g.*, *Rwanda: Kigali Reintegrates Four Ex-Rebel Commanders into National Army*, IRIN, July 7, 2004 (reporting reintegration of four rebel commanders into RPF). Thus, it is not the case that Rwanda shows a "steadfast determination to hold accountable *everyone* suspected of having contributed to the 1994 genocide." Schabas, *Genocide Trials and Gacaca Courts*, *supra* note 170, at 882. When, in 1999, IBUKA ("Remember"), the main survivors' association, opposed the RPF's appointment of a parliamentarian accused of genocide participation, the RPF attacked IBUKA for slander and arrested several survivors. Heidi Rombouts, Victim Organisations and the Politics of Reparation: A Case Study on Rwanda 303 (2004) (unpublished Ph.D. dissertation, University of Antwerp) (on file with author).

195. Rombouts, *supra* note 194, at 252-56, 302-04. For an insightful critique of the government's genocide ceremonies, see Claudine Vidal, *Les commemorations du genocide au Rwanda* [*Commemorations of the Rwandan Genocide*], LES TEMPS MODERNES, 2001, at 1.

196. Rombouts, *supra* note 194, at 302-04.

197. See Section III.E.1 for discussion of the lack of reparations for genocide survivors.

198. In early 2000, President Kagame linked Joseph Sebarenzi, the charismatic parliamentary leader, to monarchists. Though not a survivor, Sebarenzi was close to the survivor community. Reyntjens, *Rwanda, Ten Years On*, *supra* note 152, at 181 n.7.

assassinated under mysterious circumstances.[199] That same year, the RPF installed one of its central committee members as the new president of IBUKA, the main Tutsi survivors' organization.[200] Since then, IBUKA has been largely supportive of government policies. During the 2003 parliamentary election campaigns, the RPF accused the Liberal Party of promoting ethnic "divisionism" for its supposed advocacy on behalf of Tutsi genocide survivors.[201]

The RPF's political strategies have shifted over time in response to changes in the inner circle, domestic developments, and international pressure. The RPF first began to talk seriously about national reconciliation in 1999 after largely defeating the former genocidal forces' insurgency in northwest Rwanda.[202] Reconciliation gained further momentum after the RPF marginalized genocide survivors in 2000.[203] The RPF currently promotes an ideology of "national unity and reconciliation" through the media and solidarity camps (*ingando*).[204] The government's reconciliation discourse hearkens back to an imagined Rwandan unity before colonizers introduced ethnicity.[205]

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199. Sebarenzi went into exile in the United States. Two Tutsi journalists who published an article about the RPF's attack on Sebarenzi also fled after the government suppressed their journal. After Assiel Kabera, an influential Tutsi genocide survivor and aide to President Bizimungu, was assassinated, his two brothers fled the country: one was vice-president of IBUKA, the main survivors' association, while the other was head of the survivors' assistance fund. Reyntjens, *Rwanda, Ten Years On*, *supra* note 152, at 181; HUMAN RIGHTS WATCH, THE SEARCH FOR SECURITY AND HUMAN RIGHTS ABUSES 10-11 (2000). Other leaders of survivors' associations went into exile as well. Rombouts, *supra* note 194, at 147 n.91. The government also arrested Jean Mbanda, a Tutsi survivor and parliamentarian, on corruption charges in 2000 after he publicly criticized the government. He was eventually released in 2003 and subsequently left the country. FRONT LINE, *supra* note 182, at 9 & n.11.

200. INT'L CRISIS GROUP, RWANDA, *supra* note 184, at 13.

201. The then Minister of Local Administration (who also served as the RPF's campaign chairman) made that accusation. Author's field notes, Kigali, Rwanda (2003) (on file with author).

202. Reyntjens & Vandeginste, *supra* note 182, at 102. *See* U.N. Comm'n on Human Rights, *Report on the Situation of Human Rights in Rwanda*, ¶ 180, U.N. Doc. E/CN.4/2000/41 (Feb. 25, 2000) (prepared by Michel Moussali) ("[A]fter 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."). On the insurgency, see generally AFRICAN RIGHTS, RWANDA: THE INSURGENCY IN THE NORTHWEST (1998); HUMAN RIGHTS WATCH, RWANDA: OBSERVING THE RULES OF WAR? (2001).

203. *See* Reyntjens & Vandeginste, *supra* note 182, at 103 ("In this context of political elimination of opponents, it is obviously much more 'comfortable' for the regime in power to declare that reconciliation is a policy objective.").

204. The government's National Unity and Reconciliation Commission started the solidarity camps in 1999. All students must pass through the camps before attending university. In addition, the camps have been used to reeducate demobilized soldiers, former insurgents, and released *genocidaires* before their reintegration into society. For discussions of *ingando*, see generally Chi Mgbako, *"Ingando" Solidarity Camps: Reconciliation and Political Indoctrination in Post-Genocide Rwanda*, 18 HARV. HUM. RTS. J. 201 (2005); PENAL REFORM INT'L, FROM CAMP TO HILL, *supra* note 23, at 16-41, 90-103, 110-11; HUMAN RIGHTS WATCH, THE SEARCH FOR SECURITY AND HUMAN RIGHTS ABUSES, *supra* note 199, at 21-22. *Cf.* HUMAN RIGHTS WATCH, HOSTILE TO DEMOCRACY: THE MOVEMENT SYSTEM AND POLITICAL REPRESSION IN UGANDA, *supra* note 183, at 65-69 (describing Uganda's *chaka-mchaka* solidarity camps which inspired *ingando*).

205. According to Pottier, "This representation glossed over significant social complexities, not only to mask the *pre-colonial origins of ethnicity in Rwanda*, but also to intellectually justify a system of leadership by Tutsi minority rule." POTTIER, *supra* note 138, at 111 (emphasis in original). *But see* Drumbl, *Punishment*, *supra* note 6, at 1296 ("Common citizenship can be encouraged by reaching back to Rwandan civil society before colonial 'discovery.'"). On the RPF's rewriting of ethnicity, see generally ELTRINGHAM, *supra* note

Consequently, discussion of ethnicity, including use of the terms Hutu and Tutsi, has become politically taboo.[206] In part, that policy reflects the legitimating needs of a minority (Anglophone Tutsi) regime to cast itself as "a government of national unity and reconciliation" for the "Rwandan people." Any deviation from RPF policy is defined as an attack on "national unity and reconciliation" and hence "divisionist" or even genocidal.[207] The government's declarations of national reconciliation are undercut by its instrumentalization of the genocide to bolster its political legitimacy[208] and to attack perceived opponents.[209] The RPF also insists on its own single, absolutist version of history, rather than acknowledging the multiplicity of historical narratives and interpretations, some of which have been used to promote ethnic violence.[210]

138, at 12-27; POTTIER, *supra* note 138, at 110-23; Longman & Rutagengwa, *supra* note 144, at 164-66.

206. PENAL REFORM INT'L, INTERIM REPORT, *supra* note 23, at 48; PENAL REFORM INT'L, FROM CAMP TO HILL, *supra* note 23, at 38. *See* FRONT LINE, *supra* note 182, at 41-43 (reporting the government's reluctance to grant legal status to an indigenous rights organization that insisted on advocating for the Twa). One set of researchers found that

> there is a disconnect between the national focus on reconciliation and the inability of the majority of Rwandans to speak about ethnicity or the group differences that led to conflict in 1994 . . . Barring discussion of ethnicity has greatly hindered the ability of the NGOs to address the causes of recent violence in Rwanda and facilitate the beginning of healing.

Cynthia Burns, Laura McGrew & Illiga Todorovic, *Imagine Coexistence Pilot Projects in Rwanda and Bosnia*, *in* IMAGINE COEXISTENCE, *supra* note 13, at 85, 89.

207. This demonstrates how a politics of comprehensive reconciliation can be deeply illiberal. *See* Gutmann & Thompson, *supra* note 13, at 22, 32 ("Reconciliation is an illiberal aim if it means expecting an entire society to subscribe to a single comprehensive moral perspective."); Timothy Garton Ash, *True Confessions*, N.Y. REV. BOOKS, July 17, 1997, at 37 ("[Reconciliation] taken to an extreme [is a] "deeply illiberal idea. . . . Would it not be more realistic to define a more modest goal: peaceful coexistence, cooperation, tolerance?").

208. *See, e.g.*, JEFREMOVAS, *supra* note 168, at 121-22; POTTIER, *supra* note 138, at 111, 123-26, 130-31. The RPF's use of the term "Hutu moderates" for Hutu killed during the genocide reinscribes ethnicity and, simultaneously, promotes the notion of collective Hutu guilt:

> The phrase 'Hutu moderates' is only used *retrospectively* . . . . It is solely an epitaph and may imply that the only 'moderate' (or 'anti-genocide') Hutu are dead . . . the depiction of this group as an 'extinct category' contributes to a portrayal of contemporary Rwanda according to a crude, binary framework, composed *only* of 'victim-*rescapé*-Tutsi' and 'perpetrator-*génocidaire*-Hutu.' This binary segmentation echoes the imagined manichean [sic] construction of Rwandan society found in genocidal propaganda.

ELTRINGHAM, *supra* note 138, at 75-76 (citations omitted). This helps explains the RPF's attacks on Paul Rusesabagina, the Hutu hotel manager of the Hotel des Milles Collines during the genocide, who was featured in the film Hotel Rwanda and who was subsequently awarded the Presidential Medal of Freedom. *See* Terry George, *Smearing a Hero: Sad Revisionism Over "Hotel Rwanda,"* WASH. POST (May 10, 2006) (quoting President Kagame's criticism of Rusesabagina for "climb[ing] on the falsehood of being a hero").

209. In mid-2004, the government accused a wide range of civil society and media organizations—including CARE International, BBC, and Voice of America—of promoting "genocidal ideology." FRONT LINE, *supra* note 182, at 20-24.

210. ELTRINGHAM, *supra* note 138, at 177-79, 181-82. While Rwandan history is taught in the solidarity camps, it has not been taught in primary and secondary schools since the genocide because the RPF has not finished revising the history curriculum. *See* Sarah Warshauer Freedman et al., *Confronting the Past in Rwandan Schools*, *in* MY NEIGHBOR, MY ENEMY, *supra* note 13, at 226, 248. As Mark Osiel observed, the official rewriting of history "highlights, unwittingly, the rulers' self-perception that their legitimacy hangs precariously on public acceptance of a particular historical interpretation. This interpretation is often conspicuously inconsistent with others recently foisted upon the public with equal vehemence." OSIEL, *supra*

While the RPF has "effectively dominate[d]" the discourse over history and reconciliation, "[i]t is yet to be seen, however, whether this domination can create a collective memory or bring about reconciliation."[211] The strains in the RPF's politics of reconciliation are most apparent in the context of providing accountability for the genocide.

C. *Transitional Justice and Injustice*

Following the genocide, the new RPF-dominated government rejected the idea of a South African-style truth commission, insisting that only retributive justice could end the prevailing culture of impunity.[212] Soldiers and officials arrested tens of thousands of genocide suspects, often on the basis of unsubstantiated denunciations.[213] Early on, the RPF seemed more interested in using the judicial system to impose collective guilt and social control on the Hutu majority than in establishing individualized accountability for the genocide.[214] The former Prosecutor General justified the mass arrests and detentions in the following terms:

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note 13, at 213.

211. Longman & Rutagengwa, *supra* note 144, at 178.

212. In late 1994, then Vice President Paul Kagame declared, "There can be no durable reconciliation as long as those who are responsible for the massacres are not properly tried." ORG. OF AFRICAN UNITY, RWANDA, THE PREVENTABLE GENOCIDE para. 18.3 (2000) [hereinafter O.A.U. REPORT], *available at* http://www.aegistrust.org/images/stories/oaureport.pdf. At an international conference in South Africa in 2001, the then Minister of Justice stressed the need for "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." RWANDA AND SOUTH AFRICA IN DIALOGUE: ADDRESSING THE LEGACIES OF GENOCIDE AND A CRIME AGAINST HUMANITY 49 (Charles Villa-Vicencio & Tyrone Savage eds., 2001) [hereinafter RWANDA AND SOUTH AFRICA IN DIALOGUE]; *see* Schabas, *Genocide Trials and Gacaca Courts*, *supra* note 170, at 884 (noting that then President Pasteur Bizimungu ruled out amnesty at an international conference in late 1995). The crucial prerequisites for a truth commission were absent in Rwanda: political will, a negotiated agreement, a strong civil society, and a cessation of violence. *See* HAYNER, UNSPEAKABLE TRUTHS, *supra* note 78, at 234-48 (discussing ingredients for success of truth commissions). William Schabas also stated that a truth commission "seems inappropriate, given the magnitude of the crimes and the scale upon which they were committed." Schabas, *Rwanda*, *supra* note 16, at 529. *But see* Drumbl, *Punishment*, *supra* note 6, at 1271-77 (advocating truth and reconciliation commission among other transitional justice mechanisms). *See generally* Evelyn Bradley, *In Search for Justice—A Truth and Reconciliation Commission for Rwanda*, 7 J. INT'L L. & PRAC. 129 (1998) (same).

213. At its height, in early 1995, approximately 1000 were arrested per week. SHAHARYAR M. KHAN, THE SHALLOW GRAVES OF RWANDA 119, 152 (2000). In September 1996, the government passed a law retroactively legalizing arrests and pre-trial detentions back to April 1994 and giving prosecutors more time to issue arrest warrants. 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, at 8-10 (on file with author); LAWYERS COMMITTEE FOR HUMAN RIGHTS, PROSECUTING GENOCIDE IN RWANDA: THE ICTR AND NATIONAL TRIALS (1997), *available at* http://www.humanrightsfirst.org/pubs/descriptions/rwanda.htm. The law also suspended the right of detainees to appeal their pre-trial detention. *Id.* The government has subsequently amended the law several times to legalize continuing preventive detention. AMNESTY INT'L, GACACA: A QUESTION OF JUSTICE, AI Index AFR 47/007/2002, Dec. 2002, at 6-7. *See, e.g.*, LAW NO. 35/01 OF 7/7/2001 RELATING TO PROVISIONAL MODIFICATION OF THE CRIMINAL PROCEDURE CODE FOR PERSONS BEING PROSECUTED FOR GENOCIDE OR CRIMES AGAINST HUMANITY, COMMITTED BETWEEN 1 OCTOBER 1990 AND 31 DECEMBER 1994, *in* JOURNAL OFFICIEL NO. 15, Aug. 1, 2001, at 14-15 (on file with author).

214. PRUNIER, *supra* note 142 (arguing that "generalized arbitrary detentions are a powerful tool of political and social control" and "the non-judgment of prisoners is also a way of keeping open the sore of

> 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 and reconciliation 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.[215]

In 1995, the Kigali prosecutor estimated that twenty percent of detainees were innocent—a figure consistent with recent acquittal rates.[216] Prosecutors and police occasionally rearrested people acquitted by the courts.[217] The prison population reached approximately 120,000 at the end of 1999.[218] Besides overwhelming the prison and judicial system, the mass arrests encouraged a culture of accusatory practices: "For a house, for a field or a tool, people are denounced without evidence, and awkward neighbours are arrested."[219] Alison Des Forges noted: "Because the overburdened judicial system has failed to discover and punish false accusations,

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collective Hutu guilt").

215. Interview with Gerald Gahima, Former Prosecutor General of Rwanda, in N.Y., N.Y. (Jan. 28, 2005); *see* RWANDA AND SOUTH AFRICA IN DIALOGUE, *supra* note 212, at 109 (remarks of Gerald Gahima at conference). Akhavan made the same argument: "The detention and trial of tens of thousands of *génocidaires* before Rwandese courts may be viewed as an alternative to mass expulsions or widespread extrajudicial executions and private revenge killings." Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* 95 AM. J. INT'L L. 7, 23 (2001). Here, Akhavan appeared to assume that all detainees were *genocidaires*.

To be fair, the lengthy pre-trial detentions have to be seen in context. The RPF was fighting the former genocidal army and militias based in the eastern Democratic Republic of Congo and in northwest Rwanda. Thus, the RPF had some cause for concern that large-scale releases of genocide suspects could provide recruits for that insurgency. *See* RWANDA AND SOUTH AFRICA IN DIALOGUE, *supra* note 212, at 109 (remarks of Gerald Gahima at conference); Schabas, *Rwanda*, *supra* note 16, at 548 (likening the situation to detention of prisoners of war for the duration of an armed conflict). By late 1999, though, the insurgency inside Rwanda had essentially been defeated.

216. DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 754; *see* HUMAN RIGHTS WATCH, WORLD REPORT: RWANDA (2003) (noting that twenty-seven percent were acquitted in 2002).

217. AMNESTY INT'L, *supra* note 213, at 16 n.22; Eugene Habiyambere, *Rearrestation a la porte du penitencier* [*Rearrested at the Prison Gate*], LE VERDICT (Rwanda), July 2002, at 16-17; HUMAN RIGHTS WATCH, WORLD REPORT: RWANDA (2002).

218. The prison population grew exponentially from 10,000 in November 1994 to 86,000 in November 1996. PRUNIER, *supra* note 142, at 365. By 2000, approximately 120,000 genocide suspects were crammed into Rwanda's prisons and *cachots* (communal lock-ups). *See* Reyntjens & Vandeginste, *supra* note 182, at 110 (stating that International Committee for the Red Cross registered approximately 118,000 detainees in June 2000). According to the then Minister of Justice, there were 116,100 genocide detainees in mid-2001. RWANDA AND SOUTH AFRICA IN DIALOGUE, *supra* note 212, at 49.

Andre Sibomana, a priest and human rights defender, blamed government indifference for the high mortality rates among prisoners. ANDRE SIBOMANA, HOPE FOR RWANDA: CONVERSATIONS WITH LAURE GUILBERT AND HERVE DEGUINE 109 (1999). While prison conditions have improved over the years, they remain poor. U.S. DEP'T OF STATE 2006, *supra* note 138.

219. SIBOMANA, *supra* note 218, at 107; *see* PENAL REFORM INT'L, THE RIGHTEOUS, *supra* note 178, at 21 (finding that in Kibuye province, "[m]any of the Righteous [those who saved others] were thus falsely accused of having participated in the genocide, or even denounced in the hope of getting rid of troublesome witnesses"). The phrase "accusatory practices" is borrowed from SHEILA FITZPATRICK & ROBERT GELLATELY, ACCUSATORY PRACTICES: DENUNCIATION IN MODERN EUROPEAN HISTORY, 1789-1989 (1997). Two brilliant cinematic representations of denunciation in small face-to-face communities, both filmed under Nazi occupation, are Carl-Theodor Dreyer's *Day of Wrath* and Henri-Georges Clouzot's *Le Corbeau*.

increasing numbers of people have brought false charges for their own interests."[220] Denunciation has become a favored political weapon. The RPF regularly accuses perceived opponents of being *genocidaires*, ethnic "divisionists," or purveyors of "genocidal ideology."[221]

To reduce the detainee population, the government has periodically granted provisional release to large numbers of genocide suspects, including the elderly, sick, those who were less than fourteen years old in 1994, and those without case files. In late 1998, the government announced it would release ten thousand detainees.[222] That provoked an outcry from the survivor community, and eventually only about 3365 detainees were released.[223] Following the political cooptation of genocide survivors in 2000, prosecutors in several provinces began presenting detainees without case files before local communities to gather witness testimonies.[224] When there was insufficient evidence to warrant continued detention, the prosecutors granted provisional releases (sometimes on the spot).[225] By the end of 2002, prosecutors had presented 11,659 detainees and 2721 (twenty-three percent) had been provisionally released.[226] In January 2003, President Kagame suddenly ordered the release of detainees who had

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220. DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 754. The OAU report similarly observed that:

> 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.

O.A.U. REPORT, *supra* note 212, at ¶ 18.39; *see also* FITZPATRICK & GELLATELY, *supra* note 219, at 17 ("[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.").

221. For example, the government added Pierre Celestin Rwigema, who served as prime minister from 1995 to 2000, to the Category 1 list of top genocide suspects in 2001 not long after he sought political asylum in the United States. In early 2003, the government accused forty-six MDR politicians and their alleged supporters of promoting genocidal ideology. HUMAN RIGHTS WATCH, PREPARING FOR ELECTIONS, *supra* note 184, at 7. In mid-2004, the government accused several civil society organizations of propagating "genocidal ideology." FRONT LINE, *supra* note 182, at 29. In October 2004, the Minister of Education suspended thirty-seven secondary school educators from their posts and twenty-seven students from school, accusing most of them of divisionism. *Id.* at 24-25.

On a few occasions, the RPF criticized genocide survivors for false denunciations. Vandeginste, *Rwanda: Dealing with Genocide*, *supra* note 156, at 282 n.35 (describing RPF criticism after the main genocide survivors' organization denounced an RPF member of parliament).

222. Reyntjens & Vandeginste, *supra* note 182, at 110.

223. *Id.*; U.N. Comm'n on Human Rights, *Report on the Situation of Human Rights in Rwanda*, ¶ 132, U.N. Doc. A/55/269 (Aug. 4, 2000) (prepared by Michel Moussali); AMNESTY INT'L, *supra* note 213, at 19-20.

224. In early 2002, one prosecutor estimated that 1500 of 7000 detainees in his province had no case files. WILLET WEEKS ET AL., RWANDA CONFLICT VULNERABILITY ASSESSMENT 26 (Aug. 2002, *revised* Oct. 2002), *available at* http://pdf.dec.org/pdf_docs/PNACU962.pdf. The quality of the evidence in the case files is quite poor. *Id.* at 26-27.

225. GACACA, LIVING TOGETHER IN RWANDA (Gacaca Productions/Dominant 7 2002) (depicting a June 2001 presentation in Gitarama province); Power, *Two Faces of Justice*, *supra* note 180, at 49-50 (describing a pre-*gacaca* presentation in Butare province). Prosecutors sometimes used presentations to release the sick, the elderly, and those who were minors at the time of the genocide.

226. Communication to author from Citizens Network (2003).

already served their sentences in pretrial detention.[227] By March 2003, a total of 24,873 detainees and prisoners had been released including 14,636 confessed detainees.[228] By mid-2004, the government had reduced the number of genocide suspects in pretrial detention to approximately 71,000.[229] In late July 2005, the government provisionally released approximately 19,155 genocide suspects, of whom 16,470 had confessed.[230] As with the 2003 releases, the government did not consult the genocide survivors' organizations or, more importantly, the *gacaca* courts before initially selecting the detainees to be released.[231] In March 2006, an estimated 54,000 persons were still in detention on genocide charges.[232]

Rwanda became the first country to pass domestic criminal legislation on genocide in 1996.[233] The Genocide Law contained several novel features designed to

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227. *See* PENAL REFORM INT'L, THE GUILTY PLEA PROCEDURE, *supra* note 23, at 10-17. In part, those releases may have been a bid to woo Hutu voters in advance of the 2003 presidential and parliamentary elections, as well as an attempt to encourage more confessions among detainees.

228. 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*], Mar. 7, 2003. A few hundred were subsequently rearrested on new charges of involvement in the genocide. Released detainees were required to undergo reeducation in solidarity camps before being reintegrated into their communities. Those released must still be tried by *gacaca* courts and could be returned to prison if they are convicted of worse crimes than those for which they confessed. Released detainees will not start community service until after they have been sentenced by *gacaca*. Alberto Basomingera, then-Attorney General, Ministry of Justice, Remarks at the CLADHO Conference on *Gacaca*, Kigali, Rwanda (Feb. 14, 2003) (on file with author) [hereinafter Remarks of Alberto Basomingera]. For a fascinating look at the return of one confessed killer to his community, see IN RWANDA WE SAY . . . THE FAMILY THAT DOESN'T SPEAK DIES (*Gacaca* Productions/Dominant 7, 2004).

229. LIPRODHOR, RAPPORT DU PREMIER TRIMESTRE 2006 SUR LA SITUATION CARCERALE AU RWANDA [FIRST TRIMESTER 2006 REPORT ON THE PRISON SITUATION IN RWANDA] 8 (2006) (on file with author).

230. Interview with anonymous representative, Prosecutor General's Office, in Kigali, Rwanda (Sept. 12, 2005). *See Rwanda Begins Releasing Thousands of Genocide Perpetrators*, HIRONDELLE (Tanzania), July 29, 2005. Those releases may have been partly motivated by the ICRC's announcement in early 2005 that it would stop supplying the central prisons with food, medicine, and sanitary supplies. Nonetheless, the provisional releases in 2003 and 2005 represent a long overdue improvement in the country's human rights situation. Yet, by releasing detainees en masse rather than on a rolling basis, the provisional releases have caused considerable fear and anxiety among survivors.

