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Date Aug. 21 2003
Abstract

The epicentre of post-genocide Rwandan society and politics has been the need for reconciliation to assuage ethnic tensions and end a culture of impunity. The relevance of justice after genocide speaks to the appropriateness of retributive versus restorative modes of justice in a dualist post-genocide society such as Rwanda. Additionally, the mode of justice must be reconciled to the nature of a political regime enforces unity under an ethnocratic minority.

The International Criminal Tribunal for Rwanda (ICTR) has not met its goal of reconciliation in Rwanda. The failure of the tribunal goes beyond its institutional shortcomings and can also be attributed the norms of international criminal law that render it an inappropriate response to criminalising mass violence. The Gacaca courts were resurrected in Rwanda as an indigenous form of restorative justice. The principles and process of these courts hope to mitigate the failures of “Arusha Justice” at the tribunal and seeks to punish or reintegrate over one hundred thousand genocide suspects. Its restorative foundations require that suspects will be tried and judged by neighbours in their community.

However, the revelation that Gacaca is a reconciliatory justice does not preclude its potential for inciting ethnic tension if it purports to serve as an instrument of Tutsi power. The state-imposed approach of command justice has politicised the identity of the participants in Gacaca; perpetrators remain Hutus and victims and survivors remain Tutsis. Additionally the refusal of the Kagame government to allow for the prosecution of RPF crimes to be tried in Gacaca empowers the notion that Tutsi survival is preconditioned by Tutsi power and impunity. If Gacaca fails to end the perceptions of impunity in post-genocide Rwanda, it will come at a much higher cost for reconciliation than the failure of the ICTR.
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Acknowledgements

This thesis was not just a requirement to finish my Master’s degree in Political Science at UBC; it represents a personal achievement for me to finally contribute something significant to the study of Rwanda and the genocide. In particular, my hope was to bring attention to issues of justice and reconciliation that take Rwandan politics and society outside of the narrow framework of genocide studies. The more I study Rwanda, its problems and its progress, the more I have realised that Rwanda scholars need to establish the lowest levels of tolerance for impunity, and highest of standards for reconciliation.

There are many people to whom I owe a great deal of gratitude for helping me complete my program and my thesis, successfully and on time! Most importantly, thank you to my thesis advisor, Dr Brian Job, who offered me a great deal of his time and assistance throughout many drafts. The attention to detail, thoughtful revisions, and academic integrity of his guidance has made this a rewarding process and a reassuring transition into my PhD.

I would also like to thank Dr Erin Baines for helping me to explore new avenues of research on Rwanda and providing an outlet and audience to which I can express my ideas and my frustrations. Being nothing short of a mentor, she has offered me wonderful opportunities to study and share my research in an academic community that is just beginning to appreciate the importance of African studies.

The graduate student community in the Department of Political Science has been motivating, and most importantly, thoroughly entertaining. The academic quality of their work and their supportive friendship has set the bar high and the stress low.

On a personal note, I would be remiss not to acknowledge the support, friendship and caring of Lisa, Rob and Tom over these past few months. I am lucky to have people in my life who readily share the burdens of my successes and my failures.
Finally, both my parents have always been understanding and encouraging of my academic pursuits and have bailed me out of endless crises. It is for their respect and pride that I will continue to work hard. All of my future success is owed to their unwavering love and support.
I. Introduction

The dangers of impunity loom large in post-genocide Rwanda. The extermination of 800,000 Rwandans in 1994 have left over one hundred thousand prisoners awaiting trial for genocide crimes. The national judicial system was completely dismantled in terms of infrastructure and personnel: only fourteen lawyers and five judges remained after the killings had ceased. It has gone without saying that reconciliation between Tutsis and Hutus, as victims and perpetrators in these crimes, cannot be realised without justice. The form that this justice should take is at the heart of the reconciliation agenda in Rwanda.

The attempt to end impunity at an elite level resulted in the creation of the International Criminal Tribunal for Rwanda, established by the international community. The tribunal has failed to meet the expectations of Rwandans and does nothing to mitigate the conditions of overcrowded prisons. The solution presented by the Rwandan government is to revive a traditional form of dispute resolution, called Gacaca (Ga-CHA-cha). As a form of restorative justice, the 10,000 Gacaca courts will put on trial genocide suspects in the communities where their crimes were committed. They will be tried and judged by their neighbours.

Hutus and Tutsis continue to live side by side in communities that are still divided along ethnic lines and the memory of what they saw and did during the genocide lingers. Some live in fear of vengeance while some live in the hope of exacting vengeance. Many want to see punishments rendered against those who violated them or killed members of their family. Not all of those who face trial in Gacaca will be punished. Many will be immediately reintegrated into their community through plea bargains or a lack of evidence.

Both forms of justice, the ICTR and the Gacaca courts, hope to provide some measure of reconciliation. However, reconciliation can mean many things and the standards for Rwanda have been set too low. For many it is simply enough that Hutus and Tutsis are no longer killing each other and the government has convinced the international community that ethnicity in
Rwanda is no longer a reality. However, for others the salience of ethnicity remains in its use as a tool for eliminating opposition groups to a Tutsi led government and the impunity for crimes committed by Tutsi soldiers.

Both the ICTR and Gacaca will likely achieve their practical goals of incarcerating elite suspects and restoring genocidaires to their communities. However, the inability of Gacaca to provide for reconciliation will come at a much higher cost than the failures of the ICTR. Gacaca justice is meant to be as intimate as the genocide itself; if the process is threatened by an approximation of the same politicised ethnic identities that fuelled the violence then reconciliation will not be attainable.

One of the intentions of this thesis is to present a critical analysis of the humanitarian approaches to justice in Rwanda that do not adequately address the Gacaca courts as a critical response to the failings of the ICTR. Given this, it becomes evident that the failings of the tribunal are not only institutional, as many have repeatedly identified, but normative as well. This argument speaks not only to the appropriateness of international criminal law in response to mass violence but also to the difficulty of attempting local reconciliation through an international tribunal.

The second intention is to recontextualise the positive and negative aspects of Gacaca in terms of the Rwandan context. This context is one that sees justice as highly politicised and ethnocratic. Much of the reporting on the Gacaca courts is positive, looking past its legal and human rights shortcomings and arguing that it is “good enough”. Those in human rights organisations and adherents of international law remain critical of Gacaca’s violations of due process and lack of capacity. The purpose here is to highlight how the political agenda of the government is more important than an adherence to a justice paradigm. Additionally, the purpose is to caution against unconditional approval of the Gacaca courts merely because they appear to be indigenous.
This thesis addresses two fundamental questions in regards to the Gacaca courts. First, why was Gacaca chosen by the Government of Rwanda to be resurrected from an indigenous process of dispute resolution to be used as an appropriate mechanism for prosecuting genocide cases? Gacaca is needed both to accommodate the institutional failures of the ICTR and the limited capacity of the national Rwandan courts with respect to prosecuting genocide suspects. It will be argued that the need for Gacaca also represents a meta-theoretical challenge to international criminal law that extends beyond the practical and institutional failures of its tribunals. Gacaca represents a mitigation of the normative failures of international criminal law, positing a restorative instead of a retributive justice that is relevant to post-genocide Rwanda.

Second, what potential contributions and dangers does Gacaca hold for the post-genocide reconciliation process, based on its institutional characteristics and normative foundations? As an indigenous and “grassroots” process Gacaca has been sanctioned by the international community for its potential contributions to reconciliation for several reasons, such as the participation of respected community leaders and victims in the trial and sentencing process that will see the reintegration of many genocide suspects. These aspects qualify Gacaca as a form of restorative justice that is appropriately contextualised to a post-genocide society where victims and perpetrators coexist in the same social and political space. However, there are several elements to the Gacaca process that threaten its restorative capabilities and are the consequence of the current Kagame government’s Tutsi ethnocracy: the lack of prosecution for RPF crimes and consequent appearance of “victor’s justice” instead of “survivor’s justice”; the ethnic delineation of participants, i.e. Hutu defendants and Tutsi witnesses and victims; the violations of its indigenous principles; and the lack of grassroots comprehension and formal mechanisms for the reintegration of genocide suspects who will have plea-bargained out of their conviction.
Analytical Framework: The Justice and Reconciliation Dynamic

The concept of "justice", specifically in the context of post-conflict reconciliation, can have many descriptive qualifiers that denote different rules, procedures, and goals. Additionally justice paradigms assign different parties to the roles of architects and beneficiaries of the judicial process. Ultimately these categorizations are not mutually exclusive as the intended beneficiaries and architects of a judicial process are reflected in the rules and procedures, and vice versa. For both the ICTR and Gacaca courts, the architects of each system have accorded different notions of legitimacy to the process through various institutional characteristics and normative pillars. However, the intentions of these architects have tainted the legitimacy of each process with the ultimate consequence of making their goals unattainable.

The architects of the ICTR, the international community, have constructed a tribunal that follows the rules and procedures of retributive justice that seeks to end a culture of impunity. Retributive justice is punitive, focussing on the adversarial relationship between defence and prosecution. Success can be measured by the fairness of the process and the equality and proportionality of the sanctions (see Table 1.1).¹ This type of justice is deemed by the international community to be an appropriate response to the Rwandan genocide. It follows as part of an atrocities regime that converges international criminal law with crimes against humanity and human rights abuses. As will be shown, the ICTR is ultimately an institution whose goal is a political justice. Despite its mandate to promote reconciliation, it is designed to satisfy its architects by exacting punitive measures against the elite criminals of the genocide. Thus the politicised nature of retributive justice has allowed for the architects of the ICTR to also be its only beneficiaries, leaving Rwandans unaffected and unreconciled by its measures.

Restorative justice is the alternative to retributive justice and the Gacaca courts exhibit its characteristics. The goals of restorative justice are to repair the harm, heal the victims and community, and restore offenders to a healthy relationship with the community. Success is measured by the value of the offender to his/her community after reintegration and the level of emotional and financial restitution for the victim(s) (see Table 1.1). Furthermore, restorative justice can be differentiated from retributive justice with its focus on reintegrative shaming over guilt and its impact on reconciliation: “Reintegrative shaming means that expressions of community disapproval, which may range from mild rebuke to degradation ceremonies are followed by gestures of reacceptance into the community of law-abiding citizens.”

Table 1.1 Justice Paradigms

<table>
<thead>
<tr>
<th></th>
<th>Retributive Justice</th>
<th>Restorative Justice</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Definition of Crime</strong></td>
<td>Crime is a breach of a rule created by the sovereign</td>
<td>Crime is a disruption of community harmony and relationships</td>
</tr>
<tr>
<td><strong>Participants</strong></td>
<td>Crimes should be addressed by professionals who are not connected to the victims or the offender.</td>
<td>Crimes should be addressed in the community by the community, the victim and the offender.</td>
</tr>
<tr>
<td><strong>Primary Focus</strong></td>
<td>Focus on defendant.</td>
<td>Equal focus on offender, community and victim.</td>
</tr>
<tr>
<td><strong>Sentencing Goals</strong></td>
<td>Vindicate social values, deter defendant and others, isolate defendant from community, rehabilitate defendant if possible. Primary beneficiary is government, secondary is society and tertiary is the victim.</td>
<td>Repair the harm, heal the victim and community, restore offender to healthy relationship with community through offender accountability, encourage community to take responsibility for responding to crime.</td>
</tr>
<tr>
<td><strong>Measures of Success</strong></td>
<td>Fairness of process; equality and proportionality of sanctions (i.e. sanctions are related to seriousness of crimes and similarly situated offender receive uniform sanctions).</td>
<td>Emotional and financial restitution for victims, restoration of community harmony, return of offender to valued role in community and low recidivism.</td>
</tr>
<tr>
<td><strong>Rwandan Context</strong></td>
<td>International Criminal Tribunal for Rwanda</td>
<td>Gacaca Courts</td>
</tr>
</tbody>
</table>

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2 Ibid


The Gacaca courts largely fall under the rubric that characterises restorative justice. Its positive aspects of communitarianism, reintegration, victim participation, etc., advance the goals of social justice versus the political justice of the ICTR. However, with the Tutsi dominated Rwandan government as Gacaca's architects, the ability of the courts to provide for reconciliation is undermined. As will be shown, the institutional procedures and the norms underlying Organic Law\(^5\) render Gacaca a victor's justice instead of a survivor's justice. This will reinforce ethnic cleavages as the beneficiaries of Gacaca justice will not be survivors, but the government as the architects.

Ultimately these two justice paradigms serve very different purposes, interests, and actors in a post-conflict reconciliation agenda. Many doubt the utility of dichotomising these two paradigms as many judicial responses to criminal violations incorporate notions of both punishment and rehabilitation, either for an individual or a community. However, in the Rwandan context the retributive and restorative paradigms are closely tied to the intentions and design of ICTR and Gacaca respectively. Is then worth questioning how, despite the different approaches, both paradigms of justice can fail?

It is important to note that both the ICTR and Gacaca courts have stated the goal of reconciliation in their mandate. The relationship between justice and reconciliation raises questions of appropriateness and perceptions. The first question then becomes, which paradigm of justice is most appropriate in providing for reconciliation? A review of the institutional failures and norms underlying the ICTR suggests it is likely that the restorative model of Gacaca will be more successful in this endeavour. However, there is an implicit assumption within justice theories and the rhetoric surrounding reconciliation that if justice is perceived to be carried out it will be naturally followed by reconciliation. This begs the question of what perceptions of justice are based upon? What becomes apparent is the importance of the

\(^5\) Organic Law governs the prosecution of genocide crimes and will be discussed in greater detail in chapter four.
beneficiaries and architects. As the ICTR and Gacaca both state reconciliation as a goal, the beneficiaries of the justice they provide should be the surviving Rwandan population. The perception of justice in using both paradigms can be corrupted by the characterisation of the architects. Both the international community and the Tutsi-dominated Rwanda government have threatened the success of the paradigms of justice they espouse.

It is from this framework of comparative justice paradigms, the relationship between justice and reconciliation, and ultimately the importance of politics over a rigorous adherence to paradigms of justice, that this thesis will proceed. There are four chapters following this introduction. The second chapter, “The Rwandan Context” provides a brief overview of the facts of the genocide and more importantly of the many discourses that have surrounded the historicisation of the genocide and the post-genocide reconciliation process. This section uses Mark Drumbl’s “dualist post-genocide society” typology to map out the various social, political and judicial issues that present day Rwanda faces. The third chapter, “Politicised Retributive Justice: The International Criminal Tribunal for Rwanda” begins with an outline of the purpose and development of the ICTR. This is followed by a well documented, description of the institutional failures of the tribunal. Subsequently, this paper turns to a discussion of the importance of norms in international criminal law. These norms posit retributive justice as the “appropriate” response to mass violence that has limited, if not threatened, the reconciliation process in Rwanda.

The fourth chapter, “Gacaca Courts: The Manipulation of Indigenous Justice for Reconciliation”, has three goals. The first is to trace the indigeneity and modernisation of Gacaca as conceptualised by Organic Law. The second is to comment on the progress of Gacaca and its perception among Rwandans. Third, and most importantly, is to contextualise Gacaca as a restorative justice that carries the possibility of mitigating the normative failures of the tribunal and holds hope for reconciliation. The positive and reconciliatory aspects of Gacaca lie in its
characterisation as indigenous tradition and the perceptions among Rwandans that justice is possible outside of the retributive model.

The fifth and chapter, "Victor’s Justice: The Tutsi Ethnocracy and the Politicisation of Gacaca" presents a significant caveat to the restorative justice paradigm. This chapter first addresses and largely discounts the majority of criticisms levelled at Gacaca that are based on international standards of human rights and criminal law. This discussion is followed by the application of the "victor’s justice" concept to the characterisation of the current government as a Tutsi ethnocracy. This label is justified by examining the history of the RPF as guided by notions of Tutsi power and survival. The final sections apply this concept to ability of Gacaca to reconcile Tutsis and Hutus. It posits that the ethnocratic nature of Gacaca’s architects, the Kagame government, have manipulated the indigenous and restorative attributes of the courts. This is the single most important caveat to the success of Gacaca in providing for reconciliation: it is the Tutsi ethnocracy and not the violations of the norms of international criminal law that threaten justice in post-genocide Rwanda. The abuse of Gacaca for a political agenda enables it to be better characterised as “victor’s justice”. The sixth and concluding chapter suggests possible avenues for further research, new perspectives on the Gacaca courts, and future prospects for the success of failure of this approach.

Preventing the resurgence of ethnic violence in Rwanda does not solely depend on “ending impunity” or an adherence to the most appropriate paradigm of justice. The Gacaca courts operate within a framework of reconciliation policies that will be assisted by the mitigation of poverty levels, reintegration of displaced persons, resolution of conflict in the Great Lakes region, and the fairness of upcoming parliamentary and presidential elections. What is important to recognise is that reconciliation is not possible without a perceived and legitimate effort to end the “culture of impunity” that Rwandans see as a potential trigger for future violence. Additionally, it is important to contextualise justice within the reconciliation
framework and specifically as a politicised process. The Gacaca courts are anything but isolated from the dangers of ethnocratic politics and the desires of many to exact revenge from within the justice process itself. Gacaca has been characterised as somewhat of a last resort, therefore its failure, if a result of ethnocratic politics, is a threat to the entirety of the reconciliation process.
II. The Rwandan Context

The story of the Rwandan genocide is one that has been told many ways and the historicisation of the events surrounding the genocide has played a crucial role in the formulation of reconciliation policies. Almost a decade later there exists several competing discourses on the genocide. Differences between these discourses range from disagreement over the facts of daily events and the statistics involving death tolls, rates of sexual violence, and injury, to the language and historical significance employed by each discourse. First, this chapter addresses that an important element in the discourses is the telling of facts or broadly accepted truths of the events of the genocide and the possible explanations for its occurrence. This will be followed by the various elements that contribute to the evolution of discourses, such as the need to individualise mass violence and the prevalence of abusive narratives. Following this, Mark Drumbl’s typology of a "dualist post-genocide society" is used to highlight the important social, political and justice related issues of post-genocide Rwanda.