231. Of the 19,155 genocide suspects provisionally released in July 2005, 1865 had been returned to prison by mid-September after state prosecutors received additional information from survivors' organizations and *gacaca* courts indicating that those suspects may have committed worse crimes than those to which they had confessed. Interview with anonymous representative, Prosecutor General's Office, in Kigali, Rwanda (Sept. 12, 2005).

232. U.S. DEP'T OF STATE 2006, *supra* note 138 (citing figures from the International Committee of the Red Cross).

233. 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, *in* JOURNAL OFFICIEL, Sept. 1, 1996 (on file with author) [hereinafter 1996 GENOCIDE LAW]. That law simply adopted the definition of genocide in the 1948 Genocide Convention. *Compare* 1996 GENOCIDE LAW, *supra*, art. 1, *with* Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 227, art. 2. A 2003 law largely defined genocide in the same terms used by the Genocide Convention, but added "regional" groups to the list of protected categories. 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 (on file with author). Temporal jurisdiction is for crimes committed between

speed up trials for genocide suspects. First, it created specialized chambers within the national courts to hear genocide cases.[234] Second, it established four categories of genocide crimes, corresponding to the severity of the offense and punishment: Category 1 for genocide planners, leaders, notorious killers, and those who committed sexual torture; Category 2 for intentional homicide or attempted homicide; Category 3 for manslaughter and serious bodily assault; and Category 4 for property crimes.[235] Finally, the law introduced the common law practice of plea-bargaining by which prisoners could significantly reduce their sentences through timely guilty pleas in which they named their accomplices.[236]

The first genocide trials finally began in December 1996, after much delay by the government.[237] From December 1996 to December 2003, Rwanda's courts tried about 9,700 people.[238] William Schabas has offered an overly positive appraisal of Rwanda's

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October 1, 1990 and December 31, 1994. 1996 GENOCIDE LAW, *supra*, art. 2. By contrast, the temporal jurisdiction of the International Criminal Tribunal for Rwanda ("ICTR") is limited to 1994. S.C. Res. 995, art. 1, U.N. Doc. S/RES/995 (Nov. 8, 1994). For a review of Rwandan law and case law on genocide, see AVOCATS SANS FRONTIÈRES, VADE-MECUM: LE CRIME DE GENOCIDE ET LES CRIMES CONTRE L'HUMANITE DEVANT LES JURIDICTIONS ORDINAIRES DU RWANDA [THE CRIME OF GENOCIDE AND CRIMES AGAINST HUMANITY IN RWANDA'S COURTS] (2004) [AVOCATS SANS FRONTIÈRES, VADE-MECUM], *available at* http://www.asf.be/FR/FRnews/vade_mecum.pdf.

234. 1996 GENOCIDE LAW, *supra* note 233, ARTS. 19-21. The specialized chambers were later abolished by the *gacaca* law that took effect in 2001. 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. 96 [hereinafter 2001 *GACACA* LAW]. The former Prosecutor General stated: "At the end of the day, they didn't make much of a difference: ninety-five percent of the cases were genocide cases." Interview with Gerald Gahima, former Prosecutor General of Rwanda, in N.Y., N.Y. (Jan. 28, 2005) (on file with author).

235. 1996 GENOCIDE LAW, *supra* note 233, art. 2.

236. 1996 GENOCIDE LAW, *supra* note 233, arts. 4-16. For example, someone who pleads guilty to (a non-Category 1) killing can receive a twelve to fifteen-year sentence (or a seven to eleven-year sentence if the plea occurs before prosecution). Although the period for pleading guilty was originally set for eighteen months, it has been repeatedly extended. *See. e.g.*, MINISTERIAL ORDER NO. 027 OF 24/03/2003 TO EXTEND TIME PERIOD FOR CONFESSION AND GUILT PLEA, *in* JOURNAL OFFICIEL NO. 7 BIS, Apr. 1, 2003, at 10 (on file with author). For a review of the literature on plea-bargaining and its use in the ad hoc international criminal tribunals, see generally Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1 (2002); *see also* Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 363 (1997) (arguing that Rwanda's adoption of plea-bargaining "turned out to be somewhat incompatible" with the ICTR).

237. *See* Schabas, *Rwanda*, *supra* note 16, at 559 (noting it took "two years of prodding by international donors and NGOs" to start trials); SIBOMANA, *supra* note 218, at 106 (criticizing the government for obstructing investigations and trials of genocide suspects). The government also rebuffed early offers to have American and European lawyers help prosecute and judge genocide cases in the national courts. Schabas, *Rwanda*, *supra* note 16, at 528; HUMAN RIGHTS WATCH, WORLD REPORT: RWANDA (1996).

238. HUMAN RIGHTS WATCH, STRUGGLING TO SURVIVE: BARRIERS TO JUSTICE FOR RAPE VICTIMS IN RWANDA 18 (2004) [hereinafter HUMAN RIGHTS WATCH, STRUGGLING TO SURVIVE]; AMNESTY INT'L, *supra* note 213, at 17. The numbers of people tried rose steadily until 2000, but then dropped off: 399 in 1997, 895 in 1998, 1306 in 1999, 2458 in 2000, 1416 in 2001, 1909 in 2002, and 1358 in 2003. LIPRODHOR, Tableau No. 2: Decisions judiciaries par Annees [Table No. 2: Judicial Decisions by Year] (1996-2002) (on file with author); LIPRODHOR, SITUATION DES DROITS DE LA PERSONNE AU RWANDA: RAPPORT 2003-2004 [THE HUMAN RIGHTS SITUATION IN RWANDA 2003-2004] 29 (2005) (on file with author) [hereinafter LIPRODHOR, SITUATION DES DROITS DE LA PERSONNE]. LIPRODHOR is the most reliable source as it has been the only independent, Rwandan human rights NGO that engaged in systematic monitoring of the national trials. Other

national courts based on a selective reading of the genocide case law: "the judgments provide a reassuring portrait of a judicial system hard at work, contending with the rights of the accused, conflicting evidence and legal questions, and attempting to come to a fair result."[239] In fact, the quality of justice in trials has been poor due to inadequate defense representation,[240] lack of resources,[241] and especially political

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authors provide slightly different figures. *See, e.g.*, AMNESTY INT'L, *supra* note 213, at 17; Schabas, *Genocide Trials and Gacaca Courts*, *supra* note 170, at 10; Reyntjens & Vandeginste, *supra* note 182, at 109. Courts stopped functioning for half of 2003 and most of 2004, and no genocide trials seem to have been held in 2004. This was partly the fault of sweeping judicial reform proposals: most justice sector activity was put on hold as key government stakeholders jockeyed for power and justice sector personnel worried about losing their positions. *Id.* at 119. All courts (except the Supreme Court and High Court) again stopped functioning for several months at the beginning of 2006 due to the government's administrative reorganization. *See* Felly Kimenyi, *Rwanda: Courts Resume on Monday*, NEW TIMES, Apr. 9, 2006 (reporting that courts would reopen on April 10, 2006).

239. Schabas, *Genocide Trials and Gacaca Courts*, *supra* note 170, at 889. Schabas relied on the genocide decisions selected and published by Avocats sans Frontières-Belgique, which were chosen precisely for their value as good precedents. For critical overviews of the Rwandan judicial sector, see Lars Waldorf, *Still Searching for Solutions to Impossible Problems: Justice, Impunity, and International Donors in Post-Genocide Rwanda*, *in* BEYOND AIDING VIOLENCE (Peter Uvin ed., forthcoming 2006); MARTIEN SCHOTSMANS, BELGIAN TECHNICAL COOPERATION, RAPPORT D'EVALUATION A MI-PARCOURS DU PROJET APPUI AU RENFORCEMENT DE L'ETAT DE DROIT ET DE LA JUSTICE AU RWANDA (2004) (on file with author); MARIE THÉRÈSE KAMPIRE ET AL., CAGEP-CONSULT/USAID, ASSESSMENT OF THE JUDICIAL SECTOR IN RWANDA (Nov. 2002), *available at* http://www.rwanda1.com/images/Docs/Judicial%20Sector%20Assessment%20and %20Appendices,%20November%202002.pdf; WEEKS ET AL., *supra* note 224, at 40-41 (Oct. 2002).

240. The Genocide Law provides a right to defense, but not at government expense. 1996 GENOCIDE LAW, *supra* note 233, art. 36. Legal representation for defendants remains grossly inadequate: only half the defendants have benefited from representation. DANISH INSTITUTE FOR HUMAN RIGHTS, LEGAL AID IN RWANDA app. 3, 83 (2004). The Rwandan government has displayed considerable hostility to providing defense counsel for suspects in national genocide trials. In 1998, the Ministry of Justice forced the departure of Legal Aid Rwanda, which had provided advice and representation to approximately 450 detainees in Kigali Central Prison. DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 756. In mid-2002, Avocats Sans Frontiéres stopped providing representation in genocide cases after disputes with the bar association and government. In late 2004, the Ministry of Justice, with the support of the bar, dismantled the Corps of Judicial Defenders, an association of paralegals, which had represented approximately 4100 defendants and 11,200 civil parties (victims) in completed cases from 2000 through 2003. DANISH INSTITUTE FOR HUMAN RIGHTS, LEGAL AID IN RWANDA, *supra*, at 42.

241. The 1994 genocide devastated the judicial infrastructure and left the country with very few lawyers and judges. "Before April 1994, judicial personnel (including judges, prosecutors, judicial police inspectors, and registrars) totaled around 1200; in October 1994, less than 400 (including for instance, no more than fourteen public prosecution officers) remained in place." Reyntjens & Vandeginste, *supra* note 182, at 108 (citing Rwandan government sources). *See* Schabas, *Genocide Trials and Gacaca Courts*, *supra* note 170, at 5 ("There were only about 20 lawyers with genuine legal education in the country when I visited Rwanda in November 1994."). In addition, many of the RPF and Tutsi lawyers who returned after the genocide had been trained in Anglophone, common law jurisdictions like Uganda and Tanzania and were unfamiliar with Rwanda's civil law system inherited from Belgium. Some of the lack of manpower is also due to the government's replacement of older, experienced Hutu judges with younger, inexperienced (but better educated) Tutsi returnees. HUMAN RIGHTS WATCH, WORLD REPORT: RWANDA (1999) (concluding that "the judiciary [was] largely in the hands of Tutsi, many of whom were recent returnees"). In 2004, about 500 of 600 district and provincial-level judges were dismissed from their posts, even though some met the newly required qualifications. U.S. DEP'T OF STATE 2006, *supra* note 138. Two hundred and thirty judges were appointed as replacements. *Rwanda Overhauls Judiciary System*, Associated Press, July 21, 2004. It is not clear whether those removals had a disproportionate impact on Francophone or Hutu judges. Interviews in

interference.[242] The fairness of genocide trials has improved over the years: the acquittal rate rose from six percent to twenty-seven percent while the percentage of death sentences fell from forty-five percent to three percent.[243] No executions have occurred since April 1998, when twenty-two persons were killed by firing squads in public stadiums around the country.[244]

Some authors have wrongly blamed many of the problems with national genocide prosecutions on the international community, which preferred to lavish money on the United Nations International Criminal Tribunal for Rwanda ("ICTR") based in Tanzania. Alvarez speculated that "each dollar spent by the international community on the ICTR is one less dollar available for assistance to Rwandan courts."[245] Yet, as Des Forges and Longman caution, "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."[246] Alvarez also argued that the ICTR's primacy, and consequently its decision to try Colonel Theoneste Bagasora, the presumed mastermind of the genocide, deprived Rwanda's government of much-needed legitimacy and "undermined its claim that it was, unlike

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Kigali, Rwanda, July 2005.

242. Hutu prosecutors and judges who refused to arrest or convict people in the absence of credible evidence often found themselves charged with genocide or corruption. *See* HUMAN RIGHTS WATCH, WORLD REPORT: RWANDA (2002); Eugene Habiyambere, *Le Tournant Critique du Process Anaclet Nkundimfura et ses Coaccuses* [*Critical turning point in the trial of Anaclet Nkundimfura and his co-accused*], LE VERDICT (Rwanda), Jan. 2003, at 3-4; LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 213; *see also* SIBOMANA, *supra* note 218, at 106-107 (criticizing the arrest of one judge and the unsolved murders of two others). The clearest examples of executive interference were the wholesale removal of the Supreme Court in 1999 and the removal of six Supreme Court judges in 2002 (in the latter episode, the Prosecutor General forced the judges to resign by threatening to jail them on corruption charges). Although judicial independence appears to have increased since the 2004 judicial reforms, the US State Department noted that "problems remained." U.S. DEP'T OF STATE 2006, *supra* note 138; *cf.* Carothers, *supra* note 181, at 12 (observing that "the judiciary in dominant-power countries is typically cowed, as part of the one-sided grip on power").

243. INT'L CRISIS GROUP, FIVE YEARS AFTER THE GENOCIDE: JUSTICE IN QUESTION 13 (1999); LIPRODHOR, SITUATION DES DROITS DE LA PERSONNE, *supra* note 238, at 29.

244. Commenting on those trials and executions, Martha Minow wrote, "Rather than ending the cycles of revenge, the trials themselves were revenge." MINOW, VENGEANCE AND FORGIVENESS, *supra* note 21, at 124. The lack of executions since then probably owes as much to concern for donor sensitivities as to the post-1998 policy of national reconciliation. *See* Schabas, *Genocide Trials and Gacaca Courts*, *supra* note 170, at 895 (attributing the "abandonment of the death penalty" solely to governmental understanding that "harsh, retributive punishment is not the way forward").

245. Alvarez, *Crimes of State/Crimes of Hate*, *supra* note 6, at 446; Cobban, *supra* note 85. The United States spent more than $32 million on the ICTR in 2004 and 2005, compared to $44.6 million in rule of law assistance to Rwanda over the eight-year period from 1997 to 2004. E-mail from Office of Democracy and Governance, USAID, to the author (Feb. 8, 2005) (on file with author). It is unlikely, however, that international donors would have been willing to finance the Rwandan judicial system at anywhere near the levels of financing for the ICTR. In other words, donor money not spent on the ICTR would more likely have been spent on other countries rather than on Rwanda. Also, the Rwandan judicial sector simply did not have the capacity to absorb the amount of money spent on the ICTR. For discussions of the ICTR's problems, see the excellent series of reports that Thierry Cruvellier did for International Crisis Group: INT'L CRISIS GROUP, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA: TIME FOR PRAGMATISM (2003); INT'L CRISIS GROUP, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA: THE COUNTDOWN (2002); INT'L CRISIS GROUP, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA: JUSTICE DELAYED (2001).

246. Des Forges & Longman, *supra* note 28, at 62.

the former regime, committed to the rule of law in a multiparty, pluralistic state."[247] Alvarez wrote that despite the speedy show trial and public execution of Froudald Karamira by the Rwandan government, which arguably violated human rights guarantees and deprived other national trials and the ICTR of Karamira's insider testimony.[248] Also, the government still has not tried the high-profile suspects in its custody, including Valerie Bemeriki, the notorious RTLM journalist who was apprehended in June 1999, and Agnes Ntamabyiriro, the former minister of justice in the genocidal regime, who has been in detention since 1996.

According to Alvarez, Rwanda's "thousands" of local criminal prosecutions involving low-level perpetrators

> may better preserve collective memory and promote the mollification of victims, the accountability of perpetrators, the national (and even the international) rule of law, and national reconciliation. The didactic functions of war crimes trials may best be furthered locally, through thousands of indictments and trials that truly resonate within a culture and whose lessons do not appear to be imposed, in top-down fashion, by the international community.[249]

Alvarez qualified this claim significantly by limiting it to "good faith domestic prosecutions that encourage civil dissensus."[250] Yet, he offered no criteria for determining good faith prosecutions and implicitly presented Rwanda's domestic trials as meeting that standard. Alvarez glancingly recognized the danger that thousands of trials would overwhelm judicial resources, but optimistically opined it would promote local innovation such as Rwandan-style plea bargains.[251] With that example, Alvarez unwittingly undermined his argument, for plea bargains do not produce the sort of public, detailed truth-telling, let alone civil dissensus, he advocated. Most

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247. Alvarez, *Crimes of States/Crimes of Hate*, *supra* note 6, at 402. *But see* Akhavan, *supra* note 215, at 26 (noting problems with national justice, particularly violence against judicial personnel, in arguing with Alvarez).

248. *See* MINOW, VENGEANCE AND FORGIVENESS, *supra* note 21, at 124 (arguing that Karamira's trial and execution, along with twenty-one others, represented vengeance rather than justice). *But see* Schabas, *Genocide Trials and Gacaca Courts*, *supra* note 170, at 887 (arguing, based on personal observation, that Karamira's trial appeared fair).

249. Alvarez, *Crimes of States/Crimes of Hate*, *supra* note 6, at 482-83. Taking a less optimistic view of Rwanda's national trials, Drumbl instead proposed that local restorative justice in the form of *gacaca* would better accomplish the goals laid out by Alvarez. Drumbl, *Punishment*, *supra* note 6, at 1323-25. Drumbl's greater skepticism toward the formal judicial process may partly reflect his two-month stint in Rwanda in 1998 providing defense representation to genocide suspects through Legal Aid Rwanda, an American NGO, that was eventually denied accreditation by the government. *See* Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545 (1998); DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 756 n.47 (discussing Legal Aid Rwanda). To his credit, Drumbl proposed a diverse mix of transitional justice mechanisms for Rwanda: (1) criminal trials for the genocidal leadership and notorious killers; (2) a truth commission; (3) an international compensation fund; (4) a truly multi-ethnic power-sharing among elites; and (5) "*gacaca*-based reintegrative shamings" for low-level perpetrators. Drumbl, *Punishment*, *supra* note 6, at 1235.

250. Alvarez, *Crimes of States/Crimes of Hate*, *supra* note 6, at 482. For a discussion of "civil dissensus," see OSIEL, *supra* note 13, at 36-58.

251. Alvarez, *Crimes of States/Crimes of Hate*, *supra* note 6, at 468.

problematically, Alvarez applied Mark Osiel's and Judith Shklar's notion of liberal political trials to a regime that is neither liberal nor liberalizing.[252]

D. Gacaca: *Reinventing Tradition*

In an effort to reduce the overwhelming number of genocide cases and prisoners, Rwandan officials turned for inspiration to *gacaca*, a local dispute resolution mechanism, where community elders (*inyangamugayo*, literally "those who detest disgrace") adjudicated family and inter-family disputes over property, inheritance, personal injury, and marital relations as the need arose.[253] *Gacaca*, which means "lawn" or "small grass," refers to the place where dispute resolution traditionally took place.[254]

Traditional *gacaca* generally did not treat cattle theft, murder, or other serious crimes, which were handled by chiefs or the king's representatives.[255] Older men dominated *gacaca* as women were not permitted to speak.[256] Traditional *gacaca* could impose a range of sanctions to achieve restitution. Punishment was not individualized; rather, family and clan members were also obligated to repay any assessed judgment.[257]

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252. *See* OSIEL, *supra* note 13, at 65 ("Whether show trials are defensible depends on what the state intends to show and how it will show it. Liberal show trials are ones self-consciously designed to show the merits of liberal morality and to do so in ways consistent with its very requirements."); JUDITH SHKLAR, LEGALISM: LAW, MORALS AND POLITICAL TRIALS 145 (1986) ("[T]rials may actually serve liberal ends, where they promote legalistic values in such a way as to contribute to constitutional politics and to a decent legal system."). *But see* Posner, *supra* note 5, at 3-4 (contending that political trials are inherently illiberal and problematic in the international and transitional contexts).

253. *See* O.A.U. REPORT, *supra* note 212, at ¶ 18.43 ("A *gacaca* is not a permanent judicial or administrative institution, it is a meeting which is convened whenever the need arises and in which members of one family or of different families or all inhabitants of one hill participate."); Reyntjens & Vandeginste, *supra* note 182, at 118 (noting ad hoc nature of traditional *gacaca*). Rwanda does not have healing rituals of the sort used in Mozambique. Kenneth Roth & Alison Des Forges, *Justice or Therapy?* BOSTON REV., Summer 2002, *available at* http://www.bostonreview.net/BR27.3/rothdesForges.html; Interview with Danielle de Lame, Royal Museum of Central Africa, in Tervuren, Belgium (Feb. 3, 2006).

254. LOUISE NIBAGWIRE & R. DAVID ZORC, RWANDA AND RUNDI (IKINYARWANDA-IKIRUNDI) NEWSPAPER READER 162-63 (2002). *Gacaca* is sometimes incorrectly referred to as "village justice." *See, e.g.*, Maya Goldstein Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2 J. DISP. RESOL. 355, 377 (2004) (describing traditional *gacaca* courts as "village-based"). In fact, Rwandans traditionally lived in separate homesteads spread out on hillsides rather than villages. HUMAN RIGHTS WATCH, UPROOTING THE RURAL POOR IN RWANDA III (2001) [hereinafter HUMAN RIGHTS WATCH, UPROOTING THE RURAL POOR], *available at* http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDCOI&id=3bd540b40; *see* DE LAME, *supra* note 180, at 111 ("The scattered homesteads confound European observers, who tend to assimilate the hillside to a village . . . ."). The term "village justice" also mistakenly suggests that traditional *gacaca* was institutionalized and involved the entire community.

255. U.N. HIGH COMM'R FOR HUMAN RIGHTS, *GACACA*: LE DROIT COUTUMIER AU RWANDA 20 (1996) (noting that traditional *gacaca* did not handle murder cases); NIBAGWIRE & ZORC, *supra* note 254, at 163 (same). *But see* Drumbl, *Punishment*, *supra* note 6, at 1265 (claiming *gacaca* had heard murder cases).

256. *See* NIBAGWIRE & ZORC, *supra* note 254, at 162-63 (defining *gacaca* as "[t]he conversation of those old men" and noting that only husbands were summoned to the *gacaca* during resolution of marital disputes).

257. Reyntjens & Vandeginste, *supra* note 182, at 118 ("The traditional objective of *gacaca*, therefore, is 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.").

The losing party typically had to provide beer to the community as a form of reconciliation.[258]

By the late 1980s, *gacaca* had been transformed into a "semi-official and 'neo-traditional'" institution used by local authorities to resolve minor conflicts outside the formal judicial system.[259] *Gacaca* may have continued in some communities through the genocide.[260] Although a U.N. report found *gacaca* practically nonexistent in late 1994,[261] an anthropologist discovered *gacaca* functioning or being reorganized in several communities by mid-1995.[262] Some *gacaca* reportedly played a role in arresting genocide suspects.[263] Several local officials also revived *gacaca* to deal with property disputes as refugees returned to the country and found their houses and lands occupied.[264] Encouraged by prison officials, detainees started their own *gacaca* in 1998 to hear confessions from their fellow inmates.[265]

In 1995, several Rwandan scholars had rejected the idea of using *gacaca* to try genocide cases: "The justice of *gacaca* would be incompetent in the matter of genocide because it cannot even judge a homicide case."[266] Rather, they proposed that *gacaca* function as local truth commissions to differentiate the innocent from the guilty.[267] In

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258. U.N. HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 255, at 9-10, 18-19; Alice Karekezi, *Juridictions Gacaca: Lutte contre l'Impunitie et Promotion de la Reconciliation Nationale* [Gacaca *Jurisdictions: Fighting against Impunity and Promoting National Reconciliation*], *in* CAHIERS DU CENTRE DE GESTION DES CONFLITS [JOURNAL OF THE CENTER FOR CONFLICT MANAGEMENT] 1, 32 (2000).

259. Filip Reyntjens, *Le Gacaca ou la Justice du Gazon au Rwanda* [Gacaca, *or Justice on the Grass in Rwanda*], *in* POLITIQUE AFRICAINE 31, 31-41 (1990). When Reyntjens examined *gacaca* in a Butare commune in 1987, he found that the sector *conseiller* (official), assisted by the cell committee, presided over the *gacaca* sessions, which usually met once a week, hearing approximately four to five cases. *Id.* at 32-33. In a sample of 112 cases, Reyntjens found that forty percent were quarrels, brawls, and public insults (some involving personal injuries), and sixty percent were between family members or immediate neighbors. *Id.* at 34-35. 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." *Id.* at 41 (author's translation from French original); *see also* DE LAME, *supra* note 180, at 38 (mentioning author's participation in *gacaca* dealing with an injured dog).

260. ROSE, JUSTICE, *supra* note 57, at 5.

261. *Id.* at 10.