The Genocide Discourses: Identifying Facts and Truths

Many factors ranging from ethnicity to political economy have been offered to explain the Rwandan genocide that killed approximately 800,000 in the spring of 1994. While labelling the genocide as an "ethnic conflict" is a gross simplification of the factors that mobilized and targeted Rwandans for acts of violence, it is fair to discern that the majority of those killed were Tutsis and some were moderate Hutus. Historically and systematically reinforced by the Belgian colonial administration, Tutsis were hierarchically ordered in society as the superior race. The Tutsis, defined as being of Hamitic origins, were said to have more northern features such as long noses, fingers, lighter skin, and thinner and taller body structures. Hutus, defined as being of Bantu origins, supposedly possessed characteristics such as broad noses, dark skin, and short

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6 Estimates of the number of fatalities during the genocide range from 500,000 to one million; the Rwandan government and the majority of NGOs generally assume the 800,000 figure.
and stocky builds. These characteristics were co-opted by colonial administrators to place Tutsis in positions of higher political and socio-economic authority.

Prior to independence the Belgian administrators turned their favour from the Tutsis towards the Hutu population. As the Hutus represented almost ninety per cent of the population, granting them proportional political status would make the transition to independence appear democratic. The newly disenfranchised Tutsi elite subsequently threatened the success of an ethnically harmonised post-independence Rwanda. This new political climate encouraged the codification of Hutu grievances against the Tutsi resulting in the Hutu Manifesto in 1957. This manifesto also demanded the transfer of political authority solely to the Hutu majority. In 1959, the year of the revolution and independence, many Rwandan Tutsis fled into exile. Decades later Rwandan refugees, primarily in Uganda, attempted repatriation through force and the formation of militias. The most successful militia formed came to be known as the Rwandan Patriotic Front (RPF) under the military leadership of Paul Kagame.

Mobilized by the fear that Tutsis would continue to politically and economically marginalize the Hutus, eventually rendering them extinct, radical Hutu extremists called for the extermination of all Tutsis and those moderate Hutus opposed to the government. The Hutu-led government organized an elaborate propaganda campaign that demonised and dehumanised Tutsis, referring to them as *inyenzi* (meaning cockroaches). A plane crash that killed President Habyarimana marked the beginning of the genocide that witnessed the slaughtering of hundreds

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of thousands of Rwandans. This mass violence was accomplished primarily by machete, at the hands of the Hutu-led Interahamwe militia the government Forces Armées Rwandais (FAR).

The genocide continued for one hundred days between April 6th and July 18th 1994. Formal hostilities ceased with the arrival and victory of the Tutsi-led RPF. While the genocide was undoubtedly well orchestrated by elite Hutu extremists there was also a great deal of complicity necessary for such efficient and widespread massacres to take place. Specifically, the blind eyes of the Catholic Church, and at times the direct involvement of its officials, were an integral component to the impunity of the genocide. Also, the ignorance and apathy of the international community and the lack of political will among member states in the United Nations meant that its own personnel were left in Rwanda with no capability of halting the massacres.

The demographic and socio-economic toll of the genocide was devastating. Rwanda saw five per cent of its population of 8 million bludgeoned, tortured, and hacked to death. Of the 800,000 persons massacred, up to 500,000 of the victims were Tutsis; this resulted in the decimation of more than three-quarters of the Tutsi population. Among those killed, between seventy-five and eighty per cent were males. Additionally, an estimated 500,000 Rwandan

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10 For detailed accounts of the events of the genocide and stories from witnesses and victims, see, African Rights. Rwanda: Death, Despair and Defiance. (London: African Rights, 1995 rev ed.). Also, Philip Gourevitch. We wish to inform you that tomorrow we will be killed with our families: stories from Rwanda. (New York: Picador, 1998) Also, Alison Des Forges. “Leave None to Tell the Story: Genocide in Rwanda” (New York: Human Rights Watch, 1999)


12 Higher figures of 750,000 Tutsis was estimated by Gerard Prunier, however, this is based on a higher estimate of the pre-genocide Tutsi population. Alan Kuperman denotes the difficulty of identifying the precise total of Tutsi deaths because of several factors, including the inability to determine Tutsi from Hutu corpses, and the varying demographics on the number of Tutsis and Hutus prior to the genocide. Kuperman arrives at his figure by using the estimated 1994 population figures that were extrapolated from the 1991 census. This places the pre-genocide Tutsi population at 650,000; the remaining number of Tutsi survivors after the genocide was estimated by aid organisations to be 150,000. See, Alan J. Kuperman. “Rwanda in Retrospect” in Foreign Affairs, January/February 2000.
women, both Tutsi and Hutu, were raped or experienced some form of sexual violence.\(^{13}\) Furthermore, many Rwandan children were rounded up and killed in their schools or homes. Most of those who survived witnessed the killing of their parents and family leaving many orphans and child-headed households. Children were also used as killers. The Interahamwe militia comprised many Rwandan youth who were supporters of the Habyarimana regime. For all Rwandans who survived the genocide, their physical and emotional scarring is an extremely volatile component in society that hinders the reconciliation process.

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Attempts to rationalise the behaviour of those who participated in the killings, the *genocidaires*, encounter the dilemma of whether this kind of evil was organized by elites or swelled from below. The low-tech but extremely efficient massacres, more efficient than the use of Zyklon gas in the Nazi death camps, indicate that the genocide was not solely the product of elite manipulation and orchestration.\(^\text{14}\) The efficiency and specific targeting of particular individuals, orchestrated by an extensive media campaign, was undoubtedly the product of careful planning. Carrying out such a phenomenal extermination indicates an extremely high rate of civilian participation. According to Mahmood Mamdani, individualizing mass violence is necessary to make the genocide “thinkable”.\(^\text{15}\) By contextualising the genocide within history, politics and geography, one is able to explain the “popularity” of the genocide on a state and individual level of analysis.

Likewise, Mark Drumbl individualises mass violence by citing literature that speaks to the definition of “radical evil”: “the kind of collective behaviour that leads to radical evil would not have materialised unless carried out with a high degree of conviction on the part of those who participated in it.”\(^\text{16}\) The dialogue on the causes of the genocide needs to be taken beyond macro-political and economic explanations to the individual level of analysis. This analysis can make a significant contribution to the reconciliation process. This is realised by a focus on the local level for rebuilding communities and relationships as opposed to a state mandated policy of forced unity and national identity. In regard to justice issues, the process that criminalises genocide violence is a process that identifies individuals as perpetrators and victims. Therefore, this individualised approach is a needed adjustment in the genocide discourses.

\(^{15}\) Ibid: 8
The post-genocide era in Rwanda also suffers under narratives that abuse and obscure the history of the genocide. Johan Pottier examines the narrative produced by the international community that, out of guilt, has effectively sanctioned the post-genocide political regime of President Kagame. Pottier’s focus is on the “the pervasiveness and power of clustered narratives that simplify reality to make the post-genocide government of Rwanda and its practices, intelligible, rational and legitimate in the eyes of the world…. (Kigali) knows how to make political capital out of the empathy and guilt that exist within the international community.”

This narrative is having a profound impact on the meagre responses of the international community to Kagame’s military engagements in neighbouring countries and his domestic politics of Hutu-Tutsi reconciliation.

Finally, integral to the discourse on the genocide and the post-genocide era is the use and abuse of language by actors involved and by those who seek to explain and mitigate the effects of the genocide. As Alain Destexhe observes within the context of justice after the genocide, “employing a particular vocabulary can cast doubt on the actual causes of the massacres and foster confused images of the guilty and the victims.”

Categorisation of participants and victims and decisions on the appropriate time frame that encompasses the genocide will have a significant impact on the reconciliation process. Some examples include the distinction between “civil war” and “genocide”, as well as the distinction between “survivors” and “victims” that has confused and tainted policies that address criminal prosecution.

The previous discussion addressed how the new elements in the genocide discourse (the individualisation of participation, the new narratives, and the abuse of language) have the

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18 Kagame has made his case to the international community that Hutus in the DRC are former genocidaires and therefore they are a foreign armed presence that should be removed alongside other foreign militaries, and that the Rwandan government has the right to pursue them to bring them to trial. Similar justifications of “ending impunity” and promoting unity have been made by Kagame to excuse his elimination of political opposition and the imbalance between Hutus and Tutsis facing trial for genocide crimes. This shall be discussed in greater detail in chapter five.
casualty of producing an unintelligible framework of reconciliation in the post-genocide era. As such, the political and justice issues that Rwandans currently face remain unmitigated by those who are capable of manipulating and profiting from this confusion.

**Post Genocide Rwandan Social Geography**

Categorising Rwandan society as one that is simply “post-genocide” is not sufficient for prescribing the proper institutions and tasks necessary for justice and reconciliation. Mark Drumbl has devised a typology of post-genocide societies that characterises them as homogenous, dualist, or pluralist. He argues that Rwanda constitutes a dualist post-genocide society, which therefore requires a mode of justice that is primarily restorative in nature. While this typology does not prescribe a monolithic discourse on all aspects of Rwanda’s current social and political context, it does provide a useful template from which one can weigh the political rhetoric and options for reconciliation against other post-genocide societies. Indeed it serves the argument that not all post-genocide societies are alike in terms of the events that unfolded or the actions required to punish perpetrators and prevent violence from occurring again.