262. *Id.* at 3. Rose, however, idealized the post-genocide *gacaca* "as spontaneous outgrowths of communities' need[s] for cooperation and peaceful coexistence," even though she, like Reyntjens earlier, found *gacaca* under the control of local officials. *Id.* at 4, 8.

263. *Id.* at 14-15 (discussing Mabanza commune).

264. Karekezi, *supra* note 258, at 33; *see* PENAL REFORM INT'L, INTERIM REPORT, *supra* note 23, at 8 (noting that traditional *gacaca* handled civil property disputes). On property and returning refugees, see HUMAN RIGHTS WATCH, UPROOTING THE RURAL POOR, *supra* note 254, at III and POTTIER, *supra* note 138, at 179-201.

265. *See Gacaca*: Living Together Again in Rwanda? (*Gacaca* Productions/Dominant 7 2002) (on file with author) (depicting a prison *gacaca*); PENAL REFORM INT'L, INTERIM REPORT, *supra* note 23, at 25 (noting that in Kigali Central Prison, the *gacaca* committee heard 1127 confessions from approximately 8000 inmates from late 1998 to late 2001); *see also* Karekezi, *supra* note 258, at 33-34 (describing how evangelical Christian sects have promoted a religiously-inspired *gacaca* in some prisons and *cachots*).

266. U.N. HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 255, at 20 (author's translation from French).

267. *Id.*

1999, the government, which had begun promoting national reconciliation, decided to modernize *gacaca* for use with genocide cases, but it took another year-and-a-half to pass a *gacaca* law.[268] In 2000, then Prosecutor General Gerald Gahima stated that *gacaca* meant the government was putting "political considerations ahead of the message of [ending] impunity" in an effort "to put the genocide behind us."[269] In November 2003, he struck a similarly pragmatic note about *gacaca* and hinted at a future amnesty:

> It's clear that *gacaca* the way it's structured could not cope with the work. *Gacaca* is not the last chapter. *Gacaca* was not possible in 1995 . . . . Today, by and large, even survivors could live with it . . . . So who knows what's possible tomorrow? . . . I think time heals wounds. There are things not open in the past that could open up in the future.[270]

The 2001 *Gacaca* Law retained the central features of the 1996 Genocide Law—the four categories of genocide crimes[271] and reduced sentences for guilty pleas[272]—while creating approximately 11,000 local courts (with some 260,000 elected judges) to hear cases—with the exception of Category 1 cases which will still be heard by national courts.[273] The other innovation introduced in the *gacaca* law is that persons

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268. *See* Karekezi, *supra* note 258, at 17-18 (summarizing political discussions around *gacaca* in 1999). In October 1998, then President Pasteur Bizimungu set up a commission to explore "a new type of arbitration court" to try non-Category 1 genocide suspects. REPUBLIQUE RWANDAISE, LES TRIBUNAUX D'ARBITAGE DANS LES PROCES DU GENOCIDE PERPETRE AU RWANDA A PARTIR DU 1 OCTOBRE 1990 JUSQU'AU 31 DECEMBRE 1994 3 [REPUBLIC OF RWANDA, ARBITRATION COURTS FOR THE TRIALS OF THE GENOCIDE PERPETRATED IN RWANDA FROM OCTOBER 1, 1990 TO DECEMBER 31, 1994] (Jan. 1999) (on file with author). The commission's January 1999 report laid out the elements of what became modernized *gacaca* without ever using the term *gacaca*. *Id.* Six months later, the government 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)." 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 25 (July 1999) (on file with author).

269. Cobban, *supra* note 85.

270. Interview with Gerald Gahima, Prosecutor General of Rwanda, in Kigali, Rwanda (Nov. 24, 2003).

271. 2001 *GACACA* LAW, *supra* note 234, art. 51

272. *Id.* arts. 56, 68-71.

273. The courts also kept jurisdiction over approximately 5000 cases transmitted by the public prosecutor before promulgation of the 2001 *Gacaca* Law on March 15, 2001. *Id.* art. 48. Under the 2001 law, Category 2 cases were to be tried by 106 district-level *gacaca* courts, Category 3 cases by 1545 sector-level *gacaca* courts, and Category 4 cases by 9201 cell-level *gacaca* courts. *Id.* art. 48. In 2001, Rwanda's administration was reorganized into the following hierarchy: 11 provinces (formerly prefectures), plus the city of Kigali, 106 districts (formerly communes), 1545 sectors, and 9201 cells. The cell, the smallest administrative unit, averages 830 people, though there are considerable variations. Vandeginste, *Rwanda: Dealing with Genocide*, *supra* note 156, at 252 n.60. In addition, cells are sub-divided into groupings of ten households called *nyumbakumbi*. PENAL REFORM INT'L, INTERIM REPORT, *supra* note 23, at 30. In early 2006, the Rwandan government engaged in a sweeping administrative reorganization of the country that reduced the number of provinces (from 11 to 4), districts (from 106 to 30), and sectors (from 1545 to 416). *See* Mansur Kakimba, *Musoni Speaks Out on Restructuring Reforms*, NEW TIMES, Feb. 13-14, 2006, at 7-8 (quoting government minister on administrative reforms). It appears that *gacaca* will not have to conform to the new administrative demarcations.

who plead guilty to Category 2 crimes, or who are convicted of Category 3 crimes, are eligible to serve half their sentences doing community service.[274]

Gacaca begins with a lengthy pretrial phase at the cell level, where judges compile local histories of the genocide and establish lists of victims, property damages, and suspects.[275] The lists of suspects are based not only on the evidence given in *gacaca*, but also on prisoner confessions and, most importantly, files from state prosecutors.[276] The pretrial phase ends when the judges "categorize" the accused, placing them in the criminal category that corresponds to evidence of their worst crimes.[277] The files of the accused are then sent to the appropriate jurisdiction for trial.[278]

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274. 2001 *GACACA* LAW, *supra* note 234, arts. 69, 70. Originally, community service was supposed to consist of non-remunerated labor three days a week in public or private enterprises that benefit the public such as construction and repair of roads, bridges, and schools. PRESIDENTIAL ORDER NO. 26/01 OF 10/12/2001 RELATING TO THE SUBSTITUTION OF THE PENALTY OF IMPRISONMENT FOR COMMUNITY SERVICE, arts. 25, 32. In theory, community service has several advantages: it will reduce the prison population, reintegrate convicted *genocidaires* back into their communities, provide a method for indigent *genocidaires* to make reparations to society, and contribute to national development. However, a massive and expensive bureaucracy would have been needed to manage the program. Recognizing that, the government created labor camps in 2005 where those sentenced to community service live and work six days a week (and consequently complete their sentences more quickly). Interview with representative of international NGO, in Kigali, Rwanda (Mar. 18, 2006). An informed Rwandan expressed concern that community service, which started in late 2005, had become "forced labor." *Id.* Interview with former government official, Washington, D.C. (Dec. 2005).

275. To speed up the pre-trial phase, the government turned to the *nyumbakumbi*—the local administrators responsible for ten households—to fill out the lists even though that is not authorized by the *gacaca* laws. SERVICE NATIONAL DES JURIDICTIONS GACACA, PLAN STRATEGIQUE 2005-2007 [NATIONAL SERVICE OF GACACA JURISDICTIONS, STRATEGIC PLAN 2005-2007] 5 (May 2005) (on file with author) [hereinafter SERVICE NATIONAL DES JURIDICTIONS GACACA, PLAN STRATEGIQUE]. This practice made *gacaca* less participatory and more susceptible to corruption, while also reinforcing the power of state representatives at the expense of *gacaca* judges and local communities. Interview with Jean-Charles Paras, Head of Penal Reform International, in Kigali, Rwanda (Feb. 15, 2006); *see also* PENAL REFORM INT'L, ENTRETIEN AVEC LE PRESIDENT DES JUGES GACACA [INTERVIEW WITH THE PRESIDENT OF THE GACACA JUDGES], No. 777, Ref. E010/T004, at 2 (Mar. 15, 2005) (Penal Reform International CD-ROM II) (discussing problems with *nyumbakumbi*); PENAL REFORM INT'L, RAPPORT D'OBSERVATION DES JURIDICTIONS GACACA: 31 JULLIET 2005 [OBSERVATION REPORT OF THE GACACA JURISDICTIONS: JULY 31, 2005], Ref. E012/D004, at 2-3 (Penal Reform International CD-ROM II); PENAL REFORM INT'L, RAPPORT D'OBSERVATION DES JURIDICTIONS GACACA: 4 OCT. 2005 [OBSERVATION REPORT OF THE GACACA JURISDICTIONS: OCT. 4, 2005], Ref. E047/D003, at 2 (Penal Reform International, CD-ROM II) (describing how poorly educated *nyumbakumbi* made errors on lists); PENAL REFORM INT'L, RAPPORT D'OBSERVATION DES JURIDICTIONS GACACA: 1 AOUT 2005 [OBSERVATION REPORT OF THE GACACA JURISDICTIONS: AUGUST 1, 2005] 1, Ref. E037/D004, at 3 (Penal Reform International CD-ROM II) (reporting that some *nyumbakumbi* destroyed lists). *See also* Catherine Honeyman, *Gacaca* Jurisdictions: Transitional Justice in Rwanda, Observations from: June 10-Aug. 8, 2002, at 13-14 (2002), *available at* http://www.convenor.com/madison/PDF_Gacaca_Report.pdf (discussing how a few pilot cell-level *gacacas* used *nyumbakumi* to make lists in mid-2002).

276. AMNESTY INT'L, *supra* note 213, at 2, 18, 35. The prosecutors' case files threaten to usurp independent fact-finding by *gacaca* judges, especially if those files already categorize the accused. *Id.* at 35-36.

277. *Id.* at 36. Cell-level judges have received insufficient instruction on categorization. *See* AFRICAN RIGHTS, *GACACA* JUSTICE: A SHARED RESPONSIBILITY 4-17 (2003) [hereinafter AFRICAN RIGHTS, *GACACA* JUSTICE] (discussing weaknesses in initial training of *gacaca* judges); Honeyman, *supra* note 275, at 19-20 (same). The *gacaca* manual for judges provides no guidance on how to evaluate evidence and categorize

Some observers have described the *gacaca* for genocide cases as traditional or indigenous even though few "customary" features remain.[279] The new *gacaca* system is an official state institution intimately linked to the state apparatus of prosecutions and incarceration, and applying codified, rather than "customary," law.[280] Second, *gacaca* courts are judging serious crimes, whereas traditional *gacaca* mostly involved minor civil matters. Third, *gacaca* judges are not community elders as in the past, but rather elected, comparatively young, and nearly one-third women.[281] 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."[282]

Linked to this perception of *gacaca* as traditional is the notion that *gacaca* promotes restorative justice.[283] "In fact, *gacaca* has always been an uneasy mix of

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offenses. DEPARTEMENT DES JURIDICTIONS GACACA, MANUEL EXPLICATIF SUR LA LOI ORGANIQUE PORTANT CREATION DES JURISDICTIONS GACACA [DEPARTMENT OF GACACA JURISDICTIONS, EXPLANATORY MANUAL ON THE ORGANIC LAW CREATING GACACCA JURISDICTIONS] (2001), *available at* http://www.asf.be/FR/FRterrain/rwanda/manuel_gacaca.pdf. The prosecutors and judges who trained the *gacaca* trainers in 2002 differed among themselves about how to categorize various offenses and how to treat accomplice liability. Letter from Pierre St. Hilaire, Resident Legal Advisor to Rwanda, U.S. Department of Justice, to Gerald Gahima, Prosecutor General of Rwanda (Mar. 26, 2002) (on file with author). The procedure for appealing categorization is unclear, with the result that different *gacaca* courts have taken inconsistent approaches. AVOCATS SANS FRONTIÈRES, MONITORING DES JURIDICTIONS *GACACA*, PHASE DE JUGEMENT, RAPPORT ANALYTIQUE, MARS-SEPTEMBRE 2005 [LAWYERS WITHOUT BORDERS, MONITORING OF GACACA JURISDICTIONS, REPORT ON TRIAL PHASE, MAR.-SEPT. 2005] 20-21 & n.43, n.44 (2005) [hereinafter AVOCATS SANS FRONTIÈRES, PHASE DE JUGEMENT], *available at* http://www.asf.be/FR/FRnews/rapport_monitoring_gacaca_mars_sept_2005.pdf.

278. AMNESTY INT'L, *supra* note 213, at 35.

279. *See, e.g.*, Drumbl, *Collective Violence*, *supra* note 36, at 600-01 ("The Rwandan government has sought—with halting success—to institute traditional community dispute resolution—called *gacaca* . . . ."); Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73, 179 (2002) [hereinafter Daly, *Transformative Justice*] ("[*G*]*acaca* tribunals could herald the return of indigenous forms of justice and a familiar conception of law as a forum for resolving problems within the communities."); Jason Strain & Elizabeth Keyes, *Accountability in the Aftermath of Rwanda's Genocide*, *in* ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES 87, 118 (Jane E. Stromseth ed. 2003) (describing modernized *gacaca* as an "innately Rwandan process"); Brooks, *supra* note 22, at 2336 (calling *gacaca* "traditional").

280. In an effort at state-imposed informalism, the Rwandan government also established local mediation committees (*abunzi*) in mid-2004 to provide ADR in all sectors of the country. CONST. art. 159; ORGANIC LAW NO. 17/2004 OF JUNE 20, 2004 ON ORGANISATION, POWERS AND FUNCTIONING OF THE MEDIATION COMMITTEE (on file with author); MINISTERIAL ORDER NO. 122 OF OCTOBER 18, 2004 ON INTERNAL RULES AND REGULATIONS OF THE MEDIATION COMMITTEE (on file with author). These mediation committees are likely to supplant whatever remains of "customary" *gacaca* dispute resolution.

281. *See* NAT'L SERVICE OF GACACA COURTS, REPORT ON IMPROVING THE LIVING CONDITIONS FOR THE INYANGAMUGAYO 2 (Nov. 2005) (on file with author) (finding on the basis of surveys that thirty-four percent of *gacaca* judges are women). The initial election of *gacaca* judges in October 2001 was not as democratic as it appeared: local officials nominated candidates in advance and many of those candidates were already involved in the local administration. PENAL REFORM INT'L, INTERIM REPORT, *supra* note 23, at 30-31 & 35 n.39.

282. Reyntjens & Vandeginste, *supra* note 182, at 118.

283. Mark A. Drumbl, *Restorative Justice and Collective Responsibility: Lessons for and from the Rwandan Genocide*, 5 CONTEMP. JUST. REV. 5, 13 (2002) [hereinafter Drumbl, *Restorative Justice*]; Cobban, *supra* note 85, at 15; Tiemessen, *supra* note 192, at 58, 60; Wierzynska, *supra* note 30, at 1958-59; PETER HARRELL, RWANDA'S GAMBLE: *GACACA* AND A NEW MODEL OF TRANSITIONAL JUSTICE 83-96 (2003).

restorative and retributive justice: confessions *and* accusations, plea-bargains *and* trials, forgiveness *and* punishment, community service *and* incarceration."[284] Early on, Penal Reform International warned that the implementation of *gacaca* was emphasizing legalistic retribution over socio-political reconciliation.[285] Since then, *gacaca* has become increasingly retributive, both in design and in practice.

Gacaca started as a pilot project in June 2002 that expanded in November 2002 to include ten percent of the country. As a result of difficulties encountered during the pilot phase, the government amended the law in June 2004.[286] The new law combined Categories 2 and 3 (intentional murder, attempted murder, manslaughter, and assault cases) into a single category, now renamed Category 2,[287] and slightly modified the definitions of crimes.[288] It also streamlined *gacaca* by reducing the number of courts and judges.[289] The new law reduced the size of the *gacaca* bench from nineteen judges to nine[290] and lowered the quorum from fifteen to seven.[291]

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284. Lars Waldorf, *Rwanda's Failing Experiment in Restorative Justice*, *in* A HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 422, 422 (Dennis Sullivan & Larry Tifft eds. 2005); *see also* Bolocan, *supra* note 254, at 399 (recognizing that "retribution retain[s] a central role in *gacaca*"); Pernille Ironside, *Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation*, 15 N.Y. INT'L L. REV. 31, 57 (2002) (stating that *gacaca* "provides an innovative and practical blend of retributive and restorative justice"); Corey & Joireman, *supra* note 157, at 74 (noting that the retributive element predominates).

285. PENAL REFORM INT'L, INTERIM REPORT, *supra* note 23, at 43-44.

286. ORGANIC LAW NO. 16/2004 OF 19/6/2004 ESTABLISHING THE ORGANISATION, COMPETENCE AND FUNCTIONING OF *GACACA* COURTS CHARGED WITH PROSECUTING AND TRYING THE PERPETRATORS OF THE CRIME OF GENOCIDE OR CRIMES AGAINST HUMANITY, COMMITTED BETWEEN OCTOBER 1, 1990 AND DECEMBER 31, 1994, art. 51 [hereinafter 2004 *GACACA* LAW], *available at* http://www.inkiko-gacaca.gov.rw/pdf/newlaw1.pdf. At the same time, the government created the National Service of *Gacaca* Jurisdictions, an administrative body independent of the Supreme Court, which had previously been charged with supervising *gacaca*. LAW NO. 08/2004 OF 28/04/2004 ON THE ESTABLISHMENT, ORGANIZATION, DUTIES AND FUNCTIONING OF THE NATIONAL SERVICE IN CHARGE OF THE FOLLOW-UP SUPERVISION AND COORDINATION OF THE ACTIVITIES OF *GACACA* JURISDICTIONS, *in* JOURNAL OFFICIEL NO. 9, May 1, 2004 (on file with author).

287. Category 2 is subdivided into three categories corresponding to the *actus rea* and *mens rea*:

> The person whose criminal acts or criminal participation place [him] among killers or who committed acts of serious attacks against others, causing death, together with his or her accomplices;
>
> The person who injured or committed other acts of serious attacks with the intention to kill them, but who did not attain his or her objective, together with his or her accomplices;
>
> The person who committed or aided to commit other offences persons [sic], without the intention to kill them, together with his or her accomplices.

2004 *GACACA* LAW, *supra* note 286, art. 51.

288. Aside from the changes to Category 2, Category 1 was expanded to cover torture (not just sexual torture) and "dehumanizing acts on the dead body." *Id.*

289. The new law eliminated the district and provincial courts, while increasing the role of the 1545 sector courts. Sector *gacacas* will now hear all Category 2 cases. *Id.* art. 42. The law also created new sector-level *gacaca* appeals courts to hear appeals from Category 2 cases. *Id.* arts. 37, 43. The 9201 cell-level *gacaca* courts remain responsible for pre-trial fact-finding and trying property offenses (now reclassified as Category 3 crimes). *Id.* art. 41. *See also supra* note 273.

290. 2004 *GACACA* LAW, *supra* note 286, art. 8. Consequently, the number of *gacaca* judges dropped from approximately 260,000 to 110,619. This figure does not include the deputy, or back-up, judges. *See id.* (providing that each *gacaca* bench will have five deputy judges).

The amended law bars prosecutions for property offenses where perpetrators and victims have reached amicable settlements.[292] The new law reduced some penalties in an effort to harmonize sentencing ranges and encourage more guilty pleas.[293] Now, the maximum sentence that can be handed down by *gacaca* courts is thirty years (instead of life).[294] Also, the law explicitly provided that mitigating circumstances merit lesser sentences within the sentencing range for the particular category.[295] Importantly, the new law provided that only people convicted of willful murder will suffer permanent deprivation of their civil and political rights.[296]

By mid-2005, the pretrial phase in the pilot *gacaca* cells had resulted in 63,447 persons being placed on lists of the accused.[297] Only a meager 2883 (five percent) had confessed before the *gacaca* courts.[298] The pilot *gacaca* courts had preventively detained 606 suspects and provisionally released 555 others.[299] Of the 59,171 already categorized at that point, approximately eleven percent were placed in Category 1, sixty-two percent in Category 2, and twenty-seven percent in Category 3.[300]

Gacaca was launched nationwide on January 15, 2005. The first trials began in the pilot sectors on March 10, 2005. As of mid-June 2006, trials had yet to start in the remaining ninety percent of the country. *Gacaca* officials initially estimated that *gacaca* would continue for approximately ten years,[301] but the head of the *gacaca* administration has pronounced that *gacaca* would be completed in 2007,[302] which

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291. *Id.* art. 23.

292. *Id.* art. 51. By contrast, the 2001 *gacaca* law only recognized settlements reached before the date that law took effect (March 15, 2001), thus eliminating any incentive to settle property disputes after that date. 2001 *GACACA* LAW, *supra* note 234, art. 51.

293. For example, a Category 1 defendant who confesses will receive a twenty-five to thirty year sentence, as opposed to a twenty-five year to life sentence. 2004 *GACACA* LAW, *supra* note 286, art. 72.

294. *Id.* art. 73.

295. *Id.* art. 81. *But cf. id.* art. 57 (providing that persons who make incomplete confessions are subject to the maximum sentence for the crimes to which they did not confess).

296. *Id.* art. 76. By contrast, the earlier *gacaca* law provided that all persons found guilty of Category 1 or Category 2 would be deprived of their civil and political rights. 2001 *GACACA* LAW, *supra* note 234, art. 72. During the 2003 elections, approximately 80,000 people in pre-trial detention were denied their voting rights. *See* ORGANIC LAW NO. 17/2003 OF 07/7/2003 GOVERNING PRESIDENTIAL AND PARLIAMENTARY ELECTIONS, art. 10, *in* JOURNAL OFFICIEL NO. SPECIALE, July 7, 2003 (on file with author) (listing the classes of people that may not register to vote). That violated international human rights norms. *See* Human Rights Comm'n, General Comment 25 (57), ¶ 14, General Comments under art. 40, ¶ 4 of the ICCPR, 1510 mtg., U.N. Doc. CCPR/C/21/Rev. 1/Add. 7 (Aug. 27, 1996) ("Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.").

297. Service National des Juridictions *Gacaca*, Etat d'avancement du Processus *Gacaca*, tbl.2.4.1 (Power Point presentation, June 10, 2005) (on file with author) [hereinafter Processus *Gacaca*]. It is unclear how many of those suspects were named by state prosecutors and confessed prisoners, as opposed to the *gacaca* proceedings themselves. Prosecutors had listed 56,763 suspects for all those pilot cells. *Id.* If, as is likely, most of those suspects now appear on the *gacaca* lists, then it would be clear that state prosecutors have undue influence over pre-trial fact-finding.

298. *Id.*

299. *Id.*

300. *Id.* at tbl.2.4.2.

301. Gacaca to Complete Genocide Cases in 'Less than 10 Years,' HIRONDELLE NEWS AGENCY, May 5, 2005.

302. Yassin Tusingwire, *Gacaca Courts End in 2007*, RWANDA NEWSLINE, July 31-Aug. 6, 2005, at 8.

seems unrealistic. The first trials went quickly because they started with those who had already confessed: in the first three months of operation, the *gacaca* courts tried 1568 persons and issued 1451 judgments.[303] The speed suggests, however, that *gacaca* courts did not entertain many challenges to those confessions. By mid-2005, nine percent of genocide suspects (134 of 1451) had been acquitted[304] and forty-five percent (648 of 1451) had received sentences that included community service.[305]

Avocats Sans Frontieres (Lawyers Without Borders) has monitored numerous sector-level *gacaca* trials throughout Rwanda. Of the 407 accused whose trials were completed between March and September 2005, 286 (seventy-one percent) were found guilty and sentenced, 92 (twenty-three percent) were acquitted, and 29 (seven percent) were reclassified as Category 1 suspects and their cases transferred to national courts.[306] *Avocats Sans Frontieres* documented several troubling aspects of *gacaca* trials, the most serious being the absence of reasons given in the majority of judgments.[307]

In September 2005, the head of the *gacaca* jurisdictions proposed further modifications to *gacaca*, including the creation of a national-level *gacaca* court to try Category 1 suspects and hand down death sentences.[308] Afterwards, international donors and international NGOs successfully pressed the government for assurances that *gacaca* courts would not impose the death penalty.[309]

Gacaca moved very slowly during the first six months of 2006 due to the administrative reforms and the delay in passing a revised *gacaca* law. Trials only resumed in the pilot sectors in May and, as of June, there were still no trials in the rest of the country and no amended *gacaca* law.

E. Gacaca*'s Structural Weaknesses*

Gacaca is unsatisfactory to many Tutsi and Hutu. For both Tutsi and Hutu survivors of the 1994 genocide, *gacaca* does not include reparations to offset the light sentences for confessed *genocidaires*. For many Hutu, *gacaca* does not offer accountability for family members killed by the RPF's predominantly Tutsi soldiers. Finally, *gacaca* does not provide a sufficient avenue for redress to female victims of sexual violence.

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303. Processus *Gacaca*, *supra* note 297, at tbl.2.5.2.3.

304. The number of acquittals seems unusually high given that most of the early trials involved confessions of guilt.

305. Processus *Gacaca*, *supra* note 297, at tbl.5.2.3. Also, twenty-nine percent of judgments (425 of 1451) had been appealed and forty percent of these appeals (170 of 425) had already resulted in an appeal judgment. *Id.*

306. AVOCATS SANS FRONTIÈRES, PHASE DE JUGEMENT, *supra* note 277, at 33 (Annexe 1).

307. *Id.* at 13-14 & n. 21. With *gacaca* courts failing to specify whether the accused made their guilty pleas before or after being accused, it is impossible to know whether the sentences conform to the law. *Id.* at 22 & n.46.

308. *See* Letter from Avocats Sans Frontiéres, The Danish Center of Human Rights, Penal Reform International and RCN Justice & Democratie, to the Executive Secretary, National Service of *Gacaca* Jurisdictions (Oct. 17, 2005), *available at* http://www.asf.be/FR/FRnews/position_paper_ong_justice.pdf (discussing the proposed amendments to the *gacaca* law announced at a September 2005 meeting).

309. *Id.*; Author's interviews, in Kigali, Rwanda, Feb.-June 2006.

1. The Absence of Reparations for Genocide Survivors[310]

Most genocide survivors are desperately poor and want reparations.[311] Yet, twelve years after the genocide, the Rwandan government still has not created the Compensation Fund for Victims of the Genocide and Crimes Against Humanity called for in both the 1996 Genocide Law and the 2001 *Gacaca* Law.[312] The 2004 *Gacaca* Law deferred the issue of reparations.[313] In the past few years, top Rwandan officials have said the country cannot afford a reparations fund, once again underscoring the political powerlessness of genocide survivors.[314]

The Compensation Fund is supposed to pay some of the damages awarded by both *gacaca* and ordinary courts.[315] National courts have already awarded millions of

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310. While this discussion of reparations focuses on genocide survivors, it is important to recognize that the *Gacaca* Law makes no provision for compensating persons who have been unjustly detained for lengthy periods. *See* 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 266 (John Torpey ed., 2003) [hereinafter Vandeginste, *Victims of Genocide*]; *see also* UVIN, *supra* note 16, at 24 (noting need to provide compensation, even if only in the symbolic form of apologies, to those unjustly imprisoned).

311. Longman & Rutagengwa, *supra* note 144, at 173; *see also* In Rwanda We Say . . . The Family That Doesn't Speak Dies, *supra* note 228 (interviewing genocide survivors who voiced their economic desperation and desire for reparations).

Under international norms, victims of gross human rights abuses have a right to "expeditious, fair, inexpensive and accessible" redress for their suffering. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex ¶ 5, U.N. Doc. A/Res/40/34/Annex (Nov. 29, 1985). *See also* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 9, U.N. Doc. A/6316 (Dec. 16, 1966) (entered into force Mar. 23, 1976) (providing an "enforceable right to compensation"). Rwanda published its ratification of the ICCPR on February 12, 1975. The Rome Statute empowers the International Criminal Court to award reparations to victims either from convicted persons or from a trust fund for victims. Rome Statute, *supra* note 17, arts. 75, 79.

312. 1996 GENOCIDE LAW, *supra* note 233, art. 32; 2001 *GACACA* LAW, *supra* note 234, art. 90; *see also* Reyntjens & Vandeginste, *supra* note 182, at 108 (noting that proposed legislation on compensation was first drafted in 1997). According to a Ministry of Justice official, the government drafted ten compensation bills between 2000 and early 2003, but none proved acceptable to all stakeholders. Basomingera, *supra* note 228.

313. *See* 2004 *GACACA* LAW, *supra* note 286, art. 96 ("Other forms of compensation the victims receive shall be determined by a particular law."); *see also id.* art. 39 (granting *gacaca* courts the power to "take temporary protective measures against the property of those accused of genocide crimes").

314. *See, e.g.*, Aimable Twahira, *Rwanda: Genocide Survivors Tire of "Unrealistic Promises"*, INTER PRESS SERV., Apr. 20, 2006 (quoting Minister of Justice as saying: "The Rwandan government is not in a position today to promise what it will never have the means to deliver."); *see also GACACA*: JUSTICE AND RECONCILIATION (Internews July 2005) (on file with author) (interviewing representative of women survivors' organization who complained that the government has found money to fund other social programs). *Cf.* WEEKS ET AL., *supra* note 224, at 35 ("[A]t least some of Rwanda's bilateral donors have clearly expressed that they will not support individual cash payments to survivors."). Transitional governments invariably face the dilemma of whether to use scarce resources (including international assistance) to compensate individual victims for past suffering or to create future-oriented development projects to benefit a broader cross-section of society. Where the victims are numerous, successor regimes have moved slowly on the issue of individual reparation payments. *See* Naomi Roht-Arriaza, *Reparations in the Aftermath of Repression and Mass Violence*, *in* MY NEIGHBOR, MY ENEMY, *supra* note 13, at 121, 127 ("Because the number of victims is so large, episodes of mass violence can exacerbate the limitations of individual reparations schemes."); LODGE, *supra* note 77, at 190-91 (discussing the post-apartheid South African government's lack of enthusiasm for reparations); AMNESTY INT'L & HUMAN RIGHTS WATCH, TRUTH AND JUSTICE: UNFINISHED BUSINESS IN SOUTH AFRICA 6-8 (2003) (critiquing South Africa's slow payment of reparations).

315. 2001 *GACACA* LAW, *supra* note 234, art. 90.

dollars in compensation to civil parties (victims) in criminal proceedings,[316] but those judgments have not been enforced largely because the convicted *genocidaires* are indigent.[317] The Rwandan government also legislated immunity from civil liability for itself, arguing that its responsibilities are met by payments to a survivors' assistance fund and acknowledgment of the former government's role in the genocide.[318]

In 1998, the government established the *Fonds d'Assistance aux Rescapes du Genocide* ("FARG"), an assistance fund for the neediest survivors,[319] which mostly pays education[320] and health care costs[321]—though not antiretroviral treatment for female victims of sexual violence.[322] Currently, the government provides five percent of tax revenues each year to the fund.[323] The FARG is not a compensation fund and cannot be tapped to pay awards ordered by national or *gacaca* courts.[324] The FARG has been marred by corruption scandals.[325] In theory, the FARG defines survivors

316. The civil law system allows civil parties to intervene in criminal cases.

317. In a sample of 192 judgments from 1997 to 1999, civil parties obtained the right to compensation only half the time. AVOCATS SANS FRONTIÈRES, JUSTICE POUR TOUS AU RWANDA [ATTORNEYS WITHOUT BORDERS, JUSTICE FOR ALL OF RWANDA : ANNUAL REPORT 1999] 42 (1999).

318. *See* 2001 GACACA LAW, *supra* note 234, art. 91 (declaring civil actions against the State "inadmissible on account of its having acknowledged its role in the genocide and that in compensation it pays each year a percentage of its annual budget to the Compensation Fund"); Vandeginste, *Victims of Genocide*, *supra* note 310, at 259 (criticizing the inadmissibility of civil actions against the state as a violation of the rule of law).

319. 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, *in* JOURNAL OFFICIEL NO. 3, Feb. 1, 1998, at 217-24 [hereinafter FARG LAW]. A 1998 government census identified approximately 283,000 needy survivors. Rombouts, *supra* note 194, at 381.

320. The fund provides school scholarships, particularly for secondary school. Rombouts, *supra* note 194, at 383.

321. FARG distributed cards for free medical care but it sometimes failed to reimburse providers, so some providers now decline to treat survivors with those cards. *Id.* at 377.

322. HUMAN RIGHTS WATCH, STRUGGLING TO SURVIVE, *supra* note 238, at 42.

323. FARG LAW, *supra* note 319, art. 12 (1).

324. See Vandeginste, *Victims of Genocide*, *supra* note 310, at 264 (stating that FARG should not be confused with the Compensation Fund). *See generally* Rombouts, supra note 194, at 371-374 (discussing the genesis and provisions of FARG).

325. *See, e.g.*, Charlotte Kyakwera, *Rwanda: FARG Education Budget Abused*, NEW TIMES, May 17, 2006; Marie Thérèse Uwobasa, *Decentralisation du FARG: le Fonds n'assiste pas n'importe Quelle Rescape* [*Decentralization of FARG: The Funds Do Not Assist Any Survivor*], LE VERDICT, Mar. 2002, at 9-10; Vandeginste, *Victims of Genocide*, *supra* note 310, at 264-65 (describing the misappropriation and embezzlement of FARG funds); *see also* Rombouts, *supra* note 194, at 311-12 (describing how only a few survivors benefited from most of the FARG's micro-credit programs).

broadly,[326] but, in practice, it is mostly limited to Tutsi.[327] As a result, the FARG's education programs "may indeed worsen the ethnic divide."[328]

In August 2002, the Council of Ministers discussed a draft reparations law that would have replaced the FARG and increased government funding to eight percent of tax revenues.[329] The bill has been shelved since 2002. In contrast to the individualized scheme envisioned by the *Gacaca* Laws, the proposed compensation fund would have provided a fixed, but unrealistic, amount of approximately twenty-three thousand dollars to each beneficiary.[330] A fixed-sum approach would have greatly simplified the task of cell-level *gacaca* judges, who must now take detailed testimony in an effort to itemize and value each claimant's bodily injuries and property damages.[331] The draft compensation law defined beneficiaries as any persons who were pursued because of their ethnicity or opposition to the genocide and massacres, or who were closely related to someone pursued for either of those reasons.[332] Actual injury was deemed irrelevant.[333] This would have increased the pool of beneficiaries substantially.

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326. FARG LAW art. 14 defines "survivor" as:

> [A] person who survived genocide and massacres committed in Rwanda between October 1, 1990 and December 31, 1994, consisting in acts meant to: i) exterminate persons and destroy their property because of their ethnic origin; ii) exterminate persons and destroy their property because of their opinion or those of close relatives who were against genocide and massacres.

FARG LAW, *supra* note 319, art. 14.

327. ROMBOUTS, *supra* note 194, at 395 ("Problematic cases include: inter-ethnic marriages, illegitimate children, moderate Hutu persecuted for their political opinions (and their descendants).").

328. *Id.* at 408; *see also* HUMAN RIGHTS WATCH, LASTING WOUNDS: CONSEQUENCES OF GENOCIDE AND WAR FOR RWANDA'S CHILDREN 52 (2003) (describing disparities in educational benefits); Vandeginste, *Victims of Genocide*, *supra* note 310, at 265 (noting government survey that found a substantial percentage view the fund as discriminatory); Roht-Arriaza, *supra* note 314, at 136 (noting that "a preference-based approach [to reparations] can create new resentments and a sense of victimization among those who are not the beneficiaries").

329. Projet de loi Portant Creation, Organisation et Fonctionnement du Fonds d'indemnisation des Victimes des Infractions Constitutives du Crime de Genocide ou de Crimes Contre l'humanite Commises Entre le 1 Octobre 1990 et le 31 Decembre 1994 [Draft Law Regarding the Creation, Organization, and Functioning of a Compensation Fund for Victims of Genocide or Crimes Against Humanity Committed Between Oct. 1, 1990 and Dec. 31, 1994], arts. 14, 22, 23 [hereinafter DRAFT COMPENSATION LAW]; Rombouts, *supra* note 194, at 316.

330. DRAFT COMPENSATION LAW, *supra* note 329, art. 19. The draft law was silent whether the fixed sum would be reduced by amounts already paid out under FARG or by defendants in civil claims. The draft law contemplated donor contributions to the fund. *Id.* art. 14. Recognizing that sufficient funds might not be available, the bill provided that compensation could be made either in cash or in 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). *Id.* art. 20.

331. *See* Rombouts, *supra* note 194, at 427-29 (assessing the lump sum approach as more practicable but less fair).

332. DRAFT COMPENSATION LAW, *supra* note 329, art. 17.

333. *See id.* (failing to mention the need for actual injury). Under international human rights norms, however, priority should be given to compensating "[v]ictims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes," as well as their immediate family members. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, ¶ 12, U.N. Doc. A/Res/40/34/Annex (Nov. 29, 1985); *see also* U.N. Comm'n on Human Rights, *Civil and Political Rights, Including the Questions of: Independence of the Judiciary, Administration of Justice, Impunity*, Annex ¶ 8, U.N. Doc. E/CN.4/2000/62 (Jan. 18, 2000) (defining victims as those who have suffered

The failure to create a compensation fund has affected *gacaca* in several ways. First, it reduces the incentive for survivors to participate.[334] Recognizing that, the government has tried to increase the symbolic reparations that survivors can receive through *gacaca*: the 2004 law now requires *genocidaires* who plead guilty to reveal the whereabouts of their victims' remains.[335] Second, it leaves *gacaca*'s community service component as the only remaining mechanism for compensating survivors. Yet, such a policy could exacerbate ethnic tensions as it could be seen as a return to the colonial-era forced labor system under which Hutu clients worked for Tutsi patrons.[336]

2. The Lack of Accountability for RPF War Crimes

Despite the RPF's insistence on the need to end impunity in Rwanda,[337] it has consistently prevented its (then mostly Tutsi) soldiers from being held accountable for war crimes and crimes against humanity committed against Hutu civilians during the 1990-1994 period.[338] RPF soldiers[339] engaged in widespread and systematic killings of

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physical, mental, or economic harm and their immediate family members).

334. It may even induce survivors to sell their silence or testimony. PENAL REFORM INT'L, RAPPORT DE SYNTHÈSE DE MONITORING ET DE RECHERCHÉ SUR LA *GACACA*: PHASE PILOTE JANVIER 2002-DÉCEMBRE 2004 [SUMMARY REPORT ON *GACACA* MONITORING AND RESEARCH: PILOT PHASE JANUARY 2002—DECEMBER 2004] 50 (Dec. 2005) (on file with author) [hereinafter PENAL REFORM INT'L., RAPPORT DE SYNTHÈSE]. The former IBUKA president commented that "[t]here are no incentives for survivors [in *gacaca*]: there has not been compensation or reparation." Antoine Mugesera, Remarks at CLADHO Conference on *Gacaca*, Kigali, Rwanda (Feb. 14, 2003) [hereinafter Remarks of Antoine Mugesera] (author's notes). Similarly, a prominent Rwandan academic stated, "Starting *gacaca* without solving the issue of compensation . . . you're asking for another sacrifice to be made. . . . How long does it take?" Alice Karekezi, Director of the Center for Conflict Management, National University of Rwanda, Remarks at CLADHO Conference on *Gacaca*, Kigali, Rwanda (Feb. 14, 2003) [hereinafter Address of Alice Karekezi] (author's notes); *see* AFRICAN RIGHTS, *GACACA* JUSTICE, *supra* note 277, at 28-29 (describing the anxiety of survivors in facing their persecutors). *See generally* Beatrice Mukamurenzi, *Problematique d'indemnisation des victims du genocide* [*The Problem of Compensating Genocide Victims*], LE VERDICT, Aug. 2002, at 6-7; Eugene Habiyambere, *Besoin de loi sur l'indemnisation* [*Need for a Compensation Law*], LE VERDICT, Aug. 2002, at 8.

335. 2004 *GACACA* LAW, *supra* note 286, art. 54.

336. One justice official publicly rejected the idea of having prisoners perform community service work to directly compensate their victims.

> Many people brought up the idea of using community service as a contributing source of compensation funds. 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 labor, which can be used as a pretext for bringing animosity.

Remarks of Alberto Basomingera, *supra* note 228. For a description of the hated, exploitative *corvee* and *ubureetwa* clientship system under which poor Hutu men were forced to perform menial labor for Tutsi patrons, see NEWBURY, *supra* note 140, at 140-43.

337. President Kagame declared: "We must also rise and fight against the culture of impunity that has been rampant in the country for a long time, culminating in the genocide." ELTRINGHAM, *supra* note 138, at 145.

338. As Sibomana ruefully observed, "Impunity is always in the interest of the state, and the current state in Rwanda is no exception." SIBOMANA, *supra* note 218, at 107. RPF soldiers also killed thousands of Hutu civilians after 1994: during the closing of the refugee camps in 1995, the anti-insurgency campaign in northwest Rwanda in 1997 and 1998, and the wars in the eastern Democratic Republic of Congo. Few soldiers and even fewer officers have been prosecuted for those crimes. *See generally* FEDERATION INTERNATIONALE DES LIGUES DES DROITS DE L'HOMME [INTERNATIONAL FEDERATION FOR HUMAN RIGHTS], VICTIMS IN THE BALANCE: CHALLENGES AHEAD FOR THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 64 (2002)

an estimated twenty-five thousand to forty-five thousand Hutu civilians during and immediately after the genocide in 1994.[340] However, the government has only acknowledged a handful of isolated revenge killings by its soldiers.[341] President Kagame claimed that "'the country's military tribunals have conducted very serious investigations' into the crimes and that 'some of our soldiers were proven guilty, convicted and executed.'"[342] As of late 2002, however, the military court had tried only twenty cases of "vengeance killings" from 1994, acquitting three soldiers and sentencing twelve more to prison for one to three years.[343] It appears that only one high-ranking officer was tried for war crimes committed in 1994.[344] By November 2002, the chief military prosecutor had no open files on 1994 war crimes.[345] The RPF also has blocked the ICTR from investigating RPF war crimes.[346]

[hereinafter FIDH] (providing statistics of RPA soldiers prosecuted for human rights crimes between 1996 and 2000). According to Rwandan government statistics, forty-nine soldiers were prosecuted for murder from 1996 to 2000. *Id.* Twelve senior officers were convicted of criminal negligence, manslaughter, or violating human rights between 1995 and 2002. *Id.* at 70. Most convicted soldiers received light sentences. *Id.* at 65-69. The most notorious example involved Lieutenant Colonel Fred Ibingira, who commanded the troops that massacred an estimated 2000-4000 Hutu refugees at the Kibeho refugee camp in April 1995. POTTIER, *supra* note 135, at 160-64 (describing the aftermath of the 1995 massacre). Ibingira was sentenced to eighteen months in prison (with credit for time already served) for "failing to give assistance to a person in danger." MINISTRY OF DEFENCE, MILITARY LAW REPORTS: Vol. II 306-07 (1999); *see also* DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 733-34 (describing the relatively light sentences given to those officers convicted of civilian killings and human rights violations). President Kagame promoted Ibingira in July 2004. Presidential Order No. 35/01 of 16/08/2004 Promoting General Officers of the Rwanda Defense Forces to the Rank of Major General, JOURNAL OFFICIEL NO. 19, 17 (Oct. 1, 2004).

339. RPF soldiers are commonly referred to as the Rwandan Patriotic Army (RPA). The government renamed the military the Rwandan Defense Forces (RDF) in 2002. However, the term RDF suggests a greater separation between the RPF and the military, as well as greater civilian control over the military, than there actually appears to be. This Article uses the term RPF soldiers because that is how they were known for most of the period under discussion here.

340. DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 16, 728. The RPF's war crimes cannot be equated to the genocide, either in scope or intent. *See* Philip Verwimp, *Testing the Double-Genocide Thesis for Central and Southern Rwanda*, 47 J. CONFLICT RESOL. 423, 441 (2003) (using empirical data on fatalities to show that the RPF killings cannot be characterized as genocide).

341. *See* FIDH, *supra* note 338, at 16-17 (discussing statistics and documents addressing RPF soldiers and senior officers brought to trial); *GACACA*: JUSTICE AND RECONCILIATION, *supra* note 314 (interviewing head of *gacaca* administration about RPF war crimes).

342. FIDH, *supra* note 338, at 16.

343. *Id.*; *see also* DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 733-34 (finding that six of twenty-one RPF soldiers arrested and charged with killing civilians in November 1994 were convicted and given short sentences). It is doubtful that victims received any form of compensation as a result of these proceedings.

344. Major Sam Bigabiro was convicted for the killings of more than 30 civilians. FIDH, *supra* note 338, at 16, 70; DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 733-34. Although sentenced to life, he was released after a successful appeal. HUMAN RIGHTS WATCH, WORLD REPORT: RWANDA (2002).

345. Interview with Colonel Andrew Rwigamba, then-Military Prosecutor General (Auditorat Generale), in Kigali, Rwanda (Nov. 11, 2002) (on file with author).

346. In early 2002, ICTR Prosecutor Carla del Ponte prematurely announced that she would file at least one indictment against the RPF before the end of that year. Vandeginste, *Rwanda: Dealing with Genocide*, *supra* note 156, at 260. In June 2002, the Rwandan government imposed travel restrictions on prosecution witnesses that forced a halt to three genocide trials for lack of witnesses. FIDH, *supra* note 338, at 53-56. Del

The 2004 *Gacaca* Law removed *gacaca*'s subject matter jurisdiction over war crimes, making it consistent with past government pronouncements that RPF crimes would not be heard in *gacaca*.[347] That amendment may have been prompted by the fact that people sometimes raised RPF war crimes in pilot *gacaca* proceedings. For example, in one *gacaca* session, two judges asked the *gacaca* court to investigate the disappearance of their family member who had been arrested by RPF soldiers just after the genocide.[348] The *gacaca* president and local officials told them not to confuse that with genocide and to take their allegations to the local political authorities or military courts.[349]

Gacaca's one-sided focus on the genocide does little to encourage Hutu participation or to promote long-term peaceful coexistence.[350] Hutu victims of RPF war crimes cannot expect either accountability or reparations from the government.

Ponte then suspended her investigations of the RPF and informed the Security Council that the Rwandan government was pressuring her to halt those investigations. *Id.* In response, the Rwandan government attacked the ICTR, arguing, "It would appear that the proposed indictments of [RPF soldiers] are merely intended to appease advocates of a so-called 'ethnically balanced justice' and proponents of revisionism." Government of Rwanda, Reply of the Government of Rwanda to the Report of the Prosecutor of the International Criminal Tribunal for Rwanda to the Security Council (July 26, 2002); *see also* Marc Lacey, *Tribunal Says Rwanda Is Stalling Inquiry Into 1994 Killings*, N.Y. TIMES, Sept. 7, 2002, at A3 (describing the ICTR's allegations of Rwanda's obstructionism). The Security Council eventually issued a tepid statement reminding Rwanda of its legal obligation to comply with the Tribunal. The Security Council President, *Statement by the President of the Security Council*, S/PRST/2002/39 (Dec. 18, 2002). The Security Council did not renew del Ponte's mandate as ICTR Prosecutor, partly as a response to Rwandan government pressure. The new ICTR Prosecutor has not issued any RPF indictments—even though the deadline for completing investigations expired in December 2004. *See* Letter from Filip Reyntjens, Professor, University of Antwerp, to Hassan Jallow, ICTR Prosecutor (Jan. 11, 2005) (on file with author) (withdrawing as an expert witness for the prosecution because of the Tribunal's failure to issue indictments for RPF war crimes). Rwanda's successful coercion of the international tribunal certainly suggests that international criminal trials do not ineluctably favor the interests of strong states, as Eric Posner seems to argue. *See* Posner, *supra* note 5, at 73 ("If only the strongest states have the power to establish international tribunals, determine their membership, set their agenda, and thus influence the development of international criminal law, predictably the resulting norms of international criminal law will reflect the interests of the strong states, not the weak states."). Curiously, Posner excludes ICTR from his schema of political trials, justifying this omission with the cryptic remark that it is an "ambiguous case[]." *Id.* at 8, 11 n.16.

347. *Compare* 2004 *GACACA* LAW, *supra* note 286, preamble, art. 1, *with* 2001 *GACACA* LAW, *supra* note 234, preamble, art. 1. This is not a matter of leaving military cases to military tribunals. The *gacaca* courts and national courts will hear cases against members of the former genocidal army who allegedly participated in the genocide. (Those who have been reintegrated and are still serving in the military will be heard by military tribunals). Interview with Colonel Andrew Rwigamba, *supra* note 345.