The typology of a dualist post-genocide society entails a specific set of characteristics as outlined by Drumbl (see Table 2.1). The first requires that both groups, victims and oppressors, coexist within the nation-state. Control over power may vary – be it control by the oppressor group, the victim group, a power sharing arrangement between the two, or control by a third party. However, the caveats are whether the group that controls power is numerically significant (radically larger or smaller) in comparison to the victim group and whether it controls economic power. Another variable is the geographic distribution of the two groups. In the dualist post-genocide society both groups coexist in the same areas and a territorial division is not feasible. Finally the level of public involvement in the genocide, including complicity, is an essential

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21 Ibid: 1237-1239.
variable. This takes into account both the number of participants or perpetrators as well as the number of victims and survivors of violence.

The paradox of a society that has experienced "radical evil", citing Kant's description, has two components. A dualist post-genocide society is in danger of genocide occurring again if institutions and civil society are incapable of ensuring that both groups can coexist within the same social and political space. Additionally, institutions that seek to reconcile the two groups must be conscious of the risk that punishment of past violence may incite more violence. Thus moderation in punitive measures may be necessary. Drumbl then makes the argument that in dualist post-genocide societies restorative justice is required over retributive justice to moderate punitive measures and maximise the possibility of reintegration through an emphasis on shame over guilt.

Rwanda is contrasted to other post-genocide societies in this typology (see Table 2.1). Post-World War Two Germany and Austria as well as Kosovo represent homogenous post-genocide societies where the oppressor groups all but eliminated the victims group. Furthermore, Bosnia, South Africa and Iraq are provided as examples of pluralist post-genocide societies where the oppressor group continues to exist with the victim group in addition to a third group, or, there are several victims and oppressor groups.

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22 Ibid: 1239.
23 Ibid: 1253
24 Ibid: 1236-1237
Table 2.1 Typology of Post-Genocide Societies

<table>
<thead>
<tr>
<th>Type of Society</th>
<th>Victim/Oppressor Group Relationship</th>
<th>Other Variables</th>
<th>Society Examples</th>
<th>Suggested Model for Accountability and Justice</th>
</tr>
</thead>
<tbody>
<tr>
<td>Homogenous</td>
<td>Oppressor group has &quot;eliminated&quot; victim group (through death or displacement)</td>
<td>-Control over power (political and economic) -Group in power represents significantly large or small portion of population</td>
<td>Nazi Holocaust, Kosovo, Aboriginal communities in Australia and Canada</td>
<td>International (or successor regime) criminal trials Retributive Justice</td>
</tr>
<tr>
<td>Dualist</td>
<td>Both groups coexist within same nation-state (territorial division not possible)</td>
<td>Geographic Dispersion</td>
<td>Rwanda</td>
<td>Must be sensitive to consequences of punitive measures Restorative Justice</td>
</tr>
<tr>
<td>Pluralist</td>
<td>Oppressor group coexists with victim group and third group; or, several oppressor and victim groups</td>
<td>-Level of Public Involvement in Genocide (extent of public participation and level of victimisation)</td>
<td>Iraq, Bosnia, South Africa</td>
<td>Must be sensitive to consequences of punitive measures Restorative Justice</td>
</tr>
</tbody>
</table>

Rwanda complies with the characteristics of a dualist post-genocide society on all counts. In Rwanda, Tutsis (the victims) and Hutus (the oppressors) both coincide within a nation-state whose population is too dense and land in such shortage that territorial division between the two would be impossible. Additionally, both groups live in the same communities, participate in civil society, and share an identical culture and social status. In terms of power sharing it is the victim group, the Tutsis, who wield the most political power despite being numerically weaker at only ten per cent of the population. In regards to levels of participation, the nature of the genocide and the killing indicate that a large number of civilians participated and large numbers of victims and survivors remain.

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While this typology identifies an important structural approach to understanding Rwandan society in the post-genocide era it does not reveal the intricacies of political and social life that inherently condition any approach to justice and reconciliation.

Post Genocide Rwandan Politics

The genocide produced staggering statistics that indicate the enormity of reconciliation in terms of scope and process: the genocide created an initial population displacement of 1.7 million Hutus fearing reprisals, left 400,000 widows, 500,000 orphans, and 130,000 imprisoned upon suspicion of committing acts of genocide.\(^{27}\) The post-genocide political regime is one that is goal-oriented towards reconciliation through the elimination of a culture of impunity and an aggressive unity agenda. Concerns over the legitimacy of the government’s power is based on the accusation that it promotes a “Tutsified” state under the leadership of the RPF. This is a challenging claim to make as the government itself adheres to a policy of “Rwandaness” that would outwardly deny any ethnic characterisation of the government.\(^{28}\) The success of political liberalisation and reconciliation in Rwandan hinges on the public’s perception of whether the current government represents all Rwandans or only the Tutsi minority who represent the victims of the genocide.

The Government of Rwanda and President Paul Kagame, formerly the military commander of the Tutsi dominated Rwandan Patriotic Front (RPF) opposing the Hutu-led Habyarimana regime during the genocide, have outwardly remained faithful to the pre-genocide Arusha Accords that necessitated power sharing between Hutu and Tutsi political parties. On March 6\(^{\text{th}}\) and 7\(^{\text{th}}\) of 2001 an estimated ninety per cent of registered voters (approximately four

\(^{27}\) Norwegian Helsinki Committee for Human Rights. Prosecuting Genocide in Rwanda: The Gacaca System and the International Criminal Tribunal for Rwanda. International Helsinki Federation for Human Rights. [on-line] [cited 11/30/2002] [available: http://www.nho.no/rapporter/landrapporter/rwandap.PDF]: 11. There is little data indicating the number of Tutsis versus Hutus among widows orphans as the official policy of the post-genocide government is that now everyone is Rwanda. However, given that 75-80% percent of the population killed was male and up to 75% were Tutsis, it can be assumed that a similar percentage exists for those that were widowed or orphaned. Those imprisoned are overwhelmingly Hutus.

\(^{28}\) This accusation is made and supported in chapter five and will be discussed in much greater detail.
millions) participated in the first local elections in thirty-seven years to select 112 district councils. To prevent the election of self-appointed former leaders, voters could cross out candidate names. Additionally, youth and women were voted in on a quota basis and candidates were selected from three separate lists of youth, women, and mayoral candidates.

The National Unity and Reconciliation Commission (NURC) has sought to "create a well-functioning education system, to fight poverty and to develop a common identity without differences." As a result of this Commission, primary school education has become compulsory and free and any elements of racism and the history of conquest have been eliminated from the curriculum. The rhetoric of national unity is espoused with the policy that everyone is Rwandan. Former Commissioner and Executive Secretary of the NURC, Aloisea Inyumba, has stated that its role is to provide a "platform on which Rwandans can air their views about what has divided them in the past and how they can build a united and reconciled Rwanda." To facilitate this role the NURC has undertaken various national exercises to engage Rwandans in "grassroots participatory discussions" and organised a national summit on unity and reconciliation in October 2000.


30 Ibid: 11. While these elections went uncontested by political parties there were concerns over the neutrality and transparency of the election. The National Electoral Commission (NEC) was supposed to have maintained a technical role in facilitating the elections; however, its role expanded to rule on candidacies and supervise all campaigns.


33 Ibid.
As recent as 26 May 2003 Rwanda held a national referendum to approve its new constitution; the result was ninety-three per cent approval among voters. President Kagame has claimed that the new constitution reflects the desires of the Rwandan people for reconciliation by outlining various power sharing arrangements that prevent any one party from assuming too much power, and inciting ethnic hatreds. The approval of the constitution allows for multi-party parliamentary and presidential elections to go ahead as planned at the end of August. According to the Arusha Accords, the signing of a new constitution, and national elections were to take place after five years in 1999. The RPF government postponed it by another four years in order to fully implement the programmes stipulated by the Accords and avoid disruptions to “unity”.

The upcoming parliamentary and presidential elections will take place on the basis of universal suffrage, and despite concerns over ethnic divisionism, will be a multi-party process. There are a three candidates nominated to contest the incumbent President. The approved candidates are the current President, Paul Kagame, former Prime Minister Faustin Twagiramungu, former Member of Parliament Nepomuscene Nayinzira, and the first female presidential candidate in Rwandan history, Alvera Mukabaramba. The candidates contesting Kagame’s leadership are seen to represent the majority Hutu ethnic community. Kagame and Mukabaramba are each backed by their respective parties while Twagiramungu and Nyainzira will run as independents.