348. Author's field notes from *Gacaca* session, Gitarama Province, Rwanda (July 2002) (on file with author).

349. *Id.*

350. *See* Longman & Rutagengwa, *supra* note 144, at 176 (finding in attitudinal surveys that "[m]any Hutu resent the fact that their experience of suffering is excluded from official discourse"); PENAL REFORM INT'L, THE RIGHTEOUS, *supra* note 178, at 44-47 (discussing attitudes about *gacaca*'s non-inclusion of RPF war crimes); AFRICAN RIGHTS, *GACACA* JUSTICE, *supra* note 277, at 24-26 (discussing concerns by Hutu *gacaca* judges that *gacaca* would not hear RPF crimes); Constance F. Morrill, *Reconciliation and the* Gacaca*: The Perceptions and Peace-Building Potential of Rwandan Youth Detainees*, 6.1 ONLINE J. OF PEACE & CONFLICT RESOL., 1, 1 (Fall 2004), http://www.trinstitute.org/ojpcr/6_1morrill1.pdf (quoting similar views from Rwandan youth detained on genocide accusations).

For example, a Hutu man who briefly fled to Burundi in 2005, along with several thousand others, stated:

> When we fled the genocide in 1994, we left behind many of our relatives. When we came back, they were nowhere to be seen. But in *gacaca* they are not mentioned. People are always talking about the Tutsi who died. But what about Hutu? How come those who killed Hutu are not prosecuted?[351]

By contrast, other transitional justice mechanisms have shown that it is possible to chart a middle course between victor's justice and revisionism.[352]

3. Inadequate Avenues for Redress for Victims of Sexual Violence

Although thousands of Tutsi women were raped during the genocide,[353] there have been relatively few prosecutions of sexual violence in Rwandan national courts.[354] Many rape victims are unwilling to come forward and risk social stigma. Also, very few perpetrators have confessed to rape.[355]

The *Gacaca* Laws made rape a Category 1 crime and thus eligible for the death penalty.[356] While sexual violence (as a Category 1 offense) can only be tried in

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351. *GACACA*: JUSTICE AND RECONCILIATION, *supra* note 314.

352. For example, the South African TRC heard testimony about crimes committed by the African National Congress. Osiel, *Banality of Good*, *supra* note 169, at 1814-16. Also, the International Criminal Tribunal for the Former Yugoslavia has prosecuted high-ranking Bosnian Muslim generals, without diminishing the responsibility of the Serbs for much of the ethnic cleansing that occurred in the former Yugoslavia. *Id.* at 1822-23. *But see id.* at 1814-16 (cautioning against prosecuting perpetrators from all sides of a conflict). In the Rwandan context, Penal Reform International suggested that *gacaca* courts collect information about those killed by the RPF for later use by an ad hoc commission. PENAL REFORM INT'L, RAPPORT DE SYNTHÈSE, *supra* note 334, at 46.

353. HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH (1996) [hereinafter HUMAN RIGHTS WATCH, SHATTERED LIVES]; AFRICAN RIGHTS, DEATH, DESPAIR, AND DEFIANCE 748-97 (1995); AVEGA AGAHOZO, SURVEY OF VIOLENCE AGAINST WOMEN IN RWANDA (1999). Thousands were also killed. "Convincing militants to kill Tutsi women required particular effort, since women have traditionally not served as combatants and they cannot bestow ethnicity in Rwandan culture (since children take the ethnicity of the father)." Longman, *Placing Genocide in Context*, *supra* note 168, at 35.

354. MARTINE SCHOTSMANS, AVOCATS SANS FRONTIÈRES, LE DROIT A LA RÉPARATION DES VICTIMS DE VIOLENCES SEXUELLES PENDANT LE GÉNOCIDE: ANALYSE DE L'ÉTAT ACTUEL, OBSTACLES, SUGGESTIONS DE SOLUTIONS [LAWYERS WITHOUT BORDERS: VICTIMS' RIGHTS TO REPARATION FOR SEXUAL VIOLENCE DURING THE GENOCIDE: ANALYSIS OF THE SITUATION, OBSTACLES, AND PROPOSED SOLUTIONS] 3 (2000) (finding that only 49 out of a sample of 1051 suspects were prosecuted for rape or sexual torture, and only nine of those were convicted).

355. HUMAN RIGHTS WATCH, SHATTERED LIVES, *supra* note 353.

356. 2001 *GACACA* LAW, *supra* note 234, art. 51, 72; 2004 *GACACA* LAW, *supra* note 286, art. 51, 72. Perversely, then, rape is punished more severely than intentional killing in Category 2. Jean Baptiste Uwarugira, *Viol: qualification controversee* [*Rape: The Qualification Controversy*], LE VERDICT, Jan. 2003, at 23. The *Gacaca* Laws' placement of rape in Category 1 contravenes the prohibition on retroactivity, in violation of both international and Rwandan law. *See* ICCPR, *supra* note 16, art. 15 ("Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed."). The Rwandan Penal Code, which was in effect at the time of the genocide, punishes rape by a prison term of five to ten years (ten to twenty years if the victim is under age) and imposes the death penalty for rape accompanied by torture. CODE PENAL, arts. 360, 361 (Rwanda), *in* CODES ET LOIS DU RWANDA, Vol. I 417 (Filip Reyntjens & Jan Gorus eds., 1995). The 1996 Genocide Law placed sexual torture in Category 1 but the

national courts, the 2001 *Gacaca* Law left it to cell-level *gacaca* courts to conduct pretrial proceedings.[357] During the pilot phase, rape victims rarely came forward to testify in public about their ordeal.[358] As the former IBUKA president stated, "*Gacaca* is public. 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."[359] Also, few victims or judges seemed to realize that the 2001 *Gacaca* Law gave victims the right to request *in camera* hearings.[360]

The government amended the *gacaca* law in 2004 to ensure greater privacy and dignity for victims. The new law bans both public accusations and public confessions of sexual violence.[361] A victim must now make her accusations in private to a *gacaca* judge or a prosecutor of her choice.[362] Prosecutors, not *gacaca* courts, will investigate the charges before transferring the files to the national courts for trial.[363] Yet, rape victims will be even less likely to bring accusations before the classic court system (which rarely protects witness identities) without greater efforts to improve access, trauma counseling, witness protection, and reparations.[364] Rather than adopting a paternalistic approach, the 2004 *Gacaca* Law should have left the decision whether to raise allegations of sexual violence in *gacaca* with the victims themselves.

F. Gacaca*'s Problems*

During its lengthy pilot phase, *gacaca* met serious obstacles on Rwanda's hills with respect to popular participation, truth-telling, and reconciliation. These problems

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ordinary courts have split over whether rape constituted sexual torture under that law. Letter from Pierre St. Hilaire, Resident Legal Advisor to Rwanda, U.S. Dep't of Justice, to Gerald Gahima, Prosecutor Gen. of Rwanda 1 (Dec. 6, 2001) (on file with author).

357. 2001 *GACACA* LAW, *supra* note 234, art. 2, 33, 34.

358. HUMAN RIGHTS WATCH, STRUGGLING TO SURVIVE, *supra* note 238, at 20-21.

359. Remarks of Antoine Mugesera, *supra* note 334. *But see* Schabas, *The Sierra Leone Truth and Reconciliation Commission*, *supra* note 83, at 142 ("Somewhat surprisingly, many of the female victims of sexual violence did not see the need to testify *in camera* . . . . It is simply not true to state that primitive African women are ashamed to speak publicly about rape and other forms of sexual abuse.").

360. 2001 *GACACA* LAW, *supra* note 234, art. 24 (allowing *in camera* hearings "for reasons of public order or good morals"); *see* AFRICAN RIGHTS, *GACACA* JUSTICE, *supra* note 277, at 38-39 (giving example of *gacaca* president who publicly disclosed identity of rape victim communicated in writing by the woman's mother).

361. 2004 *GACACA* LAW, *supra* note 286, art. 38.

362. *Id.* Despite that amendment, a few *gacaca* courts have continued to discuss rape cases publicly. *See, e.g.*, AVOCATS SANS FRONTIÈRES, OBSERVATION DES JURIDICTIONS *GACACA*: PROVINCE DE BUTARE, JUIN 2005 [OBSERVATIONS OF GACACA JURISDICTIONS : BUTARE PROVINCE, JUNE 2005] 3, 40-41, 44 (2006) (noting two cases in separate jurisdictions where rape was mentioned in public), *available at* http://www.asf.be/FR/FR news/Rwanda_instance/monitoring%20gacaca/Butare_juin_05.pdf; COMMISSION NATIONALE DES DROITS DE LA PERSONNE, RAPPORT DE LA RESTITUTION ANNUELLE DES RESULTATS DU MONITORING DES JURIDICTIONS GACACA [NATIONAL HUMAN RIGHTS COMMISSION, REPORT ON YEAR-END RESULTS FROM THE MONITORING OF GACACA JURISDICTIONS] 26-27 (2005) (mentioning case where a woman survivor publicly discussed her rape) (on file with author).

363. 2004 *GACACA* LAW, *supra* note 286, at arts. 38, 47.

364. *See* HUMAN RIGHTS WATCH, STRUGGLING TO SURVIVE, *supra* note 238, at 20 (faulting prosecutors and national courts in their treatment of female victims of sexual violence).

are likely to persist, and perhaps worsen, as *gacaca* trials finally get underway throughout the country in 2006.

1. Unpopular Popular Justice

The Rwandan government has promoted *gacaca* as participatory justice.[365] Early public opinion surveys indicated broad support for *gacaca*,[366] but once *gacaca* began it became apparent that many Rwandans did not want to participate.[367] During one *gacaca* session, a participant plaintively observed: "Let me point out that this number here in *gacaca* is small compared to the number of people who used to go for attacks when an alarm was made."[368]

Gacaca sessions in numerous locations had to be cancelled or delayed because they did not meet the quorum of 100 adults for the pretrial phase.[369] As a result,

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365. SERVICE NATIONAL DES JURIDICTIONS GACACA, PLAN STRATEGIQUE, *supra* note 275, at 2.

366. *See, e.g.*, Stella Ballabola, *Perceptions About the Gacaca Law in Rwanda: Evidence From a Multi-Method Study*, CAHIERS DU CENTRE DE GESTION DES CONFLITS [JOURNAL OF THE CENTER FOR CONFLICT MANAGEMENT] 112, 113 (2001) (finding fifty-eight percent of respondents were "highly confident" that *gacaca* would resolve the problems of genocide trials, while fifty-three percent were "highly confident" that it would promote peace); Timothy Longman et al., *Connecting Justice to Human Experience: Attitudes toward Accountability and Reconciliation in Rwanda, in* MY NEIGHBOR, MY ENEMY, *supra* note 13, at 206, 217 (finding that eighty-three percent of those surveyed had confidence in *gacaca*); *see also* Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT'L L. & POL. 355, 374 (2000) [hereinafter Daly, *Between Punitive and Restorative Justice*] (asserting "widespread support" for *gacaca*); Drumbl, *Restorative Justice*, *supra* note 283, at 13 (claiming *gacaca* "is favourably viewed by Rwandans"); Strain & Keyes, *supra* note 279, at 131 (contending that *gacaca* "is seen domestically as a hope and a possible salvation"). *But see* NAT'L UNITY AND RECONCILIATION COMM'N, OPINION SURVEY ON PARTICIPATION IN *GACACA* AND NATIONAL RECONCILIATION 10 (2003) (on file with author) (finding that forty-four percent of non-prisoners and non-survivors interviewed in mid-2002 only intended to participate as spectators in *gacaca* proceedings while another ten percent planned to abstain). Attitudinal surveys may have measured respondents' ability to parrot widespread government propaganda, rather than actual support for *gacaca*. *Cf.* LISA WEDEEN, AMBIGUITIES OF DOMINATION: POLITICS, RHETORIC, AND SYMBOLS IN CONTEMPORARY SYRIA 82 (1999) (discussing "ritualized dissimulation" in Syria).

367. Poor participation has also hampered other local justice initiatives. Starting in June 1999, the national courts have held hearings in local communities to collect testimony and evidence from witnesses who might not otherwise travel to courthouses. However, the local population has showed "a certain lassitude, sometimes even a total disinterest." RCN JUSTICE & DEMOCRATIE, PROGRAMMES D'AIDE A LA JUSTICE CLASSIQUE, RAPPORT 'D ACTIVITIES, NOVEMBRE 2002 [ASSISTANCE PROGRAMS TO THE CLASSICAL JUSTICE SYSTEM, REPORT OF ACTIVITIES, NOV. 2002] 24 (2002) (on file with author) (translation by author).

368. Field notes from a *gacaca* session in Gitarama Province, Rwanda (Jan. 2003) (on file with author).

369. 2004 *GACACA* LAW, *supra* note 286, art. 18, 33. Several observers have documented the inability of some pre-trial *gacaca* sessions to meet the quorum. PENAL REFORM INT'L, RAPPORT D'OBSERVATION DES JURIDICTIONS GACACA: 4 OCTOBRE 2005 [OBSERVATION REPORT OF THE GACACA JURISDICTIONS: OCTOBER 4, 2005] 1-2 (Penal Reform International CD-ROM II); PENAL REFORM INT'L, RAPPORT D'OBSERVATION DES JURIDICTIONS GACACA: 13 SEPTEMBRE 2005 [OBSERVATION REPORT OF THE GACACA JURISDICTIONS: SEPTEMBER 13, 2005] 1-2 (Penal Reform International CD-ROM II); PENAL REFORM INT'L, RAPPORT D'OBSERVATION DES JURIDICTIONS GACACA: 27 OCTOBRE 2005 [OBSERVATION REPORT OF THE GACACA JURISDICTIONS: OCTOBER 27, 2005] 1 (Penal Reform International CD-ROM II); 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 [CIVIL SOCIETY SUPPORT PROJECT FOR RWANDA'S *GACACA* SYSTEM, REPORT ON THE WORK OF *GACACA* JURISDICTIONS FROM MARCH TO JUNE 2003] 5 (2003) [hereinafter PAPG *GACACA* REPORT]; LIPRODHOR,

gacaca moved much more slowly than expected: by January 2004 (a year-and-a-half after the pilot phase began), only thirteen percent of the pilot courts had even finished the pretrial stage.[370] Low participation rates have not slowed the trial phase (where there is no required quorum), but they have underscored *gacaca*'s failings as participative justice.[371]

There are several reasons for poor attendance. First, *gacaca* was imposed on local communities in a top-down fashion by a highly centralized and authoritarian regime.[372] Non-participation, then, can be seen as yet another manifestation of "*everyday* forms of peasant resistance" to state authority.[373] Second, ninety percent of the Rwandan labor

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SITUATION DES DROITS DE LA PERSONNE, *supra* note 238, at 30; LIPRODHOR, RAPPORT D'OBSERVATIONS SUR LES ACTIVITES DES ASSEMBLEES DES JURIDICTIONS *GACACA* DE CELLULE [REPORT ON OBSERVATIONS OF CELL *GACACA* JURISDICTIONS' ACTIVITIES] 9 (2002) [hereinafter LIPRODHOR, *GACACA* REPORT]; Urusaro Alice Karekezi et al., *Localizing Justice: Gacaca Courts in Post-Genocide Rwanda*, *in* MY NEIGHBOR, MY ENEMY, *supra* note 13, at 69; PENAL REFORM INT'L, REPORT V, *supra* note 23, at 27; Arthur Molenaar, *Gacaca*: Grassroots Justice after Genocide. The Key to Reconciliation in Rwanda? 66-68 (Jan. 2004) (unpublished graduation thesis, University of Amsterdam), *available at* http://www.gtifoundation.org/Conference/Thesis-gacaca_arthurmolenaar-mail.doc. Some pre-trial *gacaca* sessions (including those that involved listing the accused) proceeded in the absence of quorums. PENAL REFORM INT'L, RAPPORT D'OBSERVATION DES JURIDICTIONS GACACA: 20 SEPTEMBRE 2005 [OBSERVATION REPORT OF THE GACACA JURISDICTIONS: SEPTEMBER 20, 2005] (Penal Reform International CD-ROM II); PENAL REFORM INT'L, RAPPORT D'OBSERVATION DES JURIDICTIONS GACACA: 27 SEPTEMBRE 2005 [OBSERVATION REPORT OF THE GACACA JURISDICTIONS: SEPTEMBER 27, 2005] (Penal Reform International CD-ROM II); PENAL REFORM INT'L, RAPPORT D'OBSERVATION DES JURIDICTIONS GACACA: 11 OCTOBRE 2005 [OBSERVATION REPORT OF THE GACACA JURISDICTIONS: OCTOBER 11, 2005] (Penal Reform International CD-ROM II); Author's field notes from a *gacaca* session (2002) (on file with author).

When this Article's author visited a *gacaca* in early September 2005, the *conseiller* publicly chastised the *nyumbakumbi* and ordered them to round up absent members from their ten households so the quorum could be met. My presence was clearly awkward for the sector officials, who may have been concerned that I would report their problems with attendance to government officials in Kigali. As the *conseiller* told the assembly: "It is a shame to have people who do not want to come to *gacaca*. We also have visitors who have come from Kigali, and I do not know if they are going to see something [*gacaca*] with this number of participants." A half-hour later, several people laughed as they saw farmers on an adjacent hill running into the banana plantations to hide from the *nyumbakumbi*. Eventually, the *nyumbakumbi* rounded up sufficient numbers that the *gacaca* was able to commence an hour-and-a-half late. Author's field notes (Sept. 2005) (on file with author).

370. PENAL REFORM INT'L, FROM CAMP TO HILL, *supra* note 23, at 24. A Ministry of Justice official acknowledged that *gacaca* sessions suffered absenteeism and tardiness in eight out of twelve provinces, observing, "People are getting tired . . . . [t]he longer [*gacaca*] lasts, the more likely the tiredness of the population." Basomingera, *supra* note 228.

371. *Gacaca* trials have often taken place with only thirty to forty members of the community present. *See generally* AVOCATS SANS FRONTIÈRES, OBSERVATION DES JURIDICTIONS GACACA: 2005 [OBSERVATION OF GACACA JURISDICTIONS: 2005] (2006) (detailing *gacaca* proceedings in a series of reports covering six provinces and Kigali city), *available at* http://www.asf.be/FR/FRnews/rapports_observation.htm.

372. *See* Vandeginste, *Rwanda: Dealing with Genocide*, *supra* note 156, at 245 ("[I]f the *gacaca* tribunal system is primarily perceived as a state law institution and not as an indigenous, community-based mechanism, it may very well be seen as an instrument of state power and oppression."); *see also* Uvin, *supra* note 16, at 10 (noting that *gacaca* sensitization "had been, for most of the population, very limited, top-down, and one-way").

373. JAMES C. SCOTT, WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE xvi (1987) [hereinafter SCOTT, WEAPONS OF THE WEAK]. As Scott observed, "In the Third World it is rare for peasants to risk an outright confrontation with the authorities over taxes, cropping patterns, development policies, or

force is involved in subsistence agriculture,[374] meaning people spend most days working their fields or doing itinerant labor.[375] One judge blamed late arrivals[376] and absenteeism on poverty: "People come [to *gacaca*] after having searched for food for their families."[377] Many peasants are already required to participate in government sensitization campaigns and community labor (*umuganda*), and do not want to devote any more time to government activities.[378] Peasants continue to shirk *umuganda* and other official meetings just as they did under President Habyarimana's regime.[379]

Third, many Hutu have little incentive to participate in *gacaca* because they fear being accused as either perpetrators or bystanders and because they have no opportunity to discuss their own suffering at the hands of the RPF's mostly Tutsi soldiers.[380] Fourth, some genocide survivors are reluctant to participate for fear of retaliation by their Hutu neighbors, especially when there is no meaningful prospect for compensation.[381] The provisional release of tens of thousands of confessed *genocidaires* in 2003 and 2005 has further discouraged some survivors from participating in *gacaca*.[382]

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onerous new laws; instead they are likely to nibble away at such policies by noncompliance, foot dragging, deception." *Id.* He further noted, "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." *Id.* at xvii; *see also id.* at 289-303 (defining resistance).

374. NAT'L CENSUS SERV., *supra* note 138, at 56. For a study of Rwandan household and small peasant production in the mid-1980s, see JEFREMOVAS, *supra* note 168, at 83-95.

375. LIPRODHOR, *GACACA* REPORT, *supra* note 369, at 31. The government also acknowledged that turnout among political leaders, businessmen, and other elites during the pilot phase was "marginal." SERVICE NATIONAL DES JURIDICTIONS *GACACA*, PROGRAMME OF *GACACA* SESSIONS' MEETINGS IN DISTRICTS AND TOWNS, preamble (2005) [hereinafter SNDJ PROGRAMME], *available at* http://www.inkiko-gacaca.gov.rw.

376. A common complaint of government officials and *gacaca* observers is that *gacaca* sessions rarely start at the chosen hour (typically nine or ten in the morning); indeed, some start two to four hours late. This underscores one anthropologist's observation that Rwandan peasants live on different temporal rhythms than civil servants. DE LAME, *supra* note 180, at 119.

377. Interview with *gacaca* judge, Kigali, Rwanda (July 2002) (on file with author).

378. *Umuganda* is mandatory community service, in which all adults are supposed to participate (usually five times per month). In one community, government authorities moved the day for *gacaca* to that set aside for *umuganda* because people only wanted to spend one day a week working for the government and because absenteeism from *umuganda* results in fines. Author's field notes from Gitarama Province, Rwanda (Sept.-Nov. 2002) (on file with author). However, that did not result in greater participation. *Id.*

379. In the late 1980s, a Belgian anthropologist observed that only about thirty people participated in *umuganda* at her field site. DE LAME, *supra* note 180, at 121-22. She also observed low levels of participation at sector meetings. *Id.* at 29.

380. See *supra* Part III.E.2 for a discussion of how RPF war crimes are not handled by *gacaca*.

381. *See* Margot Leegwater, Revisiting the Horrors: Gacaca Courts in Rwanda and their Struggle for Justice After Genocide 64-65 (2005) (unpublished graduation thesis, University of Amsterdam) (on file with author) (noting that Tutsi genocide survivors often express concern for their safety as they fear retaliation by their Hutu neighbors); *see also supra* Part III.E.1 (discussing the absence of a reparations fund).

382. The 2003 releases initially caused a further decline in participation in pilot *gacaca* hearings, as people wondered why their participation mattered when the government was going to release detainees anyway. One *gacaca* official acknowledged, "[A]t first, *gacaca* courts didn't want to continue their work." F. Regis Rukundakuvuga, Supreme Court Counselor, Remarks at the CLADHO Conference on *Gacaca*, Kigali, Rwanda (Feb. 14, 2003) (author's notes). With detainees released, it is also harder for victims and witnesses to make accusations. IBUKA representative, Remarks at Coexistence Network Meeting, Kigali, Rwanda (Jan.

Gacaca sessions also have been cancelled or delayed because judges arrived late or not at all.[383] Judges are not compensated for their work,[384] and, like their neighbors, most judges are subsistence farmers or itinerant workers, whose first priority is economic survival.[385] There has been high turnover among the judges, including 1226 who were replaced after being accused of genocide.[386] To address absenteeism by judges, the 2004 *gacaca* law reduced the size of the bench from nineteen to nine (and lowered the quorum from fifteen to seven).[387] In addition, donors have financed incentives for judges.[388]

Low participation rates have forced the state to employ coercion, thus publicly exposing *gacaca*'s unpopularity and the contradictions in the state's ideology of "national unity and reconciliation."[389] This is most apparent when state officials harangue those who attend *Gacaca* for absenteeism and tardiness:

> 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.[390]

2003) (author's notes). After the 2005 releases, a genocide survivor told a journalist, "It will now be useless to attend these *gacaca* courts. These [released detainees] will stick together and hide the truth." Arthur Asiimwe, *36,000 Genocide Suspects Freed from Rwandan Jails*, INDEP., July 30, 2005.

383. *See, e.g.*, AVOCATS SANS FRONTIÈRES, PHASE DE JUGEMENT, *supra* note 277, at 8 (discussing trial phase); PENAL REFORM INT'L, RAPPORT D'OBSERVATION DES JURISDICTIONS GACACA: 8 OCTOBRE 2005 [OBSERVATION REPORT OF THE GACACA JURISDICTIONS: OCTOBER 8, 2005] (Penal Reform International CD-ROM II) (discussing appeals phase); *see also* Karekezi et al., *supra* note 369, at 81 (noting lack of participation among judges during pre-trial phase in Gishamvu Sector, Butare Province).

384. The government has offered medical benefits to *gacaca* judges and their families. *See also* NAT'L SERVICE OF GACACA COURTS, *supra* note 281 (surveying *gacaca* judges about their needs).

385. One *gacaca* president stated it was difficult for him to arrive at *gacaca* on time and then wait several hours for *gacaca* to start while his neighbors continued working. Interview with *gacaca* president, Byumba Province, in Rwanda (Oct. 2002).