34 UN IRIN. “Elections to be held in August and September”. 28 May 2003. [on-line] [cited 05/28/2003] [available: http://allafrica.com/stories/200305280057.html]
35 Ibid.
37 Ibid.
38 Ibid. Kagame has received the support of four political parties apart from his own, and Twagiramungu hails from the Mouvement Democratique Republicain opposition party that was recently banned by the Kagame government for promoting a divisive ideology. This will be discussed in further detail in chapter five.
Post-Genocide Rwandan Justice

The restorative justice that is needed in Rwanda is evenly matched by a post-genocide dualist society’s desire for punitive action. However, the country’s fledgling judicial system was all but destroyed in terms of personnel and infrastructure by the spring of 1994. The genocide witnessed the targeting of elite Tutsis and Hutus that were not adherents of the extremism in the Habyarimana regime. The judiciary was a primary target and the genocide eliminated all but 244 out of a previous 750 judges, with many of the survivors fleeing into exile.\footnote{Elizabeth Neuffer. \textit{The Keys to My Neighbor’s House: Seeking Justice in Bosnia and Rwanda.} (New York: Picador, 2001):257.} The task of rebuilding the justice system was one that had to begin with building infrastructure and accumulating physical and human resources. Courtrooms and offices that had been smashed and furniture stolen, law books and even the country’s code of criminal procedures had vanished, and the Ministry of Justice building had been almost completely destroyed.\footnote{Ibid: 57.} As of 1997 the courts in Rwanda were left to function with only fifty lawyers and a notable absence of infrastructure and administration, specifically Courts of Appeal, in all twelve counties.\footnote{Richard Sezibera. “The Only Way to Bring Justice to Rwanda” in \textit{Washington Post}, April 7, 2002. [on-line] [cited 12/01/2002] [available: http://www.globalpolicy.org/intljustice/tribunals/Rwanda/2002/0407sezibera.htm]} With over one hundred thousand prisoners in Rwanda, arrested under suspicion of committing crimes during the genocide, a national court system that is both capable and extensive is required. As noted by the Rwandan Ambassador to the United States, Richard Sezibera, “even though we had asked the international community to set up a tribunal for Rwanda, we knew that, given the way international bodies work, the bulk of the cases would have to be handled by our own legal system.”\footnote{Ibid}

The national court system in the few years following the genocide was consumed with a rehabilitation that would cost tens of billions of dollars. In addition to reconstructing infrastructure, there was an “accelerated training of its staff, starting with those working at the
beginning of the penal process (criminal police inspectors)." Furthermore, the Nyabisindu Judicial Training Centre was established to train recent law graduates, from the Université Nationale in Butare, in preparation for their responsibilities with the influx of genocide cases. By 1997, after the establishment of the Rwandan Bar Association and the development of "Organic Law", the first genocide cases were tried. (The components and importance of Organic Law is an area to which this paper will return to within the discussion of the Gacaca courts) However, despite an influx of lawyers and some assistance from the international community the Rwandan national courts will never possess the capacity to prosecute all the prisoners awaiting trial on genocide charges. In a speech to the Rwandan Bar Association in 2002, President Paul Kagame stated: "justice delayed is justice denied.... And our legal system is not meeting the challenges of transforming our society."

Human rights and justice have not enjoyed a viable working relationship in Rwanda. The government has opted for having large joint trials to reduce the backlog of cases. The result is that over a hundred suspects can be sentenced within the same trial. As of August 2003, the Ministry of Justice stated that 6,500 of the 130,000 imprisoned had been sentenced for genocide cases in the national courts, 700 have received the death sentence and twenty-three had been executed. Even a judicial system in a western country could not handle such a large number of cases and be sensitive to due process. The incremental rate of prosecution in the Rwandan national courts has meant that prisoners languish in overcrowded prisons suffering from

44 Ibid  
47 UN IRIN. "Court Sentences 11 to Death for Genocide." 4 August 2003. [on-line] [cited 08/05/2003] [available:http://www.allafrica.com]
malnutrition and disease, serving sentences without due process.\(^{48}\) The Rwandan government has responded to the accusations of human rights violations from prison conditions stating they have no alternative and to continue to follow the "western trial process would take far too long and therefore be a violation of human rights in itself."\(^{49}\) Prosecuting the remaining 110,000 genocide suspects will require either funding from the international community or establishing an alternative form of justice that is complementary to the ICTR and the national courts.

This chapter has contextualised Rwanda as a post-genocide that is focussed on the need for justice to reconcile victims and oppressors. The competing discourses on the genocide have produced a confusing framework for reconciliation that has both individualised and collectivised the mass violence that has occurred. This framework includes a political liberalisation agenda and a strong mandate to prosecute genocidaires. The discourses on the genocide, the typology of Rwanda as a dualist post-genocide society, and the nature of its political and judicial system have all suggested that justice issues are at the forefront of the agenda. The question that continues to be asked in Rwanda is what form should justice will adequately reconcile society? Two models have been presented: retributive and restorative justice. As will be shown in the next chapter's assessment, the failures of the International Criminal Tribunal for Rwanda to reconcile Rwandans are indicative of its inappropriateness as a model of retributive justice.

\(^{48}\) Kagame readily admits to this denial of basic rights for prisoners in his aforementioned speech to the Rwandan Bar Association in 2002.

III. Politicised Retributive Justice: The International Criminal Tribunal for Rwanda

Holding perpetrators accountable for genocide, crimes against humanity, and war crimes has been institutionalised in international ad hoc tribunals and now also in the International Criminal Court. Measuring the success of these institutions is possible by assessing whether the goals set out in the tribunal’s mandate have been met. This chapter first discusses the mandate of the ICTR, its inception, evolution and organisation. Evaluating the tribunal then begins with assessing its progress to date, and its institutional failures due to inefficiency and lack of credibility. The opposition that Rwanda has had to the tribunal’s original mandate and proceedings highlights several sources of tension. Following from the institutional failures, it will be established that there are a set of norms in this institution that suggest it will fail to meet its goals in spite of institutional shortcomings. To illustrate this, the reactions of victims and the Rwandan government to “Arusha Justice” are discussed with reference to cases in the ICTR.

ICTR Mandate and Organisation

The ICTR was established to be a model of international justice. Armed with the support of the international community, the tribunal had the support of those powers that had the largest capability to halt the genocide but had done nothing. During the genocide, members of the international community failed to react for a variety of reasons: the United Nations passed off warnings from General Dallaire as routine; the United States, reeling from its debacle in Somalia, denied that the numbers and nature of the violence constituted genocide; France and Belgium found themselves caught in a history of complicity towards ethnic violence in Rwanda and could hardly feign neutrality. Ironically, the same members of the international community found accountability to be of primary importance to post-genocide reconciliation.

Accountability has taken the form of retributive justice, as institutionalised by an ad hoc international criminal tribunal, to prosecute those who orchestrated the genocide. Upon the Rwandan government’s request the Security Council acted under Chapter VII of the United
Nations Charter to establish the tribunal. The use of Chapter VII is significant as the Security Council uses it to “compel an unwilling State or States to take certain action or to refrain from certain actions with a view to restoring or maintaining international peace and security.” Use of Chapter VII implied that the situation in Rwanda constituted and continued to constitute a threat to peace and security in the region. There were four specific reasons for the Security Council to act under Chapter VII (notwithstanding Rwanda’s request for the tribunal):

a) to provide an effective and expeditious means for the establishment of the Rwanda tribunal  
b) to give the Rwandan tribunal the authority to issue binding decisions with respect to States and individuals within its limited sphere of competence  
c) to ensure the cooperation of Rwanda with the Rwanda tribunal during its life span  
d) to ensure the cooperation of all States with the Rwanda tribunal, particularly with respect to handing over suspects or accused

The Statute of the Rwanda tribunal closely resembles that of the International Criminal Tribunal for the Former Yugoslavia (ICTY). The “Yugoslav and Rwanda tribunals are in effect joined at the hip, sharing not only virtually identical statutes but also some of their institutions.” The debates surrounding both ad hoc tribunals, the procedures, participants’ roles, and norms embodied in them have informed the creation of the International Criminal Court. Additionally it set important precedents with its rulings, jurisdictional capabilities and

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50 The tribunal was established by a Security Council resolution rather than by a treaty or the General Assembly to expedite the process more efficiently and make the process binding for all states involved. This was the same procedure used to establish the Yugoslav tribunal. See, Virginia Morris and Michael P. Scharf. The International Criminal Tribunal for Rwanda. (Volume One). (New York: Transnational Publishers Inc, 1998): 99.  
52 Ibid: 102.  
53 The two statutes are similar with the exception that the war crimes provisions reflect the fact that the Rwandan genocide took place within the context of a purely internal conflict.  
institutional design.\textsuperscript{55} Both tribunals were set up under Chapter VII mandates by the Security Council and are largely overseen by the General Assembly.

The ICTR is composed of three organs: the Chambers and Appeals Chamber; the Office of the Prosecutor, in charge of investigations and prosecutions; the Registry, responsible for providing overall judicial and administrative support to the Chambers and Prosecutor.\textsuperscript{56} Both the Appeals Chamber and the Office of the Prosecutor are located in The Hague. A Deputy Prosecutor to assist with prosecutions before the ICTR is based in Rwanda’s capital, Kigali.\textsuperscript{57} The Chambers consist of three Trial Chambers with three judges each, in addition to the Appeals Chamber which has five judges. All judges were elected from the General Assembly for a period of four years; elections were held in May 1995 for the first two chambers in November 1998 for the remaining judges.\textsuperscript{58} The Prosecutor’s office is divided into two divisions: the Prosecution Division and the Investigations division.\textsuperscript{59}

On 18 December 1994 the Security Council passed Resolution 955 establishing the ICTR, to be located in Arusha, Tanzania. Its charge is to:

Prosecute persons responsible for the genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations in the territory of neighbouring states between January 1\textsuperscript{st} 1994 and December 31\textsuperscript{st} 1994.\textsuperscript{60}

\textsuperscript{55} One such important precedent was the ruling in the Tadic case of the ICTY (2 October 1995) that broadened the jurisdiction of war crimes that includes the possibility that crimes against humanity could be committed during peacetime.
\textsuperscript{57} Ibid: 222.
\textsuperscript{58} Ibid: 223.
\textsuperscript{59} The first Chief Prosecutor for the ad hoc tribunals was Richard Goldstone (South Africa) from 1995-1997, followed by Louise Arbour (Canada) 1997-1999, followed by Carla Del Ponte (Switzerland) 1999-July 2003. Ms Del Ponte was asked by Secretary-General Kofi Annan on 30 July 2003 to step down from her position at prosecutor of the ICTR and her contract as the prosecutor for the ICTY was renewed. As the tribunals are nearing the end of the mandates it has been argued that each requires its own prosecutor to speed up the indictments and trials. See, World Briefing: United Nations. “Annan asks for new Rwanda prosecutor” in New York Times. 30 July 2003.
\textsuperscript{60} Howard Ball. Prosecuting War Crimes and Genocide: The Twentieth-Century Experience. (Lawrence: University Press of Kansas, 1999) 171.
The tribunal's stated purpose, and ultimately the measure of its success, is its ability to
"contribute to the process of national reconciliation in Rwanda and to the maintenance of peace
in the region, replacing an existing culture of impunity with one of accountability."\textsuperscript{61} ICTR
prosecutions differ from those under the jurisdiction of the national courts in Rwanda in that its
indictments were to target the masterminds of the genocide, including those who orchestrated
killings through political, religious or media influence. The tribunal has primacy over the
national courts of Rwanda and accordingly can request a national court to defer cases to it at any
time during its proceedings; likewise it may require Rwanda to cooperate fully in regards to
identifying and locating suspects, producing evidence and documents, access to witnesses, etc.\textsuperscript{62}

\textit{Measuring Success: Institutional Failures}

As of June 2002, upon the release of its Seventh Annual Report, the tribunal had indicted
80 persons of whom sixty had been arrested and twenty remained at large; of the sixty
imprisoned eight have been sentenced, one acquitted and the remainder are in ongoing trials or
await trial in custody.\textsuperscript{63} In the year following the tribunal improved its efficiency. As of July
2003 the tribunal has completed fourteen cases involving fifteen accused.\textsuperscript{64} The tribunal expects
to have twenty-two judgements completed by the end of 2003 or early 2004.\textsuperscript{65} In May 2003 the
tribunal handed down its first war crimes conviction in the case of George Rutaganda; at the time
of the genocide he was a businessman and a political leader in charge of the Interahamwe militia
group.\textsuperscript{66}

\textsuperscript{61} ICTR. "The Tribunal at a Glance." \textit{International Criminal Tribunal for Rwanda}. [on-line] [cited 12/01/2002]
[available: \texttt{http://www.ictr.org}]
\textsuperscript{62} Olivier Dubois. "Rwanda's National Criminal Courts and the International Tribunal" in \textit{International Review of
the Red Cross}. December 31, 1997. [on-line] [cite 05/21/2003]
\textsuperscript{63} ICTR. \textit{Seventh Annual Report of the International Criminal Tribunal for Rwanda}. United Nations General
Assembly, 2 July 2002. [on-line] [cited 12/01/2002] [available:
\texttt{http://www.ictr.org/wwwroot/ENGLISH/annualreports/a57/163e.pdf}], 2
\textsuperscript{64} Hirondelle News Agency. "ICTR Expect to have 22 Judgements Completed by End of 2003." 17 July 2003. [on­
line] [cited 08/05/2003] [available:\texttt{http://www.allafrica.com}]
\textsuperscript{65} Ibid
[cited 06/02/2003] [available: \texttt{http://allafrica.com/stories/200305271129.html}]
The ICTR is also the first of its kind to receive the Friederich-Ebert Stiftung Human Rights Awards in May 2003; the award was conferred in acknowledgement of the "ICTR’s unwavering support for the due process of law, and its contribution to the goal of national reconciliation following the Rwandan genocide."\textsuperscript{67} Despite this recognition, the success of the ICTR to bring the perpetrators to justice and to promote reconciliation has been negligible. International support has waned as the ICTR remains in the shadow of the high profile and more efficient trials of the ICTY.

To assess the ICTR is to evaluate it for its contribution and adherence to international criminal law and its inherent punitive goals in regards to crimes against humanity, war crimes and genocide. Additionally, as its mandate states, the tribunal has a national purpose and must be evaluated for its contribution to the reconciliation process and assurance of peace and stability in Rwanda. As the tribunal continues to prosecute those who orchestrated the genocide at an elite level, it fulfils its international responsibility. However, the continued resistance to the tribunal from the Rwandan government and indifference from Rwandan citizens signals a failure in its national purpose. As will be shown, these failures are both institutional and normative in nature. The ICTR’s institutional shortcomings are widely recognized. It is the ICTR’s adherence to international criminal law that has prevented the tribunal from meeting its goals of reconciliation for Rwanda.

It is important to note the Rwandan government’s initial reservations about the ICTR at its inception are consistent with the challenges the tribunal continues to experience. The Rwandan delegation to the UN was sitting on the Security Council when Resolution 955 was passed and cast the sole vote against it. Rwanda’s opposition to the structure and purpose of the

\textsuperscript{67} Ibid
ICTR can be categorized into pragmatic, political, and philosophical differences that highlight both the institutional failures and normative limitations of the retributive justice.68

Pragmatic issues were the stimulus to Rwanda casting an opposition vote to Resolution 955. The tribunal is situated in Arusha to avoid the appearance of "victor's justice" had it been placed in Kigali and the Rwandan government objected to its geographic isolation. An additional objection concerned the time frame stipulated for ICTR prosecutions of January 1 to December 31, 1994. Rwanda's objection was that Hutu planning of the genocide began in 1990 and thus the ICTR is unable to prosecute those individuals involved prior to 1994.69 Furthermore, the Rwandan government expressed concern over the poor staffing and structure of the tribunal and particularly the sharing of a prosecutor with the ICTY. The Rwandan government also opposed the ICTR prosecuting cases that fall within the jurisdiction of Rwandan national courts and desired that those indicted serve their sentences in Rwanda. The government enumerated its position on these issues to the UN in a formal position paper that stressed the potential inefficiency and lack of credibility of the tribunal.70

Accusations of inefficiency have been strengthened with the realization that while the tribunal's budget has grown from $29 million (US) in 1996 to $79 million (US) in 2000, it has only prosecuted a handful of defendants over the course of its mandate.71 Furthermore, its credibility has been seriously damaged with accusations of racism, corruption and the revelation that defence teams employed four genocide suspects.72 Bureaucratic and institutional delays in

72 An indication of the loss of credibility has been the denouncement of the tribunal by the genocide survivor’s group, IBUKA.
the tribunal’s proceedings prompted the UN to assign a commission of experts to evaluate the ICTR and ICTY. The commission’s report, released in 1999, identified multiple reasons for trial delays including mistakes in indictments, constant adjournments, confusion among prosecutors about case responsibility, and the grouping of trials by themes resulting in delaying tactics by defence attorneys.\(^73\)

The Rwandan government’s working relationship with the ICTR has been a mixed bag of cooperation, indifference and opposition. Cooperation from the government has stemmed from the ability of the tribunal to apprehend suspects who fled to other countries and the desire to gain legitimacy with the international community so that it may gather assistance for its national judicial system. The former ICTR Prosecutor, Carla Del Ponte, rebuked the Rwandan Government in the summer of 2002 for its “failure to provide government records...failure to cooperate in investigations of violations of the international law by the RPF in 1995” and the introduction of travel regulations that have prevented key witnesses from travelling to Arusha to testify.\(^74\) Aside from government opposition, the genocide survivor’s group, IBUKA, advised witnesses to boycott the tribunal after an episode in which three judges began laughing during the testimony of a rape victim.\(^75\)

The primary political dispute between the ICTR and the Rwandan government stems from the international community’s failure to intervene in the genocide. Furthermore, the post-genocide involvement of the international community’s humanitarian assistance to Hutu refugees

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\(^73\) Elizabeth Neuffer. The Key To My Neighbor’s House: Seeking Justice in Bosnia and Rwanda. (New York: Picador, 2001), 386.


\(^75\) The “laughing episode” occurred in January 2002 during the so called Reverence Case of Butare.
and the UN’s hard line against Rwanda in the ongoing civil war in the DRC have further eroded the working relationship between the government of Rwanda and the international community.\textsuperscript{76}

The tribunal has made modest attempts, primarily through the establishment of an Arusha Information Centre in Kigali, to inform Rwandans of the prosecutions and indictments from the trials. Additionally, Internews, a non-profit organization that provides daily print media reports on the ICTR and ICTY, produces video diaries on the proceedings in the ICTR to bring to Rwanda for viewing in communities and prisons.\textsuperscript{77} However, most Rwandans hear little of proceedings and few have access to electronic or print media; living in remote areas, they rely on inconsistent radio reports and rumour. As an institution, the tribunal has yet to find relevance or assuage injustice within Rwanda communities.

\textit{Measuring Success: Normative Failures}

What has come to be known, indifferently, as “Arusha Justice” is not only a consequence of the inefficiency and remoteness of ICTR proceedings. The irrelevance of the ICTR to Rwandans is also a result of the normative underpinnings of the international criminal law system. The constitutive, regulatory and evaluative norms of international criminal law prescribe a justice that does not properly contextualise it as a response to the Rwandan genocide. Beyond it being an inappropriate legal response, in terms of providing a retributive versus a restorative justice, the ICTR is a foreign imposition of cultural values of reconciliation that is at odds with Rwandan society. As the Minister of Justice noted, “the Rwandan people know this is the same international community that stood by and watched them get killed.”\textsuperscript{78}

When assessing the ICTR many have acknowledged that it has struggled through the institution building process, especially in comparison with its sister tribunal in The Hague.