386. Service National des Juridictions *Gacaca*, Table Indicating the Achievements, http://www.inkiko-gacaca.gov.rw/pdf/Achievements.pdf (last visited May 15, 2006); *see also* SERVICE NATIONAL DES JURIDICTIONS *GACACA*, PROGRESS REPORT, *in* PENAL REFORM INT'L, FROM CAMP TO HILL, *supra* note 23, at 77 (listing 1319 judges who had been replaced as of January 2004, with 656 having been accused of genocide); RAPPORT D'OBSERVATION DE LA RÉUNION DE L'ASSEMBLÉE GÉNÉRALE DES JUGES *GACACA* DU SECTEUR DE MURAMA, GISENYI PROVINCE, NOV. 8, 2005 [REPORT FROM MEETING OF *GACACA* JUDGES IN MURAMA SECTOR, GISENYI PROVINCE] (2005) (naming seventeen judges who were replaced because of genocide accusations in Murama and Musasa Sectors). In Murama Sector, the *gacaca* president stated that the removal of all judges who had pillaged in 1994 would leave *gacaca* without any judges. *Id.*

387. *Compare* 2001 *GACACA* LAW, *supra* note 234, art. 26, *with* 2004 *GACACA* LAW, *supra* note 286, arts. 8, 23.

388. For example, the Netherlands provided *gacaca* judges with portable radios in 2006. Interview with representative of Dutch Embassy, Kigali (June 4, 2006); E-mail from representative of Dutch Embassy, Kigali to author (Feb. 3, 2005) (on file with author).

389. *Cf.* SCOTT, WEAPONS OF THE WEAK, *supra* note 373, at 36 ("It is . . . extremely rare that officials of the state wish to publicize the insubordination. To do so would be to admit that their policy is unpopular, and, above all, to expose the tenuousness of their authority in the countryside—neither of which the sovereign state finds in its interest."); WEDEEN, *supra* note 366, at 22 ("[S]pectacles reveal both the power and the limitations of the regime's project by announcing the gap between enforcing participation and commanding belief.").

390. Provincial *gacaca* coordinator, Address at *Gacaca* Session, Butare Province, Rwanda (Nov. 2002)

Gacaca judges and local officials sometimes coerced attendance.[391] They ordered local paramilitary forces to close down shops, round up people for *gacaca*, and prevent them from leaving once sessions were underway.[392] They also fined, or threatened to fine, people who were absent.[393]

The 2004 *Gacaca* Law reinforced this coercive aspect by making *gacaca* attendance compulsory.[394] In a meeting of donors and NGOs, a high-level *gacaca* spokesman stated that a person who does not participate in *gacaca* risks being "mistaken for a *genocidaire*."[395] Coercive state responses further erode prospects for *gacaca*'s future. Even the former president of the main survivors' association has argued that "the population should come voluntarily without being forced to do so."[396] Low participation rates will obviously prevent *gacaca* from delivering truth, justice, and reconciliation, but so will coerced participation.[397]

2. *Truth and Consequences*

Gacaca aims to reveal the truth about what happened during the genocide, creating local knowledge in each community.[398] However, that necessarily presupposes the willingness of survivors, perpetrators, bystanders, rescuers, and witnesses to show up, speak up, and tell the truth. *Gacaca* provides both carrot and stick: Perpetrators who plead guilty before being accused get the greatest sentence

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(on file with author).

391. LIPRODHOR, *GACACA* REPORT, *supra* note 369, at 32.

392. Author's field notes from *gacaca* sessions in Byumba Province and Kigali, Rwanda (2002) (on file with author).

393. AVOCATS SANS FRONTIÈRES, PHASE DE JUGEMENT, *supra* note 277, at 4 & n.9 (discussing trial phase in 2005); PENAL REFORM INT'L, RAPPORT D'OBSERVATION DES JURIDICTIONS GACACA: 6 OCTOBRE 2005 [OBSERVATION REPORT OF THE GACACA JURISDICTIONS: OCTOBER 6, 2005] (Penal Reform International CD-ROM II) (reporting fines levied during pre-trial phase); LIPRODHOR, SITUATION DES DROITS DE LA PERSONNE, *supra* note 238, at 31 (discussing pre-trial phase in 2003); PENAL REFORM INT'L, REPORT V, *supra* note 23, at 32, 41, 62, 70, 73 (same). There is no provision in the 2001 or 2004 *gacaca* laws authorizing such fines. PENAL REFORM INT'L, RAPPORT DE SYNTHÈSE, *supra* note 334, at 41. *But see* PENAL REFORM INT'L, ENTRETIEN AVEC LE RESPONSABLE DE LA CELLULE: 14 JANVIER 2003 [INTERVIEW WITH CELL OFFICIAL: JANUARY 14, 2003] 1-3 (Penal Reform International CD-ROM II) (providing one example where local officials were ordered to stop fining people who did not attend *gacaca*).

394. 2004 *GACACA* LAW, *supra* note 286, art. 29 ("Every Rwandan citizen has the duty to participate in the *Gacaca* courts activities."). It appears that failing to participate incurs the same penalty as refusing to testify: three to six months' imprisonment (for a first offense). *Id.*; *see* SNJG, PROGRAMME, *supra* note 375, at preamble (noting that *gacaca* law was amended to make participation "compulsory for every Rwandan").

395. E-mail from participant, Meeting with Nat'l Serv. of Gacaca Jurisdictions, Kigali, Rwanda (June 22, 2004) (on file with author).

396. Remarks of Antoine Mugesera, *supra* note 334.

397. *See* Karekezi et al., *supra* note 369, at 82 (concluding that the lack of popular participation "may limit the ability of the *gacaca* process to rebuild social ties"); AFRICAN RIGHTS, *GACACA* JUSTICE, *supra* note 277, at 46 (noting that coerced participation "gives the impression that *gacaca* is a process dominated by government officials, and while it might result in higher numbers attending . . . it will not necessarily lead to meaningful contributions from the audiences").

398. Several authors have stated the truth in Rwanda is already largely known, because, unlike the disappearances in Latin America and South Africa, "there was nothing secret about was done in Rwanda in 1994." Alvarez, *Crimes of States/Crimes of Hate*, *supra* note 6, at 399. In fact, many survivors do not know what happened to their family members or where their remains are buried.

reductions and people who remain silent or give false testimony can be imprisoned for up to one year.[399] Judges frequently opened *gacaca* sessions by inviting people to confess and invoking the penalties for false testimony.[400] During the pretrial phase in the pilot *gacaca* cells at least 390 people were detained for giving false testimony or refusing to testify.[401]

The incentives and sanctions for speaking have proved somewhat ineffectual. In pretrial proceedings, small groups of survivors (including Hutu widows whose Tutsi husbands were killed) do most of the talking, while their neighbors mostly remain silent.[402] 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.

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399. The law states in part:

> Any person who omits or refuses to testify on what he or she has seen or on what he or [she] knows . . . shall be prosecuted . . . . He or she incurs a prison sentence from three (3) months to six (6) months. In case of repeat offence, the defendant may incur a prison sentence from six months (6) to one (1) year [sic].
>
> Is considered as refusing to testify on what he or she has seen or known, any person who apparently knew something on a given matter denounced by others in his or her presence, without expressing his or her own opinion.

2004 *GACACA* LAW, *supra* note 286, art. 29. By contrast, the 2001 *gacaca* law imposed sentences of one to three years (with half the sentence consisting of community service). 2001 *GACACA* LAW, *supra* note 234, art. 34. The 2004 law 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, *supra* note 286, art. 104. Sanctions for silence undermine the claim that *gacaca's* "procedural dependence on public participation has made it a forum in which speech is relatively free and protected." Wierzynska, *supra* note 30, at 1958.

Under the 2004 law, *gacaca* courts cannot impose pre-trial detention for these offenses and they must hold hearings before imposing these sanctions. 2004 *GACACA* LAW, *supra* note 286, art. 32. In practice, however, several *gacaca* courts have sentenced people for false or incomplete testimony without giving them the separate hearings required by article 32. AVOCATS SANS FRONTIÈRES, PHASE DE JUGEMENT, *supra* note 277, at 16 & n.29. That has led to "more and more fear and vulnerability" among local communities. Letter from Avocats Sans Frontiéres et al., *supra* note 308, at 3 (author's translation from French).

Article 29 also violates the right of an accused not to incriminate himself. Indeed, *gacaca* courts have pressured genocide suspects to testify. *See, e.g.*, PENAL REFORM INT'L, RAPPORT D'OBSERVATION DES JURIDICTIONS GACACA: 13 OCTOBRE 2005 [REPORT OF OBSERVATIONS OF GACACA JURISDICTIONS: OCTOBER 15, 2005] (Penal Reform International, CD-ROM II); AVOCATS SANS FRONTIÈRES, PHASE DE JUGEMENT, *supra* note 277, at 15 ; AVOCATS SANS FRONTIÈRES, OBSERVATION DES JURIDICTIONS GACACA: PROVINCE DE BUTARE, JUNE 2005, *supra* note 362, at 3, 33 (2006).

400. AVOCATS SANS FRONTIÈRES, OBSERVATION DES JURIDICTIONS *GACACA*, *supra* note at 363; Author's field notes from various *gacaca* sessions in Byumba, Butare, Gitarama, Kibungo, and Kibuye Provinces, and Kigali City, Rwanda (2002, 2003 & 2005) (on file with author).

401. Service National des Juridictions *Gacaca*, Table Indicating the Achievements, http://www.inkiko-gacaca.gov.rw/pdf/Achievements.pdf (last visited May 15, 2006).

402. Some survivors, though, are too fearful to speak in *gacaca*. *See, e.g.*, PENAL REFORM INT'L, RAPPORT D'OBSERVATION D'UNE RÉUNION DE RESCAPÉS ORGANISÉE PAR IBUKA: 17 SEPTEMBRE 2005 [REPORT FROM SURVIVORS' MEETING ORGANIZED BY IBUKA: SEPTEMBER 17, 2005] (Penal Reform International CD-ROM II).

> You don't want to tell us. Don't you know that whoever doesn't tell what he knows will be punished?[403]

That official harangue did not cajole further testimony and unwittingly reinforced the state's lack of authority over the local community. Overall, most of the evidence about serious crimes comes from confessed prisoners, not the local population.[404]

It is unrealistic to expect people to tell the truth about the genocide in *gacaca* given all the cultural and micro-political constraints (not to mention the threat of prison). There is a "pervasive" culture of secrecy in rural Rwanda.[405] As the anthropologist Danielle De Lame explained:

> Secrets are a preferred tool for forging an identity, both individual and collective. . . . Shared secrets develop internal solidarity rooted in trust in each other's ability not to reveal them . . . . 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.[406]

Rwandans view hypocrisy and deception as prudential qualities for maintaining social relations, while public displays of emotion are considered weak and shameful.[407] Furthermore, "ritualized dissimulation" in Rwanda's authoritarian political culture enables people to keep their true thoughts private.[408]

Testifying in *gacaca* is necessarily subject to "the micropolitics of local social standing."[409] In small face-to-face communities, giving evidence or remaining silent is more a demonstration of partisan loyalty to kin and patrons than a matter of telling the truth.[410] In one session, a woman who was asked about her son's role in the genocide replied: "If my son participated in the genocide, it is his affair. Me, I cannot be a traitor

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403. Author's field notes from a *gacaca* session in Butare Province, Rwanda (Oct. 2002) (on file with author).

404. *See, e.g.*, PENAL REFORM INT'L, RAPPORT D'OBSERVATION DES JURIDICTIONS GACACA: 22 SEPTEMBRE 2005 [OBSERVATION REPORT OF THE GACACA JURISDICTIONS: SEPTEMBER 22, 2005] (Penal Reform International CD-ROM II); PENAL REFORM INT'L, REPORT V, *supra* note 23, at 37 (recounting that members of the general population are reluctant to testify); Karekezi et al., *supra* note 369, at 79 (stating that prisoners describe their complicity in massacres).

405. DE LAME, *supra* note 180, at 14.

406. *Id.* at 14-15. Secrets and their attendant rumors map a community's fault lines: "[I]f we can historicize gossip, we look at the boundaries and bonds of a community. Who says what about whom, to whom, articulates the alliances and affiliations of the conflicts of daily life." LUISE WHITE, SPEAKING WITH VAMPIRES: RUMOR AND HISTORY IN COLONIAL AFRICA 65 (2000) (quoted in Kimberly Theidon, *Terror's Talk: Fieldwork and War*, DIALECTICAL ANTHROPOLOGY 19, 27 (2001)).

407. C.M. Overdulve, *Fonction de la langue et de la communication au Rwanda*, 53 NOUVELLE REVUE DE SCIENCE MISSIONAIRE 271, 279-80, 282 (1997) (Fr.). See *supra* text accompanying note 118 for reference to similar phenomenon in Sierra Leone.

408. *See* WEDEEN, *supra* note 366, at 82 (describing the effect of enforced public dissimulation on the Syrian populace).

409. Moore, *supra* note 50, at 42.

410. *See, e.g.*, *id.* at 37-38 (describing this phenomenon in the postcolonial courts in northern Tanzania).

to the family which gave me milk."[411] A team of Rwandan researchers found that "the sentiment of not wanting to attract enemies (*kutiteranya*) prevailed within the general population" during pretrial *gacaca* sessions.[412] A similar reticence has been observed during *gacaca* trials.[413]

Gacaca's ability to reveal the truth is also made difficult by the fact that Hutu and Tutsi often have radically different narratives about events during the genocide, which have become crystallized with the passage of so many years.[414] For example, in one Gisenyi sector, several Hutu residents credited the former sector leader with rallying the community to repulse an attack at the start of the genocide. However, a Tutsi survivor, protected by that leader, took a far more cynical view of his motives: she believed he was defending the Hutu community's right to loot its own Tutsi.[415]

Many of the accusations in *gacaca* come from survivors, but, generally, they are not eyewitnesses because they were hiding or fleeing. Even eyewitness testimony is notoriously unreliable, all the more so twelve years after a highly traumatizing event. In addition, traumatized survivors often have difficulty providing coherent and credible narratives.[416] Survivors also may have reasons to make false accusations, particularly given the state-sanctioned culture of denunciation. As a prominent Rwandan academic acknowledged, "There 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."[417] In a few cases, witnesses and survivors have confessed to making false accusations.[418] Both *Gacaca* Laws punish "false or slanderous denunciations."[419]

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411. Author's field notes from a *gacaca* session in Gitarama Province, Rwanda (Oct. 2002) (on file with author).

412. Karekezi et al., *supra* note 369, at 79.

413. AVOCATS SANS FRONTIÈRES, PHASE DE JUGEMENT, *supra* note 277, at 9 n.5.

414. *See* ELTRINGHAM, *supra* note 138, at 163-179 (describing opposing historical narratives of ethnicity); Rene Lemarchand, *Genocide in the Great Lakes: Which Genocide? Whose Genocide?* AFR. STUD. REV., Apr. 1998, at 5 ("Yet truth, in the eyes of those most affected by collective violence, often lies not in the facts themselves but in their moral interpretation, and how facts are interpreted is often manipulated and distorted by the very people who initiated the violence."); Forsberg, *supra* note 86, at 63 (stating "if the different interpretive frameworks do not converge, facts alone will not help to form a shared past").

415. Author's field notes from interviews in Gisenyi Province, Rwanda (June 2002) (on file with author).

416. Harvard psychologist Judith Herman observed: "People who have survived atrocities often tell their stories in a highly emotional, contradictory, and fragmented manner which undermines their credibility." HAYNER, UNSPEAKABLE TRUTHS, *supra* note 78, at 148; *see also* WILSON, *supra* note 23, at 49 (describing how victims' testimonies before the TRC "were jumbled, elliptical . . . [and] partial and fragmented, not magisterial").

417. Address of Alice Karekezi, *supra* note 334; *see also* Sarkin, *supra* note 16, at 161 (noting the danger that *gacaca* "may be used for settling personal scores, political issues, issues of land and property, and family issues").

418. However, it is difficult to assess whether the original accusations were indeed false or whether the witnesses have been bribed or intimidated into withdrawing their accusations. *See* PENAL REFORM INT'L, REPORT III, *supra* note 23, at 26 (reporting allegations that detainees and survivors are paid not to make accusations).

419. 2001 *GACACA* LAW, *supra* note 234, art. 32; 2004 *GACACA* LAW, *supra* note 286, art. 29.

Many participants in *gacaca* have incentives to make false accusations. Genocide accusations become "weapons of the weak" in personal, social, and economic disputes in Rwanda's local communities. The easiest way to get rid of a troublesome neighbor or a neighbor whose property is coveted is to accuse her of genocide in *gacaca*. By failing to provide an adequate forum for hearing property disputes, the government may have unwittingly encouraged people to try to resolve those disputes through false accusations of genocide in *gacaca*.[420] For example, 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."[421]

If accusations are sometimes false, so too are confessions. By late 2005, a large percentage of genocide detainees had confessed.[422] The number of confessions increased after early 2003 when the government provisionally released almost fifteen thousand confessed *genocidaires* who had already served their maximum possible sentence.[423] As an added incentive to confess, the government also stated that *gacaca* courts would give priority to those who have pled guilty.[424] The truthfulness and sincerity of detainee confessions is open to question. Innocent detainees may plead guilty in the hopes of provisional release or expediting their trials.[425] There is anecdotal evidence that even some common criminals have confessed to genocide in order to benefit from earlier releases.[426] Also, Rwandan prison officials have pressured some prisoners to confess.[427] One Rwandan human rights activist argued that the government needs enormous numbers of confessions in order to justify its lengthy pretrial detention of tens of thousands of suspects.[428]

While the innocent may confess to crimes they did not commit, perpetrators are likely to minimize their crimes in their confessions so they can receive lighter

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420. Rwanda's modernized *gacaca* courts only treat property offenses committed between 1990 and 1994 as part of the genocide. Thus, they are not hearing property disputes stemming from the ethnic violence against Tutsi before the genocide, the RPF's displacement of hundreds of thousands of Hutu in northern Rwanda during the civil war of 1990 to 1993, the return of several hundred thousand Tutsi exiles (who had fled before 1994), and the return of about two million Hutu refugees (who had fled after the RPF victory in 1994).

421. Field notes from a *gacaca* session in Butare Province, Rwanda (Oct. 2002) (on file with author).

422. The U.S. State Department offers an improbably high estimate of 95,066 confessed detainees. U.S. DEP'T OF STATE 2006, *supra* note 138.

423. See *supra* text accompanying note 228.

424. *60,000 Genocide Cases Ready for Rwandan Courts*, XINHUA NEWS AGENCY, Jan. 9, 2005.

425. Morris, *supra* note 236, at 36 ("Factually innocent suspects may choose to plead guilty for fear of a worse outcome at trial or to avoid extensive delays before trial."). Similarly, plea-bargaining in the United States has been criticized for encouraging innocent suspects to convict themselves. For a brief overview of that debate, see Combs, *supra* note 236, at 27-28, 57-58.

426. Communication to author from researcher who interviewed numerous prisoners in late 2004, Kigali, Rwanda (Aug. 14, 2005).

427. *Id.*; U.S. DEP'T OF STATE 2006, *supra* note 138 (reporting allegations that some detainees confessed to avoid losing privileges such as family visits).

428. Communication from Rwandan human rights activist to author, Kigali, Rwanda (2003).

sentences and earlier releases from prison.[429] Inside prisons, there is a lively market for confessions, with detainees being paid to name some and not others.[430] *Gacaca* courts do not have to accept confessions, even if the prosecutor has certified them as truthful.[431] However, the swift pace of *gacaca* trials in the pilot sectors since March 2005 indicates that numerous *gacaca* courts are not examining guilty pleas closely to assess their accuracy.[432]

In their public confessions in pretrial pilot *gacaca* hearings, perpetrators often evaded personal responsibility and showed little remorse. During one *gacaca* session, a confessed killer remarked, "if God wants, then people die."[433] In 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."[434] Klaas de Jonge, an anthropologist who monitored *gacaca* for several years for 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."[435] Other researchers also have found detainee confessions to be "almost formulaic."[436] To the extent that confessions are perceived as insincere, untruthful, or callous, they only serve to reinforce the bitterness of survivors. The government has tried to make the confessions more meaningful to survivors: under the 2004 *gacaca* law, *genocidaires* who plead guilty must now make public apologies[437] and reveal the locations of their victims' remains.[438]

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429. As the former IBUKA president worried: "It's not the truth that matters for them: the pure objective is to get out of prison." Remarks of Antoine Mugesera, *supra* note 334.

430. Communication to author from researcher who interviewed numerous prisoners in late 2004, Kigali, Rwanda (Aug. 14, 2005). Detainees may falsely accuse the men who they suspect of cohabitating with their wives. *See* WEEKS ET AL., *supra* note 224, at 32 (citing reasons prisoners confess to crimes they did not commit).

> One international researcher has found that some prisoners have confessed not only to crimes they themselves committed, but also to those that their friends or accomplices committed. The logic in such cases is that those convicted will have the same sentence no matter how many crimes they confess to, allowing others (e.g., close relatives) to go free. Others have reported that prisoners were bribed to implicate third persons falsely in their confessions.

Id.

431. 2004 *GACACA* LAW, *supra* note 286, art. 60.

432. AVOCATS SANS FRONTIÈRES, PHASE DE JUGEMENT, *supra* note 277, at 11 & n.10. Also, several *gacaca* courts have accepted vague guilty pleas where the accused acknowledged having participated in attacks without specifying what specific crimes they actually committed. *Id.* at 18.

433. Author's field notes from a *gacaca* session in Byumba Province, Rwanda (Oct. 2002) (on file with author).

434. *Id.*

435. Interview with Klaas de Jonge, Penal Reform International, in Kigali, Rwanda (Sept. 2002); *see also* PENAL REFORM INT'L, THE GUILTY PLEA PROCEDURE, *supra* note 23, at 4 (finding that "the attitude of the prisoners is more one of arrogance and strength than one of sincere repentance").

436. Karekezi et al., *supra* note 369, at 79.

437. 2004 *GACACA* LAW, *supra* note 286, art. 54; *see also id.*, art. 61 (providing that confessions will be read publicly if "the petitioner has reason beyond control preventing him or her to appear and apologise in public"). Also, the "confession procedure and guilt plea," 2001 *GACACA* LAW, *supra* note 234, art. 54, has been rechristened the "procedure of confessions, guilt plea, repentance and apologies." 2004 *GACACA* LAW,

Even full and contrite confessions may not necessarily promote forgiveness from genocide survivors. A Rwandan psychologist noted, "Confessions and seeking forgiveness do not remove fears and anger – they can even increase them."[439] After one confession in *gacaca*, the mother of a child who was killed responded angrily, "Don't ask me for forgiveness."[440] As the experience of the South African TRC showed, public narratives from perpetrators and victims are just as likely to renew anger and conflict as to lead to catharsis and healing.[441]

3. Confounding Hopes for Reconciliation and Reintegrative Shaming

Not surprisingly, Hutu and Tutsi often have differing perceptions of *gacaca*. Hutu generally view it as a way to release family members wrongly imprisoned, while Tutsi survivors often see it as a disguised amnesty for those who killed their family members.[442] Hutu and Tutsi have difficulty seeing past their own notions of collective victimization to comprehend the suffering of the other group.[443]

Eleven years after the genocide, survivors have inevitably worked out their own *modus vivendi* with their neighbors, a shaky peace that *gacaca* now threatens to upend. It is hard enough for survivors, perpetrators, bystanders, and rescuers to remain living together in small communities, bound together by mutual impoverishment, but it is far from clear how that arrangement can survive accusations and counteraccusations. In *gacaca* sessions, Hutu and Tutsi survivors have done most of the talking, while their Hutu neighbors remained silent or defended the accused—a dynamic that only reinforced mistrust between the two groups.[444] At one *gacaca* session, a survivor demanded: "My child was killed when [X] was present. There were many people by

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supra note 286, art. 54.

438. 2004 *GACACA* LAW, *supra* note 286, art. 54 (1).

439. Simon Gasibirege, Professor, National University of Rwanda, Remarks at CLADHO Conference on *Gacaca*, Kigali, Rwanda (Feb. 14, 2003) (notes on file with author); *see also* Daly, *Transformative Justice*, *supra* note 279, at 169 (stating that in Rwanda "knowledge may fuel rather than quell people's desire for retribution and indeed vengeance").

440. Author's field notes from a *gacaca* session, Butare Province, Rwanda (Jan. 2003) (on file with author).

441. *See, e.g.*, Kiss, *supra* note 61, at 82 (noting that the South African TRC sometimes caused "anger and alienation rather than reconciliation" and intensified community conflicts in some areas).