\textsuperscript{77} See, Internews [on-line] [available: http://www.internews.org/activities/warcrimes/warcrimes.htm]

Following from this, if its demise becomes a reality many will falsely attribute it to such institutional failures. However, the issue that needs to be addressed is the “appropriateness” of retributive justice as a response to reconciling communities that have experienced mass violence. As the ICTR represents a segment of a larger atrocities regime that criminalises mass violence, its normative failures have widespread implications for justice in Africa.

The concept of norms occupies a great deal of the discussion on regimes and institutions, how they influence behaviour, and are shaped by states’ interests. It is important here to distinguish between an institution and regime and the relationship between the two: institutions feature the “conjunction of convergence expectations and patterns of behaviour or practice...regimes aid the institutionalisation of portions of international life by regularizing expectations.”  

A broadly accepted definition, a norm is recognized as a “standard of appropriate behaviour for actors with a given identity”. Furthermore, norms can be conceptually differentiated as constitutive (defining actors identities), and regulatory (defining standards of appropriate behaviour). A third categorisation of norms is for those that are evaluative or prescriptive, emphasising notions of morality that set them apart from regular rules. It is the prescriptive norm that carries with it a sense “oughtness”, reflecting the moral convergence of states whose behaviour conforms to these norms.

Appropriately dichotomising these types of norms by their refined definitions does not shed as much light on the norms of international criminal law as does the notion of “appropriate” behaviour that they share. The sense of “oughtness” that is inherent in prescriptive norms represents a “shared moral assessment” by a community or society that allows us to identify

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82 Ibid: 5.
norm-conforming and norm-breaking behaviour. While the constitutive and regulatory norms that follow from the institutionalisation of international criminal law in a tribunal are significant, it is more significant in this context to note that the prescriptive norm at play: retributive justice is an "appropriate" response to criminalise mass violence and the subsequent assumption of its reconciliatory value for the victim society.

The rationale behind retributive justice and the trial process as an appropriate response to the genocide stems from the recognition that the ICTR is part of the complex and broadly defined "atrocities regime". This regime reflects norms based on human rights and the disciplinary convergence of international relations theory and international law. It has three distinct features: the distinction between interstate and intrastate violence; the emergence of norms that govern abuses in peacetime and wartime; the appropriate legal response to criminalising mass violence and ending impunity is retributive justice (as institutionalised by the ad hoc tribunals and the new International Criminal Court). In light of the distinction between an institution and a regime, it should be noted that the ICTR possesses many of the same characteristics and normative assumptions of the atrocities regime. However, it also exhibits various normative and regulatory variations that were meant to better contextualise it to the Rwandan genocide.

Prescriptive norms are useful for identifying norm-breaking and norm-conforming behaviour. Norm-breaking behaviour generates disapproval or stigma from those who adhere to it while norm-conforming behaviour generates praise or is taken for granted. The concept of a "normative failure" is used here to indicate something different from norm-breaking behaviour.

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83 Ibid: 892.
that implies a change in policy process. A normative failure employs the notions of appropriateness in prescriptive norms; a failure indicates that the norm is in fact inappropriate in a particular context. The failure of norms in this context has resulted in two things. The first is that the inappropriateness of the norms results in the failure of the institution that embodies these norms to meet its stated goals. The second is that it generates norm-breaking behaviour in the state where it is inappropriately applied. Therefore, in this case the normative failures of the ICTR has meant that it will not meet its reconciliatory goals and has generated a response from the Rwandan government who has implemented a justice mechanism that does not adhere to norms of criminal law.

The identification of the normative failures of the tribunal is not always easily distinguished from the institutional failures. For example, the location of the ICTR in Arusha, Tanzania reflects a poor choice in institutional design. Its remote location and distance from Rwanda have slowed down trials due to transportation difficulties for witnesses and poorly established lines of communication with government officials in Kigali. However, it also reflects the norm that such trials must avoid the appearance of "victor's justice". The tribunal had to be located outside of Rwanda where those who militarily ended the genocide were in power.

The norms that underscore the operations and goals of the ICTR are consistent with the components of international criminal law and the atrocities regime. The remainder of this chapter will provide examples from Rwanda of their difficulty in accepting the following norms that are embodied in the ICTR:
Table 3.1 Norms of the ICTR

<table>
<thead>
<tr>
<th>Institutional Component</th>
<th>Prescribed Norm(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Justice Paradigm</td>
<td>Retributive Justice</td>
</tr>
<tr>
<td>Goal</td>
<td>Justice to end impunity; reconciliation is secondary</td>
</tr>
<tr>
<td>Venue</td>
<td>Isolation from participants; avoid victor's justice</td>
</tr>
<tr>
<td>Due Process</td>
<td>Primacy of rules and procedures; defendant’s rights</td>
</tr>
<tr>
<td>Establishing Guilt</td>
<td>Judgement</td>
</tr>
<tr>
<td>Burden of Proof</td>
<td>Testimony; investigation</td>
</tr>
<tr>
<td>Compensation for victims</td>
<td>None</td>
</tr>
<tr>
<td>Judiciary</td>
<td>Independent</td>
</tr>
<tr>
<td>Punishment</td>
<td>Imprisonment; no death penalty</td>
</tr>
<tr>
<td>Process</td>
<td>Trials</td>
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The vast majority of these norms conflict with those of institutions adhering to a restorative justice paradigm. Some are more significant than others such as the venue, the independence and neutrality of the participants, and the method of punishment. However, the overarching dilemma among this list of norms is that retributive justice is not capable of making a significant contribution to reconciliation. In the case of the ICTR, the justice paradigm that it adheres to is incompatible with one of the goals of the institution.

The difficulty in assessing the norms of the ICTR is in regards to its “appropriateness”. Many of its “internationalised” norms clash with domestic norms of justice and reconciliation in Rwanda. The practical, political and, to be discussed, philosophical opposition to Resolution 955 displayed by the Rwandan government was the first indicator that the tribunal would face more than the garden variety institutional constraints of coordination and financing. Furthermore, the reactions of genocide suspects and victims to the ICTR throughout its proceedings have intensified the notion that “Arusha Justice” is anything but appropriate.

Many of the political and pragmatic concerns that were expressed by the Rwandan government in opposition to Resolution 955 have been realised. However, the basis of their philosophical opposition to the tribunal is only now becoming apparent. This type of conflict is an inherent problem of having concurrent jurisdiction between the Rwandan national justice system and the ICTR: “The origins and orientations of these two modes of justice have created a
barrier that renders it difficult for either side to accept the other side’s judicial process as fully legitimate even when formal cooperation exists."\(^{86}\)

An example of the philosophical tension in the application of concurrent jurisdiction is the use of the death penalty. The ICTR, prosecuting the most elite perpetrators of the genocide, cannot hand down sentences of capital punishment out of an adherence to the norms of international humanitarian law. The Rwandan national justice system, which also prosecutes those suspected of organizing and carrying out the genocide, considers the death penalty to lie at the “heart of what it means to deliver justice for victims and survivors of the genocide.”\(^{87}\) While the local Gacaca courts do not handle categories of defendants who could be sentenced to death, the national Rwandan courts do and considers it necessary for such sentencing to be widespread across cases involving the upper echelon of genocide perpetrators. The law concerning genocide prosecutions, Organic Law, makes the death penalty mandatory for any category one offenders.\(^{88}\)

On 24 April 1998 twenty-two men and one woman were the first to be publicly executed in Rwanda upon conviction of genocide crimes.\(^{89}\) Despite appeals from the international community to call off the public executions, public radio in Rwanda called on the people to “come and see the punishment with their own eyes.”\(^{90}\)

There is an additional normative tension that has become apparent since the various mechanisms of justice, nationally and internationally, have been put in place. The tension (one to which the Rwandan government would not likely admit to) is the politicisation of justice in Rwanda versus the impartial and universal norms of justice in the ICTR. The norms of


\(^{87}\) Ibid: 132.

\(^{88}\) Amnesty International. “Rwanda: Why the death sentences imposed on prisoners found guilty of genocide should be commuted in Rwanda.” 1 March 1997. [on-line] [cited 06/12/2003] [available:http://web.amnesty.org/library/print/ENGAFR470121997].

\(^{89}\) BBC News. “From butchery to executions in Rwanda” 27 April 1998. [on-line] [cited 06/12/2003] [available: http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/84120.stm]

international criminal law prescribe that defendants are innocent until proven guilty. They are accorded due process and protection of their individual rights both as defendants and convicted criminals. Under Rwandan Organic Law each genocide suspect is categorized according to the severity of the crime they committed. Categorization of crimes in this way presupposes the defendant’s participation in the genocide and runs contrary to the norms of international criminal law. Furthermore, the tendency to assume participation in the genocide has led to blame being generalized among the Hutu population.

The above examples of the death penalty and due process expose the normative tension that exists between the concurrent legal jurisdictions of the Rwandan national courts and the ICTR over genocide crimes. Additionally, both examples are indicative of the hostile and controversial political environment in which the national courts in Rwanda have been operating. More telling of such normative differences between jurisdictions will be the following examples of the reactions of Rwandans and the government to ICTR cases.