442. Longman & Rutagengwa, *supra* note 144, at 173-74; Morrill, *supra* note 350, at 20 n.41. Survivors' associations initially opposed *gacaca*, but now their reaction is muted and IBUKA defends *gacaca* at the local level. Rombouts, *supra* note 194, at 355. An AVEGA representative told an audience: "*Gacaca* is for liberating the prisoners. It's a sort of hidden amnesty." AVEGA representative, Remarks at Coexistence Network Meeting, in Kigali, Rwanda (July 23, 2002) (notes on file with author). African Rights, which has worked closely with IBUKA, noted, "[F]or survivors, gacaca is a bitter compromise." AFRICAN RIGHTS, *GACACA* JUSTICE, *supra* note 277, at 28.

443. *See* Rombouts, *supra* note 194, at 291 ("The irreconciliable positions of both victim groups results from the desire of each to somehow prove that their suffering is greater than the other's.") This is particularly apparent in the way genocide survivors and survivors of RPF war crimes rarely acknowledge one another's suffering. *Id.* at 279-90.

444. PENAL REFORM INT'L, REPORT V, *supra* note 23, at 24-27, 33, 37; Karekezi et al., *supra* note 369, at 79; Molenaar, *supra* note 369, at 81; Author's field notes from *gacaca* sessions in Butare, Byumba, Gitarama, Kibuye, and Kibungo Provinces, Rwanda (2002, 2003, & 2005) (on file with author).

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."[445]

In several communities, pretrial *gacaca* proceedings have caused a worsening of interethnic social relations.[446] One *gacaca* president warned, "Many people don't want to talk of what they saw in *gacaca* but talk of it at beer places . . . I don't want you to open *gacaca* in the beer places where you end up fighting."[447] During some pretrial sessions, survivors sat apart from their neighbors.[448] Survivors and perpetrators often fear retaliation, one from the other. A few survivors have been killed, and others have been intimidated to prevent them from testifying in *gacaca*.[449] Approximately fifteen genocide witnesses were killed in 2005, while another sixty-nine reportedly committed suicide.[450] In late April 2005, more than 6500 Hutu fled Rwanda, some of them for fear they would be accused in *gacaca* or killed in revenge after being named in *gacaca*.[451]

Thus far, the actual experience of *gacaca* has confounded hopes that it would promote reconciliation in Rwanda.[452] Drumbl portrayed *gacaca* as a form of

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445. Field notes from a *gacaca* session, Butare Province, Rwanda (Sept. 2002) (on file with author).

446. PENAL REFORM INT'L, REPORT V, *supra* note 23, at 24-25 (finding that survivors socialized less with others after *gacaca*); LIPRODHOR, SITUATION DES DROITS DE LA PERSONNE, *supra* note 238, at 110 (reporting increased tensions between survivors and defense witnesses in one district in Gitarama province); PENAL REFORM INT'L, RAPPORT D'OBSERVATION DES JURIDICTIONS GACACA: 19 AOUT 2005 [OBSERVATION REPORT OF THE GACACA JURISDICTIONS: AUGUST 19, 2005] (Penal Reform International CD-ROM II) (describing conflict between survivors and other residents during pre-trial *gacaca* session); Leegwater, *supra* note 381, at 63-66 (finding increased fear and tension in community in Butare Province as a result of *gacaca*); Molenaar, *supra* note 369, at 83-86 (describing worsening social relations in one community in Gikongoro Province as a result of *gacaca*).

447. Author's field notes from a *gacaca* session, Gitarama Province, Rwanda (Jan. 2003) (on file with author).

448. Author's field notes from *gacaca* sessions in Butare and Gitarama Provinces (2002) (on file with author). *See* PENAL REFORM INT'L, REPORT V, *supra* note 23, at 36 (noting the growing "segregation" between survivors and non-survivors during sessions in one cell).

449. COMMISSION NATIONALE DES DROITS DE LA PERSONNE, *supra* note 362, at 8-16; PENAL REFORM INT'L, RAPPORT D'OBSERVATION SUR LA COLLECTE D'INFORMATIONS, MUSASA SECTEUR, GISENYI PROVINCE: 26 SEPTEMBRE 2005 [OBSERVATION REPORT ON THE COLLECTION OF INFORMATION, MUSASA SECTOR, GISENYI PROVINCE, SEPTEMBER 26, 2005] (Penal Reform International CD-ROM II); PENAL REFORM INT'L, RAPPORT D'OBSERVATION DES JURIDICTIONS GACACA: 12 SEPTEMBRE 2005 [OBSERVATION REPORT OF THE GACACA JURISDICTIONS: SEPTEMBER 12, 2005] (Penal Reform International CD-ROM II); LIPRODHOR, SITUATION DES DROITS DE LA PERSONNE, *supra* note 238, at 46-48, 50; PROJET D'APPUI DE LA SOCIETE CIVILE AU PROCESSUS *GACACA* AU RWANDA (PAPG), LES CAS D'INSECURITE DES TEMOINS ET DES RESCAPES DU GENOCIDE DANS LES JURIDICTIONS *GACACA* [CIVIL SOCIETY SUPPORT PROJECT FOR THE *GACACA* SYSTEM IN RWANDA, CASES OF INSECURITY FOR WITNESSES AND GENOCIDE SURVIVORS IN *GACACA* JURISDICTIONS] (2004); PENAL REFORM INT'L, FROM CAMP TO HILL, *supra* note 23, at 50-54.

450. U.S. DEP'T OF STATE 2006, *supra* note 138.

451. *Id.*; Mary Kimani, *600 Tried, Thousands Flee*, INT'L JUST. TRIB., May 22, 2005, *available at* http://www.justicetribune.com/index.php?page=v2_article&id=3056. Many of those refugees later returned home, partly as a result of forcible repatriation by the Burundian government. Press Release, Human Rights Watch, Burundi: Rwandans' Asylum Claims Must Be Heard (May 27, 2005), *available at* http://hrw.org/english/docs/2005/05/26/burund11030_txt.htm.

452. *See, e.g.*, Daly, *Transformative Justice*, *supra* note 279, at 178 ("[G]acaca promotes the conciliatory agenda of the new government by strengthening intracommunity ties and fostering a culture in which people from both sides of the divide can live together").

community-based reintegrative shaming.[453] Yet, as Martha Minow reminds us, the concept of reintegrative shaming assumes "a sufficiently coherent and engaged community" capable of reintegrating wrongdoers—exactly what is so often missing after mass atrocity.[454] Rwanda's local communities have changed dramatically since April 1994 as a result of the genocide, civil war, massive population displacements, villagization,[455] and administrative reorganization of the country.[456] Tutsi survivors are a small minority in most local communities and many relocated after the genocide.[457] Hutu and Tutsi often have different attitudes toward the genocide, civil war, justice, and reconciliation.[458] Thus, genocide participants are unlikely to encounter much reintegrative shaming in rural communities, either from the Hutu majority, which is unwilling to shame,[459] or the Tutsi minority, which is unlikely to forgive. Explaining

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453. Drumbl, *Punishment*, *supra* note 6, at 1264-65; *see also* Ironside, *supra* note 284, at 49 ("By bringing victims and perpetrators face-to-face to tell their stories, it will empower victims who have been voiceless so far and create moral pressure on perpetrators to confess to their crimes and seek forgiveness."). Drumbl also argued that restorative justice is likely to be more effective where the violence was intimate among members of a shared community. *See* Drumbl, *Punishment*, *supra* note 6, at 1261 (arguing that Rwanda is a more conducive setting for restorative justice because in the Holocaust and Cambodia "there is no shared community to which victim and aggressor can return and in which the aggressor can atone (or be shamed into atoning) for the violence"). *But see, e.g.*, Ajdukovic & Corkalo, *supra* note 99, at 287-302 (suggesting through empirical studies that it may be harder to reestablish a sense of shared community where there are feelings of personal betrayal).

454. Minow, *Breaking the Cycles of Hatred*, *supra* note 98, at 75 n.53.

455. *See* HUMAN RIGHTS WATCH, UPROOTING THE RURAL POOR, *supra* note 254 (discussing forced villagization); POTTIER, *supra* note 138, at 193-96 (same). *But see* Widner, *supra* note 14, at 66 (stating incorrectly that Rwandan villagization was voluntary).

456. Drumbl recognized this in a later article, but that did not cause him to revise his argument:

> However, these relocations do not unseat the broad-based interconnectedness of life in Rwanda, nor the profoundly local nature of genocide, nor the presumption of familiarity and intimacy within communities, all of which are so pervasive that they can solely ground reintegrative shaming efforts. In addition, reintegrative shamings also can build up community in places where community may be somewhat artificial.

Drumbl, *Restorative Justice*, *supra* note 283, at 11. This presents a far more sweeping claim for reintegrative shaming than Braithwaite does, or that the empirical data on victim offender mediations supports. Braithwaite, *Restorative Justice*, *supra* note 61, at 36.

457. An Avega representative estimated that sixty-five percent of survivors have relocated since the genocide. AVEGA Representative, Remarks at the Coexistence Network Meeting, Kigali, Rwanda (July 23, 2002) (author's notes). Many have neither the will nor the resources to attend *gacaca* in their former home communities.

458. Longman & Rutagengwa, *supra* note 144, at 170-178.

459. The Hutu majority is unwilling to shame not because it was complicit in genocide, but because there are substantial economic, kinship, and moral pressures to maintain (ethnic) group cohesion and conformity in small face-to-face communities. *But see* Drumbl, *Punishment, supra* note 6, at 1261 ("[I]n Rwanda, returning an aggressor to the local community to face shaming is likely to mean that the aggressor must face the approbation of a neighbor's family or even his or her own family."). Drumbl's assumption of reintegrative shaming is also undercut by his claim of mass participation in the genocide. If, as Drumbl calculates, two million Hutu (a third of the Hutu population and presumably a majority of adult Hutu men) were involved in the genocide and considered it normal, how can Rwanda's mostly Hutu majority communities possibly be expected to engage in reintegrative shaming of perpetrators? Braithwaite has made clear that reintegrative shaming only works where a majority in the community disapproves of the particular crime. John Braithwaite, *Pride in Criminological Dissensus*, 18 LAW & SOC. INQUIRY 501, 504 (1993) (readily acknowledging that the theory of reintegrative shaming "will not work . . . when we approach

gacaca, a government prosecutor had to remind a local community: "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 . . . ."[460]

Drumbl also argued that *gacaca*'s reintegrative shaming might create "civil dissensus" more successfully than national trials.[461] Similarly, other authors have claimed that *gacaca* promotes decentralized, democratic deliberation, grassroots empowerment, or the rule of law.[462] Those arguments err in two respects. First, they adopt the transitional paradigm's teleological framework in which successor regimes, like the RPF-dominated government, are supposedly moving toward greater democracy.[463] Second, they assume, incorrectly, that *gacaca* is truly participatory.[464]

Gacaca has created some limited space at the local level where citizens might air political and economic grievances, thus revealing ordinarily "hidden transcripts."[465] During a few pretrial pilot proceedings, community members have raised RPF war crimes, land conflict, ethnic divisions, and other sensitive subjects in front of government officials.[466] It is unclear how often this has occurred and whether it was related to *gacaca* or to the presence of (Western) observers at *gacaca*. In some

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complete dissensus (just as many people believe that the crime is a good thing as believe it is a bad thing)").

460. PENAL REFORM INT'L, INTERIM REPORT, *supra* note 23, at 19, 23 (quoting address of Prosecutor General of Nyabisindu, Ntongwe, May 2001).

461. Drumbl, *Punishment*, *supra* note 6, at 1280-84.

462. *See, e.g.*, Brooks, *supra* note 22, at 2336 ("[G]acaca . . . may hold out Rwanda's best hope of coming to terms with the genocide in a way that rebuilds confidence in the government and the rule of law."); Daly, *Between Punitive and Restorative Justice*, *supra* note 366, at 376 (discussing how *gacaca* may help to promote democracy and the rule of law); Wierzynska, *supra* note 30, at 1958, (stating that *gacaca* creates "a critical communication bridge between the people and the State that did not exist before"). On the surface, at least, *gacaca* fits into the government's overall decentralization policy. One political rationale for decentralization is that devolving power can help prevent future mass atrocities because people will be less conditioned to obey the central government. *See* Longman & Rutagenga, *supra* note 144, at 165-66 ("This official view also holds that reconciliation requires the development of a democratic political culture, so that people will think independently and be resistant to irresponsible leaders who want to manipulate them to undertake future ethnic violence."). However, decentralization is not likely to be meaningful given the RPF's democratic centralism, political authoritarianism, and intolerance of political dissent.

463. Drumbl merely acknowledged that that there may not be "realistic *short-term* prospects for democratization." Drumbl, *Collective Violence*, *supra* note 36, at 597 (emphasis added).

464. *See, e.g.*, Wierzynska, *supra* note 30, at 1962 ("Finally, through encouraging and protecting participation, Gacaca, ought to create a sense of empowerment among the people of Rwanda."); Daly, *Between Punitive and Restorative Justice*, *supra* note 366, at 376 ("Rwandans of all stations will literally be defining justice for the post-genocide society rather than having it defined for and imposed on them."); Bolocan, *supra* note 254, at 382 ("Reflecting its restorative approach, truth in Gacaca emerges communicatively in a dialogue involving all community members . . . .").

465. *See* JAMES C. SCOTT, DOMINATION AND THE ARTS OF RESISTANCE xii (explaining that hidden transcripts represent "a critique of power spoken behind the back of the dominant"). In theory, *gacaca* courts could become the locus of political and economic discontent. *See* Salas, *supra* note 48, at 603 (finding that Cuba's popular courts, "rather than reconciling people to the social reforms, became the system's primary mechanism for focusing the general discontent").

466. At a *gacaca* pre-trial hearing attended by this author, two judges complained that RPF soldiers had taken away their family member, but they addressed themselves mostly to the author and other Western observers. Author's field notes from a *gacaca* session, Gitarama Province, Rwanda (July 2002) (on file with author). Based on personal observation, Wierzynska recounted an episode where someone used *gacaca* as an opportunity to challenge a recent disappearance. Wierzynska, *supra* note 30, at 1965.

locations, local officials or *gacaca* officials, rather than the judges, dominate the *gacaca* proceedings.[467] In Rwanda's increasingly repressive climate, people are inhibited from speaking freely in *gacaca* for fear of being accused of "divisionism."[468] Researchers doing interviews and focus group studies of Rwandan attitudes toward justice and reconciliation reported that "[p]eople felt severely constrained in their ability to discuss openly the social and political situation in Rwanda."[469] Furthermore, the government has made it increasingly difficult to monitor *gacaca* in violation of its public commitments that *gacaca* would be open and transparent.[470]

4. Politicizing *Gacaca* and Collectivizing Guilt

Elements within the RPF appear to be using *gacaca* to either sideline or control Hutu elites who had been reintegrated into the government's ranks.[471] 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 and some were accused of genocide.[472] A *gacaca* official subsequently stated: "Summoning

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467. *See* PENAL REFORM INT'L, FROM CAMP TO HILL, *supra* note 23, at 79 (stating that local administrative authorities in some places are interfering in the local court's activities); PAPG *GACACA* REPORT, *supra* note 369, at 7; AFRICAN RIGHTS, *GACACA* JUSTICE, *supra* note 277, at 42.

468. *See* AMNESTY INT'L, *supra* note 213, at 36 ("Information may not be forthcoming at the community level, given the limited enjoyment of freedom of expression and association or toleration of dissent at the national one."); Vandeginste, *Rwanda: Dealing with Genocide*, *supra* note 156, at 277 (arguing that for *gacaca* to succeed in its restorative goals, freedom of speech and political openness will be required); UVIN, *supra* note 16, at 25 ("If the gacaca process is really to contribute to reconciliation, people must be allowed to speak freely, including about those things the current regime understandably would not like to hear about.").

469. Longman & Rutagengwa, *supra* note 144, at 176.

470. From the outset, the government prohibited audio and video recording of *gacaca* sessions unless the recordings were provided to the Ministry of Youth, Sports and Culture for vetting. In 2002, Belgium and the UK funded IDEA, an inter-governmental organization, to coordinate the *gacaca* monitoring being undertaken by various local and international NGOs. The project collapsed after a year when the government refused to accredit IDEA to work in Rwanda. Author's conversations with IDEA and its donors (2002). The then Minister of Youth, Sports, and Culture issued a regulation in 2003 forbidding researchers from taking notes during *gacaca* proceedings. Ministry of Youth, Sports, and Culture, Instructions sur les Photographies, Enregistrement et/ou Ecrits des Journalists et Chercheurs, Relatifs aux Jurisdictions *Gacaca* [Instructions on Photographs, Recording, and/or Writing by Journalists and Researchers Relative to *Gacaca* Jurisdictions] (June 2003) (on file with author). Donor pressure from the Netherlands and the United Kingdom helped prevent enforcement of that regulation. *See, e.g.*, Letter from Alphons Hennekens, Ambassador of The Netherlands, to Robert Bayigamba, Minister, Ministry of Youth, Sports, and Culture (July 15, 2003) (on file with author). The government has repeatedly criticized Penal Reform International for its *gacaca* reports, and even pressured it into providing drafts to officials for comments before publication.

471. *See generally* Mary Kimani, *Independent Justice or Courts Under Orders?*, INT'L JUST. TRIB., Apr. 25, 2005 (discussing hearings of government officials), *available at* http://www.justicetribune.com/index.php?page=v2_article&id=3018.

472. *Gacaca Goes for the Big Fish: Views in the Rwandan Press*, HIRONDELLE, Mar. 29, 2005, http://allafrica.com/stories/printable/200503290611.html; *Justice in Rwanda 27*, INTERNEWS RWANDA, Apr. 2005, http://www.internews.org.rw/video.htm (follow "Newsreel 27" hyperlink) (showing excerpts of *gacaca* proceedings with the Prime Minister, Minister of Defense, and Ruhengeri governor). A statement posted on the official *gacaca* website calls for prosecuting high-level government officials:

It is predicted that the type of people who have for the last ten years enjoyed the cover of the blanket

government officials to testify at *gacaca* is a very important initiative because it gives all Rwandans a good example: it helps people understand that *gacaca* won't just target ordinary people but VIPs too."[473] According to the head of *gacaca*, 668 government officials have been accused.[474] By the end of 2005, genocide accusations had forced five parliamentarians to resign.[475]

In early September 2005, a *gacaca* court ordered the arrest of Major General Laurent Munyakazi—one of the most high-ranking Hutu military officers—on charges of intimidating survivors and evidence tampering.[476] Shortly thereafter, that same *gacaca* court "arraigned" Father Guy Theunis, a white Belgian priest, who had been arrested on accusations of inciting genocide.[477] After a seven-hour hearing dominated by prominent RPF officials, the *gacaca* judges did exactly what government officials—including the head of *gacaca*—had publicly stated they would do: they placed Father Theunis in Category 1 and transferred his case to the national courts.[478] The proceedings underscored the ease with which RPF elites can manipulate *gacaca* for their own 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.

The gravest danger for politicizing *gacaca* lies in the potential imposition of collective guilt on the Hutu majority. Although *gacaca* was designed to speed genocide trials and reduce the detainee population, it may have just the opposite effect:

> 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. . . . These elements that have been all along on the look out are liable to flee the country if strict measures are not put in place to keep them under surveillance. When time comes for these people to appear before gacaca jurisdictions, two phenomena are likely to accrue: the gacaca jurisdiction of his cell will fear to point him out as a suspect and if it so happens that he is pointed out there's a likelihood of fear to come out and say what role this fellow played during the 1994 genocide.

Peter Karasira, National Service of Gacaca Jurisdictions, Gacaca: Justice for All or Injustice for Some?, http://www.inkiko-gacaca.gov.rw/En/EnGacaca.htm (last visited Apr. 15, 2006).

473. GACACA: JUSTICE AND RECONCILIATION, *supra* note 314 (interviewing Anastase Balinda, a *gacaca* official).

474. *See Gacaca Court Might Indict Three Sitting Members of Parliament*, HIRONDELLE, Mar. 14, 2005 (quoting *Gacaca*'s Executive Secretary), *available at* http://allafrica.com/stories/printable/200503150078.html.

475. U.S. DEP'T OF STATE 2006, *supra* note 138.

476. *Genocide Arrest of Rwanda General*, BBC NEWS, Sept. 6, 2005, *available at* http://news.bbc.co.uk/2/hi/africa/4218842.stm.

477. Author's field notes from *gacaca* session with Father Guy Theunis, in Kigali, Rwanda, Sept. 4, 2005 (on file with author); *Belgian Priest Faces Rwanda Court*, BBC NEWS, Sept. 11, 2005, *available at* http://news.bbc.co.uk/2/hi/africa/4234480.stm. In November 2005, Rwanda released Father Theunis on Belgium's agreement to investigate the charges against him. *Belgian Courts Urged to Exonerate Guy Theunis*, INT'L FREEDOM OF EXPRESSION EXCHANGE (Nov. 24, 2005), http://www.ifex.org/en/content/view/full/70693/?PHPSESSID. Several months later, President Kagame publicly stated that Father Theunis "was indeed involved" in the genocide. *Spiegel Interview with "Rwandan President Paul Kagame: "You Can't Trust the UN,"* SPIEGEL ONLINE (Feb. 28, 2006), http://service.spiegel.de/cache/international/spiegel/0,1518,403586,00.html.

478. Author's field notes from *gacaca* session with Father Guy Theunis, in Kigali, Rwanda, Sept. 4, 2005 (on file with author); *Belgian Priest Faces Rwanda Court*, *supra* note 477.

government officials estimate that accusations and confessions in *gacaca* proceedings will result in anywhere from seven hundred thousand to one million genocide suspects[479]—almost half of all Hutu men.[480] An estimated 77,000 to 110,000 of those suspects will fall in Category 1 and thus would need to be tried in national courts.[481]

There are several reasons why *gacaca* will result in so many new accusations. First, those who plead guilty must name their accomplices in order to benefit from the reduced sentences.[482] Second, the Genocide and *Gacaca* Laws include property offenses; thus, many Hutu who engaged in opportunistic looting will be labeled as *genocidaires*. Third, people may be accused based on their former positions of authority or their membership in organizations, rather than on their individual criminal responsibility, as Category 1 includes persons in "position[s] of authority at the national, provincial or district level, within political parties, army, religious denominations or militia" who committed or encouraged others to commit offenses.[483] Fourth, the *Gacaca* Laws define accomplice liability broadly and place accomplices in the same criminal category as perpetrators.[484] Thus, people who were at roadblocks where Tutsi were killed have been convicted of Category 2 crimes, even where there is little or no evidence that they participated in the killings or had the specific intent (*dolus specialis*) to commit genocide.[485] One *gacaca* court, for example, handed down

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479. Processus *Gacaca*, *supra* note 297 (estimating approximately 761,000 suspects based on extrapolations from the pilot phase, which resulted in 63,447 accused persons in 751 of 9013 cells); Andrew Meldrum, *1 Million Rwandans to Face Killing Charges in Village Courts*, GUARDIAN, Jan. 15, 2005, at para. 1 (citing estimate by *Gacaca*'s Executive Secretary that one million people may be tried for participation in the genocide).

480. Forty-four percent of Rwanda's 8.1 million people are under the age of fifteen and fifty-two percent are women. NAT'L CENSUS SERV., *supra* note 138, at 3, 11. The author thanks Jean-Charles Paras, the former head of Penal Reform International's Rwanda bureau, for drawing his attention to the census breakdown on age.

481. Approximately eleven percent of those categorized in the pilot cells were placed in Category 1. Processus *Gacaca*, *supra* note 297, at tbl.2.4.2. As of April 2006, there were 1929 suspects on the government's official Category 1 list. Republic of Rwanda, List of Category 1 Genocide Suspects, *available at* http://www.gov.rw/government/category1.htm.

482. 2004 *GACACA* LAW, *supra* note 286, art. 54 ("To be received as confessions . . . the defendant's declarations shall contain: . . . (2) reveal the co-authors, accomplices . . . .").

483. 2004 *GACACA* LAW, *supra* note 286, art. 51; *cf.* Nina H.B. Jorgensen, *A Reappraisal of the Abandoned Nuremberg Concept of Criminal Organisations in the Context of Justice in Rwanda*, 12 CRIM. L.F. 371, 376-380 (2001) (advocating prosecution on the basis of membership in criminal organizations).

484. Under the *Gacaca* Laws, an accomplice is someone who assisted the commission of the crime "by any means." 2004 *GACACA* LAW, *supra* note 286, art. 53; 2001 *GACACA* LAW, *supra* note 234, art. 53. By contrast, the 1996 Genocide Law defined accomplice more restrictively as someone "who provided *essential* assistance in the commission of the offence." 1996 GENOCIDE LAW, *supra* note 233, art. 3 (emphasis added); *see* AVOCATS SANS FRONTIÈRES, VADE-MECUM, *supra* note 233, at 160.

485. *See* AVOCATS SANS FRONTIÈRES, PHASE DE JUGEMENT, *supra* note 277, at 14, 20 & n.40. To their credit, some government officials and *gacaca* judges have insisted on examining individual acts rather than membership in roadblocks and night patrols. For example, a former state prosecutor insisted that participation in roadblocks and night patrols was insufficient reason to detain someone: "During that time, it was an order and everybody had to go for night patrols. If she went to the roadblock and night patrol, what did she do at those?" Author's field notes of Remarks of Jean Marie Mbarushimana, Prosecutor General of Nyabisindu, at Presentation of Genocide Detainees Before the Local Population, Butare Town Stadium (Sept. 27, 2002) (notes on file with author); *see also* PENAL REFORM INT'L, ENTRETIEN AVEC UN JUGE GACACA, KAMASHYA

a twenty-five-year sentence to a woman who gave food to the *Interahamwe*, the Hutu extremist militia.[486] Fifth, the *gacaca* law makes no provision for defenses and justifications, even though some perpetrators and accomplices may have colorable claims of duress. Most *gacaca* judges will be unaware of the general provisions on defenses and justifications from the Rwandan Penal Code because the official *gacaca* manual makes no mention of those.[487] Even in the "rare" instances where *gacaca* courts have accepted duress, they have treated it as a mitigating factor in sentencing rather than as a defense.[488] Finally, the 2004 *Gacaca* Law deleted the 2001 *Gacaca* Law's provision immunizing bystanders from criminal liability for failure to render assistance.[489] Subsequently, some *gacaca* courts have convicted and sentenced persons for failure to render assistance, treating it as a Category 2 crime.[490]

Gacaca will wind up criminalizing a vast swathe of the Hutu population. The government has made fairly clear that most of the new suspects will not be incarcerated.[491] To avoid overwhelming the national courts with thousands of new Category 1 suspects, the government plans to amend the *Gacaca* Law in 2006 to narrow the definition of Category 1, moving many of those now eligible for Category 1

CELL, UMUTARA PROVINCE, MAY 15, 2005 [INTERVIEW WITH A GACACA JUDGE, KAMASHYA CELL, UMUTARA PROVINCE, MAY 15, 2005] 5-6 (Penal Reform International CD-ROM II) (distinguishing between genocidal killers and persons concerned with defending security at the barriers); PENAL REFORM INT'L, RAPPORT D'OBSERVATION DES JURIDICTIONS GACACA: 7 AOUT 2005 [OBSERVATION REPORT OF THE GACACA JURISDICTIONS: AUGUST 7, 2005] 1 (Penal Reform International CD-ROM II) (describing how cell-level *gacaca* president asked local inhabitants to differentiate among those who went to the barriers to kill and those who were forced to go there).

486. AVOCATS SANS FRONTIÈRES, PHASE DE JUGEMENT, *supra* note 277, at 20 & n.42.

487. Rwandan Code Penal, art. 70 (duress), *in* CODES ET LOIS DU RWANDA, *supra* note 356, at 394. For discussions of duress in the context of international criminal jurisprudence, see Prosecutor v. Erdemovic, No. IT-96-22-A (Oct. 7, 1997) (Judgment and Dissenting Opinion of Stephen, J.); Rosa Ehrenreich Brooks, *Law in the Heart of Darkness: Atrocity & Duress*, 43 VA. J. INT'L L. 861, 863-69 (2003) (discussing *Erdemovic*).

488. AVOCATS SANS FRONTIÈRES, PHASE DE JUGEMENT, *supra* note 277, at 22 & n.47, n.48.

489. *See* 2001 Gacaca Law, *supra* note 234, art. 95 ("Testimony . . . can never serve as a basis to take proceedings against its author charging him with the offence of failure to render assistance."); Rwanda Penal Code, art. 256, in Codes et Lois du Rwanda, *supra* note 356, at 409 (punishing the crime of failure to render assistance to those in need). The ICTR recently sentenced a sector conseiller to six years imprisonment for extermination (as a crime against humanity) on the basis that he aided and abetted the massacre of Tutsi by omission. Prosecutor v. Rutaganira, Case No. ICTR 95-1C-I (Mar. 14, 2005) (Summary of Judgement), available at http://65.18.216.88/ENGLISH/cases/Rutaganira/judgement/rutaganira-summary140305.pdf. In finding that Rutaganira had a duty to act to protect Tutsi in his sector, the Trial Chamber relied in part on the Rwandan Penal Code provision making it a crime to fail to render assistance to persons in danger. Id. at ¶ 31. This is more consistent with civil law jurisdictions, which, in sharp contrast to common law jurisdictions, criminalize persons who fail to act as Good Samaritans. *See, e.g.*, Liam Murphy, Beneficence, Law, and Liberty: The Case of Required Rescue, 89 GEO. L.J. 605, 606-08 (2001).

490. AVOCATS SANS FRONTIÈRES, OBSERVATION DES JURIDICTIONS GACACA: VILLE DE KIGALI, JUIN 2005 3, at 19-23 (2006), *available at* http://www.asf.be/FR/FRnews/Rwanda_instance/monitoring%20gacaca/MVK_juin_05.pdf (discussing former policeman sentenced to ten years for non-assistance to persons in danger).

491. As Antoine Mugesera, a member of the RPF's central committee, publicly acknowledged in 2003: "We're not going to create panic within the country, we're not going to imprison masses of people . . . the number of prisoners is not going to increase." Remarks of Antoine Mugesera, *supra* note 334. In the pilot phase of *gacaca*, 606 suspects were provisionally detained while 555 were released. Processus *Gacaca*, *supra* note 297.

to Category 2.[492] Yet, it remains far from clear how *gacaca* will manage to process upwards of a million suspects. Some elements within the RPF may be more interested in using *gacaca* to inculpate a large swathe of Hutu men than in actually seeing them brought to trial: mass accusations alone would exert a degree of social control over the Hutu majority, while further promoting a notion of collective Hutu guilt.[493] In addition, genocide accusations might be used to disenfranchise a sizable proportion of eligible Hutu voters.[494]

Several authors have critiqued the international legal community's preference for individual criminal prosecutions against high-level state actors, arguing that it ignores the mass complicity necessary for mass atrocity and it absolves the majority of perpetrators and bystanders.[495] Thus, some argue that accountability for mass

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492. Service National des Juridictions Gacaca, Compte Rendu de la Reunion d'echange et d'information Entre le Service National des Juridictions Gacaca et ses Partenaires, Tenue le 15 Septembre 2005 [National Service of Gacaca Jurisdictions, Report of the Meeting of Exchange and Information between the National Service of Gacaca Jurisdictions and its Partners, taken September 15, 2005] (on file with author).

493. On the issue of collective guilt, see POTTIER, *supra* note 138, at 150. *See also* ELTRINGHAM, *supra* note 138, at 69-99 (same). Mass incriminations might force the government to grant amnesty to lower-level suspects. Amnesties, however, would preclude those accused from clearing their name and thus also contribute to collective Hutu guilt. Speaking in 1997, Andre Sibomana strenuously opposed amnesties:

> Who do you think would be appeased by random releases, without people being declared innocent or guilty? The guilty would not have paid their dues. The innocent would not have been washed of their shame. The Hutu as a whole would have to bear responsibility for crimes committed by a minority [of them]. And those who ensured that innocent people were imprisoned would not be made to answer for their lies. It would all be too easy.

SIBOMANA, *supra* note 218, at 113.

494. Under the *Gacaca* Law, those convicted of Category 1 crimes or Category 2 killings will be permanently deprived of their voting rights. 2001 *GACACA* LAW, *supra* note 234, art. 76(2)(a). During the 2003 national elections, the government denied approximately 80,000 genocide detainees their voting rights, in violation of the presumption of innocence and international law. EU OBSERVER MISSION, *supra* note 189, at 16, 34, 36.

495. For example, Alvarez argued that the prosecution of high-level defendants, particularly by international courts, "elevate[s] the goal of absolving those who are not criminally indicted over the goal of telling the truth about the extent of collective complicity in such crimes . . . ." Alvarez, *Crimes of States/Crimes of Hate*, *supra* note 6, at 454. Similarly, Stover and Weinstein contended:

> Nor do trials address the responsibility of those who, swept along by group emotion or solidarity, participated at the margins—looting, taunting, or profiting from the misfortune of their neighbors—or of those who did nothing to stop or mitigate the violence, the so-called 'innocent bystanders.' Thus, what is billed as individual justice actually becomes a *de facto* form of collective innocence that exonerates the far larger number of individuals who were indirectly responsible for the physical, social, and psychological destruction of their communities.

Eric Stover and Harvey M. Weinstein, *Conclusion: A Common Objective, A Universe of Alternatives*, *in* MY NEIGHBOR, MY ENEMY, *supra* note 13, at 323, 335; *cf.* VALENTINO, *supra* note 9, at 37-39 (explaining the bystander phenomenon in terms of collective action theory).

Yet, a myth of collective innocence might be better than imposition of collective guilt. *See* GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIME TRIBUNALS 301 (2000) (noting "that this kind of whitewash could be politically useful"). Indeed, several legal scholars have argued that individualized criminal trials alleviate collective guilt. *See, e.g.*, MINOW, VENGEANCE AND FORGIVENESS, *supra* note 21, at 40 ("The emphasis on individual responsibility offers an avenue away from the cycles of blame that lead to revenge, recrimination, and ethnic and national conflicts."); Aryeh Neier, *Rethinking Truth, Justice, and Guilt after Bosnia and Rwanda*, *in* HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 39, 50 (Carla Hesse & Robert Post eds., 1999) (contending that individual trials "may alleviate a sense

complicity requires thousands of criminal proceedings.[496] Drumbl advocated collective guilt in Rwanda through *gacaca* proceedings:

> But 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? Although this transgresses the prevailing notion that collective guilt needs to be avoided, should the orthodoxy of this notion be questioned? As Alvarez (1999) observes, [the Rwandan genocide was] a crime of hate more than a crime of state.[497]

Calls for collective guilt rest, in part, on the false assumption that the mass of perpetrators shared the same intent (ethnic hatred).[498]

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of collective criminal guilt"); Kritz, *Coming to Terms with Atrocities, supra* note 101, at 128 (arguing that individual criminal prosecutions prevents cycles of resentment and violence).

However, initial social science research among former Yugoslavs suggests that "[i]nternational criminal trials have the effect of stigmatizing groups despite the emphasis on individualizing guilt." Laurel E. Fletcher and Harvey M. Weinstein, *A World Unto Itself? The Application of International Justice in the Former Yugoslavia, in* MY NEIGHBOR, MY ENEMY, *supra* note 13, at 29, 44. *See* Fletcher & Weinstein, *Violence and Social Repair, supra* note 22, at 581 (noting that Bosnian legal professionals who were surveyed "looked to war crimes trials to reaffirm the victimization of their own national group"). One group of researchers wrote:

> On the one hand, the intention of the court is to individualize guilt and to take the burden off a whole nation. (Most participants agreed with this notion). 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."
>
> Many study participants said they felt torn in two directions. As bystanders, they do not want to be held collectively responsible for war crimes committed by other members of their ethnic group. At the same time they cannot separate themselves from the national group, for to do so would mean jeopardizing their sense of self, their identity. Caught in this untenable position, they cannot free themselves of the guilt, so they criticize the ICTY as biased against their group, as this is the most socially acceptable option.

Dinka Corkalo et al., *Neighbors Again? Intercommunity Relations after Ethnic Cleansing, in* MY NEIGHBOR, MY ENEMY, *supra* note 13, at 143, 148; *see* Miklos Biro et al., *Attitudes Toward Justice and Social Reconstruction in Bosnia and Herzegovina and Croatia in* MY NEIGHBOR, MY ENEMY, *supra* note 13, at 183-205 (examining the attitudes in the former Yugoslavia towards the International Criminal Tribunal for the Former Yugoslavia); Fletcher & Weinstein, *Violence and Social Repair, supra* note 22, at 615 (hypothesizing that individual criminal trials may "reinforce[] the use of denial as a psychological defense mechanism within the population at large"); *see also* OSIEL, *supra* note 13, at 129 ("[T]he criminal law sets up a bright line between the parties, labeling one as victim, the other as wrongdoer. It encourages attitudes in the former of righteous indignation, attitudes that the latter inevitably view in turn as self-righteous selectivity."); Stover & Weinstein, *supra*, at 323 (concluding on the basis of empirical research that "there is no direct link between criminal trials (international, national, and local/traditional) and reconciliation"). Further empirical research conducted at a greater distance in time from the mass atrocities and the criminal trials may produce different results.

496. Alvarez, *Crimes of States/Crimes of Hate, supra* note 6, at 482.

497. Drumbl, *Restorative Justice, supra* note 283, at 11. In a later article, Drumbl modified his position, arguing for "collective responsibility" as "a middle ground between collective guilt and collective innocence" that could be sanctioned through such collective mechanisms as lustration, compelled community service, and the like. Drumbl, *Collective Violence, supra* note 36, at 576.

498. Some writers make the related, but different, argument that individuals cannot be held individually responsible for their participation in collective violence. For example, Cobban wrote:

> How can anyone start to assign a specific amount of responsibility to each one of the hundreds of thousand—probably *millions*—of people who took part. . . . Moreover, how does one identify the

No legal system is equipped to prosecute mass complicity in mass atrocity.[499] Thousands of criminal proceedings (particularly if they are to comport with due process guarantees) are simply beyond the political and economic capacities of post-conflict states.[500] Attempting to criminalize bystanders will also discourage bystanders from coming forward to testify against perpetrators. Furthermore, it is hard to see how mass prosecutions could possibly promote peaceful coexistence in countries where the alleged perpetrators come from socio-politically salient groups (an ethnic majority in Rwanda's case). Consequently, the moral responsibility and moral education of bystanders might be better addressed through mechanisms other than criminal trials.[501]

The Rwandan government (under donor pressure, if necessary) can take realistic measures to prevent an avalanche of new accusations and cases as a result of *gacaca*.[502] For a start, it should continue releasing confessed detainees who have already served the equivalent of their sentences in pretrial detention, but on a rolling basis so as not to aggravate fear and anxiety among the survivors.[503] Second, and most controversially, *gacaca* should be limited to those Category 2 suspects already in pretrial detention or on provisional release. While some *genocidaires* will thus go unpunished, that strategy would prevent further false accusations and collective guilt, while redirecting the judicial sector's attention toward processing the backlog of ordinary criminal and civil

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> role of rationality and intention in the behavior of most of the grassroots participants in the blood orgy of those terrifyingly irrational weeks?

Cobban, *supra* note 85, at 21. That argument, however, cannot account for those individuals who resisted mass violence. *See* PENAL REFORM INT'L: THE RIGHTEOUS, *supra* note 178 (discussing Hutu who rescued Tutsi during the genocide); AFRICAN RIGHTS, TRIBUTE TO COURAGE, *supra* note 178 (same); *see also* Fletcher & Weinstein, *Violence and Social Repair*, *supra* note 22, at 614 n.143 (discussing rescuer phenomenon).

499. Also, criminal law is not geared toward finding bystanders (whether national or international) legally culpable. *See* OSIEL, *supra* note 13, at 129 (discussing how criminal law, unlike civil law, does not take account of contributory negligence). *Compare* Osiel, *Banality of Good*, *supra* note 169, at 1844 (defining bystanders as "people whose intelligent intercession would likely prevent, halt, or significantly reduce the scope of the wrongs"), *with* Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 MICH. J. INT'L L. 1013, 1027 n.38 (2005) (defining bystanders as those who did not participate in or profit from the violence, but who also did not oppose it).

500. *See* Kritz, *Coming to Terms with Atrocities*, *supra* note 101, at 139-40 (arguing that prosecutions of perpetrators and collaborators in mass atrocity "would be politically destabilizing, socially divisive, and logistically and economically untenable"). Kritz recommended temporary lustration instead. *Id.* at 140.

501. Fletcher & Weinstein, *Violence and Social Repair*, *supra* note 22, at 615; *see* Osiel, *Banality of Good*, *supra* note 169, at 1837-59 (proposing collective civil sanctioning of military officers); Fletcher, *supra* note 499, at 1080, 1082-1092 (acknowledging that truth commissions may be better suited for dealing with bystanders and proposing that international criminal courts engage in more outreach programs and issue judgments with dicta about bystanders' contribution to the violence).

502. At this late date, the Rwandan government is hardly likely to convert *gacaca* to localized truth commissions, as some have proposed. *See, e.g.*, Daly, *Between Punitive and Reconstructive Justice*, *supra* note 366, at 386-95; Bolocan, *supra* note 254, at 395-99 (arguing *gacaca* should be redesigned along the model of the Community Reconciliation Process hearings in East Timor); *see also* Sarkin, *supra* note 16, at 166-72 (arguing for a TRC to supplement criminal prosecutions of perhaps 5000 to 10,000 "main architects and organizers").

503. A more radical option would be to dust off the old Penal Code's provisions for paroling persons who have served a quarter of their sentences. Schabas, *Rwanda*, *supra* note 16, at 542 n.56; *see also* PENAL REFORM INT'L, REPORT V, *supra* note 23, at 13 (proposing that persons who confess be sentenced only to community service).

cases. *Gacaca* should give priority to those Category 2 suspects who maintain their innocence and who have been detained the longest. Third, national court proceedings should be accelerated by reinstating experienced Hutu judges and prosecutors removed without due process and by funding the bar and the disbanded judicial paralegals to represent defendants. Finally, the money saved by limiting *gacaca*'s scope should be spent on providing reparations to genocide survivors in the form of in-kind educational and health benefits (including antiretrovirals for female victims of sexual violence).[504]

CONCLUSION

No government could possibly render justice for a mass atrocity on the scale of the Rwandan genocide, especially given the high rate of popular participation. But the RPF's insistence on mass (often arbitrary) arrests and extensive criminal prosecutions only worsened an already terrible situation: it saddled a devastated justice sector with the impossible task of trying some 120,000 Hutu suspects and it fostered a culture of denunciation, both of which have undermined efforts to establish the rule of law. Most cruelly, it diverted resources away from survivors: instead of providing reparations to genocide victims, the government and international donors have spent millions of dollars incarcerating (and occasionally trying) genocide suspects.[505]

Gacaca's problems are hardly surprising given the enormous numbers killed, the high degree of popular participation in the genocide, and the widespread destruction of social capital. But the Rwandan government made a fundamental mistake: it warped "customary" *gacaca* beyond recognition by converting local, ad hoc practices into more formal, coercive state structures and expanding *gacaca*'s jurisdiction to cover genocide and crimes against humanity when, historically, it was not competent to handle serious crimes. The government then compounded *gacaca*'s difficulties by failing to provide reparations to genocide survivors, making it an exercise in victor's justice, coercing participation, restricting freedom of speech on sensitive subjects, and collectivizing guilt.

Far from being a model for future transitional justice efforts, *gacaca* offers some profound cautionary lessons about how local justice should be adapted after mass atrocity. First, some of *gacaca*'s difficulties—particularly decreased popular participation and increased state coercion—are typical of state attempts to coopt or control local justice. Thus, if successor regimes want local justice to retain legitimacy and popularity, they need to adopt a largely hands-off approach. Second, local justice is poorly suited to documenting mass atrocity and producing truthful narratives of violence. Third, local justice has difficulty handling novel crimes like genocide, crimes

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504. The estimated budget for *gacaca* for 2005 to 2007 is approximately forty-three million dollars. Service National des Juridictions *Gacaca*, Plan Strategique 2005-2007 du SNJG (Power Point presentation, June 30, 2005) (on file with author).

505. For example, the donor community spent an estimated eighteen million dollars in 1998 alone to feed detainees in central prisons. DES FORGES, LEAVE NONE TO TELL THE STORY, *supra* note 142, at 764. In 1999, the Rwandan government spent about two percent of its budget feeding 86,000 prisoners in the central prisons. U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Report on the Situation of Human Rights in Rwanda Submitted by the Special Representative Michel Moussalli, Pursuant to Resolution 1998/69*, sec. 30, U.N. Doc. E/CN.4/1999/33 (Feb. 8, 1999).

against humanity, and war crimes, particularly if it never had jurisdiction over serious criminal offenses.

Local justice in transitional justice settings will be more effective and legitimate if it focuses on its ordinary subject matter—generally, property, restitution, and community reintegration. Property issues may seem trivial by contrast with the violence and suffering that has occurred, but they are an essential element of social reconstruction. Property (especially land) often plays an important role in today's brutal, intra-state conflicts,[506] both as an underlying structural factor and as an inducement to violence, so resolving property disputes provides accountability for past violence while helping to prevent future conflict.[507] It is a daily indignity, as well as a goad to further conflict, when survivors see their neighbors' houses sporting their windows, doors, or roofing. Impoverished survivors need the return of stolen property in places like Rwanda where there is little or no prospect for meaningful government reparations. In addition, successor regimes may be more willing to permit local justice mechanisms to hear property claims from all sides of the conflict because such claims are far less threatening to them than allegations of war crimes by their own forces. Finally, local justice's lack of conformity with international human rights norms for fair trials is of less concern where proceedings involve civil claims over property.

There needs to be drastically lowered expectations about what local justice—or, for that matter, any transitional justice mechanism—can accomplish after mass atrocity. Local justice is no better equipped than a formal justice system to cope with mass criminality. Local justice depends on cohesive communities and social capital, which are often lacking after mass atrocity. Rwanda's experience reinforces Jennifer Widner's reminder to be cautious about "placing too much faith in law and courts in postconflict transitions or in expecting quick results."[508] One should be especially wary of over-eager claims that local practices—which, by nature, are ad hoc, highly discretionary, and often unpredictable—will help rebuild a Western-style rule of law, especially when successor regimes are not transitioning toward liberal democracy.[509]

As Rwanda poignantly demonstrates, national justice and less formal local justice may be no more successful than international criminal justice in promoting accountability, reconciliation, victim satisfaction, collective memory, and democratic

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506. Kiernan argues that the myth of territorial diminution and the "idealization of the peasant cultivator" have been key elements in genocidal ideologies. Kiernan, *supra* note 27, at 37-46. In Rwanda, Hutu extremists portrayed Tutsi as foreign pastoralists who would dispossess the indigenous Hutu peasantry. *See* Philip Verwimp, *Development Ideology, the Peasantry and Genocide: Rwanda Represented in Habyarimana's Speeches (1973-1994)*, 2 J. FOR GENOCIDE RES. 325 (2000), http://www.cis.yale.edu//gsp/publications/Rwanda.pdf, at 26-27 (finding the Habyarimana regime glorified the peasantry, which it viewed in racial terms).

507. *See, e.g.*, INT'L CRISIS GROUP, REFUGIES ET DEPLACES AU BURUNDI: DESAMORCER LA BOMBE FONCIERE [REFUGEES AND DISPLACED PERSONS IN BURUNDI: DEFUSING THE LAND BOMB 10-14] (2003) (recommending that a local justice mechanism (*bashingantahe*) be revived to handle land disputes after civil war in Burundi); *cf.* Theidon, *Memory, Morality and Reconciliation*, *supra* note 121, at 552 (mentioning how demobilized guerrillas in the Peruvian highlands were given land to reincorporate them into communal life).

508. Widner, *supra* note 14, at 64.

509. *See id.* at 66 (contending that *gacaca* provided a foundation for rebuilding the rule of law); Brooks, *supra* note 22, at 2335 (arguing that local practices, including Balkan codes governing blood feuds, can be used to promote the rule of law).

deliberation. Transitional justice requires legally pluralistic solutions, with innovative and context-specific combinations of formal and informal mechanisms operating at the international, national, and local levels.[510] While non-criminal informal justice is better left to reintegrating low-level perpetrators and child soldiers back into their local communities, international criminal justice is better suited to prosecuting high-level perpetrators who threaten national and international peace and security.

510. According to Ruti Teitel, transitional justice has progressed through three broad historical phases in response to political developments and intellectual trends: the post-World War II Nuremberg model of international criminal prosecution, the post-Cold War restorative justice model of truth commissions, and the current globalized proliferation of international, national, and local models. Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003).