The case of Jean-Paul Akayesu was a monumental achievement for the tribunal while also demonstrating the disconnect between legal proceedings and justice for victims. In September 1998 the ICTR found Akayesu, a former mayor, guilty of nine counts of genocide, crimes against humanity and war crimes. The judgement rendered in this case was significant for several reasons: it was the first conviction by the ICTR; the first conviction for genocide by an international court; the first time that an international court had punished for crimes of sexual violence; the first time that rape was found to be an act of genocide. Sexual violence took many

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92 ICTR. “The Prosecutor versus Jean-Paul Akayesu (Case no. ICTR-94-4-T: Judgement”, [on-line] [cited 06/13/2003] [available: http://www.ictr.org]

While international criminal law has always encompassed crimes of sexual violence, international courts have been reluctant to prosecute these crimes. The Military Tribunal for the Far East (the Tokyo Tribunal) did convict
forms during the genocide as many women were individually or gang-raped, raped with crude objects, held in sexual slavery or mutilated. During Akayesu’s trial many women were called forward as witnesses to testify that they had been raped, collectively and individually, in full view of Akayesu. They also testified to witnessing Akayesu encouraging acts of sexual violence by saying to rapists, “don’t complain to me now that you don’t know what a Tutsi woman tastes like.”

Not surprisingly, many women who suffered under Akayesu’s watchful eye were eager to see his conviction. However, the remote location of the tribunal and the process of trial prosecutions left them with an unsatisfied view of justice. Witnesses who participated in Akayesu’s trial, once back in Rwanda, were not kept informed of the trial’s proceedings and had to rely on inconsistent radio reports and rumours for information. Amongst other women who are widows and victims of the genocide, one woman stated, “we have to feel that justice had been done in order to forget and move on...why won’t the UN let us have that justice here?” Additionally, they felt betrayed by the lack of compensation for their losses. Akayesu was sitting comfortably in prison while these women had lost their families, livelihood and were suffering under the social stigma of rape: “There is no justice because Akayesu lives better than us.” As Elizabeth Neuffer writes, after her conversations with witnesses and victims, Rwanda

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Japanese officers of rape, the ICTR conviction represents the first of its kind by establishing the link between sexual violence and genocide. It is worth noting that the initial charges brought up against Akayesu did not include acts of sexual violence. According to HRW this was a product of lack of political will on behalf of tribunal judges and faulty investigative methodology by staff. Under Rwandan and international pressure the Office of the Prosecutor amended the charges in 1997 to includes acts of sexual violence.

94 Targeting women was seen as an efficient way of infiltrating and destroying the Tutsi community; sexual violence was meant to degrade the woman, her family and community making it an essential component to the genocide. See, Human Rights Watch. Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath. (New York: Human Rights Watch / Africa, 1996)


96 Elizabeth Neuffer. The Key To My Neighbor’s House: Seeking Justice in Bosnia and Rwanda. (New York: Picador, 2001), 377

97 Ibid: 379.
craved a justice as intimate as the genocide itself. The need to confront their attackers and hear an admission of guilt was essential for their healing process. Both the location of the tribunal and the nature of providing testimony in a trial process, that renders guilt as a judgement as opposed to a confession, were insufficient in the provision of justice.

The dismissed case of Jean-Bosco Barayagwiza at the ICTR was widely rebuked among Rwandans as indicative of the flaws of the trial process. Barayagwiza was an elite figure during the genocide as he was responsible for establishing Radio Milles Collines, a radio station that propagated hate towards Tutsis and incited Hutus to participate in the genocide. The ICTR decided to dismiss charges against Barayagwiza in November 1999 with the judges ruling that prosecutors had violated his rights given that the defendant had waited one and a half years from the time of his arrest to the time of being charged. In their decision the judges wrote: “As difficult as this conclusion may be for some to accept, it is the proper role of an independent judiciary to halt this prosecution, so that no further injustice results. Nothing less than the integrity of the tribunal is at stake here.”

Subsequently high profile suspects being held for trial in the ICTR claimed similar denials of their rights but with little success. In response to public outrage the Chief Prosecutor asked the tribunal to reconsider and on 31 March 2000 the ICTR revised its position claiming that the extent to which Barayagwiza’s rights were denied did not justify his release.

As there was little question regarding Barayagwiza’s guilt, the initial decision to dismiss his case prompted the Rwandan government to temporarily sever its ties with the tribunal and

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98 Ibid: 373.
victims expressed their outrage. For victims of genocide the release of Barayagwiza based on procedural misconduct was a grave injustice and tantamount to saying that he was innocent. Additionally it raised the question of what “justice” truly means; the tribunal was seen to have made rules and procedures paramount to the provision of punishment for the gravest of crimes. Rwandan Justice Minister, Jean de Dieu Mucyo, described the normative differences between what the international community and what Rwanda considers to be justice.

In Western law, a man can be guilty but released because of some procedures. But in Rwanda, a man who is a criminal cannot be released without being punished. In Rwanda, the meaning is in the fact – not the form, not the procedures. Now can you understand why Rwandans don’t have faith anymore in this tribunal?\footnote{Elizabeth Neuffer. The Key To My Neighbor’s House: Seeking Justice in Bosnia and Rwanda. (New York: Picador, 2001), 375-376.}

This statement not only reflects the particular relationship between Rwanda and the ICTR but also of the perceived failing of the trial process. It demonstrates that “the criminal process may create tensions between victims and due process for the accused, which, in the case of Rwanda, deepen the rift between Tutsi and Hutu.”\footnote{Mark Drumbl. “Punishment, Post-Genocide: From Guilt to Shame to Civis in Rwanda” in New York University Law Review, November 2000: 1285.} The tribunal desires to maximize its credibility as a pillar of justice. However, as the audience it seeks to please is the international community, the integrity of the tribunal is measured by its adherences to the norms of international criminal law. These norms are often inappropriate when applied to post-genocide societies that require both equitably applied punishments not in avoidance of rules and procedures but in spite of them at times.

This chapter has established that the ICTR, as a retributive paradigm of justice, is an inappropriate response to the genocide in terms of providing for reconciliation. The tribunal has exhibited many expected institutional flaws that have been costly to the integrity of international criminal law and the reputation of an international community that seeks to end impunity. However, as this discussion has established, the tribunal was flawed at the outset as it adheres to
a set of norms that render it remote, foreign, and elitist to those that should be the intended beneficiaries of international justice. In the final analysis, despite important precedents for international criminal law, the norms of the ICTR seem to benefit only those who constructed it to mitigate their complicity in the genocide: the international community.

The failure of the tribunal to promote reconciliation in Rwanda has not been met with passivity among survivors or the government. The resurrection of Gacaca courts will attempt such a seemingly impossible goal and demonstrate a radically divergent approach to justice, both institutionally and normatively. The following chapter will discuss Gacaca with respect to several components: its resurrection or construction as a pragmatic solution to the prosecution of genocide suspects in addition to its accommodation for the normative failures of international justice; its prescribed ability, as a mode of restorative justice, to provide for reconciliation; the dangers of its abuse as an indigenous method of dispute resolution that is carefully constructed by a Tutsi ethnocracy to consolidate power for them as the victor’s over the genocide.
IV. The Gacaca Courts: The Manipulation of Indigenous Justice for Reconciliation

The revival of a traditional model of dispute resolution to deal with the over one hundred thousands genocide suspects awaiting trial has received a mixed response both inside and outside of Rwanda. Gacaca, meaning “judgement on the grass”, offers a pragmatic solution. It is expected to relieve the congestion in Rwandan prisons that are the source of many human rights abuses. Additionally, as a community based and indigenous process, it offers hope for reconciliation through the unmasking of hidden truths of the genocide through testimony and the reintegration of genocide suspects back into the community. As such, its positive attributes lie in the characterisation of Gacaca as a restorative justice that mitigates the normative failures of the ICTR.

However, the success of Gacaca in promoting reconciliation does not lie solely with its adherence to a justice paradigm. Those who are critical of Gacaca point to its characteristics that violate the rules and procedures of international criminal law, while those who champion Gacaca’s contribution to reconciliation highlight that justice cannot be achieved through an adherence to such foreign standards of legality and judicial process.

This chapter will begin with a description of what is known about the origins of Gacaca. While few historical facts on this indigenous dispute resolution process are known, there is enough information in the Gacaca literature to identify some key similarities and differences between the modernised and traditional forms. This will be followed by a discussion of the Organic Law that governs the prosecution of genocide crimes and the justice and reconciliation agenda. Organic Law is put into the perspective of the government’s intentions and the actual operations of the courts. An analysis of the progress of Gacaca’s trials (or mostly pre-trials) will then highlight many of the political and social obstacles that the courts have faced since the inception of Organic Law. Following this, the argument will be made that Gacaca, if it remains
true to its indigenous principles, adheres to the paradigm of restorative justice; given this it can mitigate the norms of the ICTR that have not affected reconciliation.

Origins of Gacaca

While Gacaca has received commendation for its indigeneity, the modernised version does not adhere exclusively to its traditional form. In its precolonial form Gacaca was used to moderate disputes concerning land use and rights, cattle, marriage, inheritance rights, loans, damage to properties caused by one of the parties or animals, and petty theft. Major disputes, including more serious offences such as theft or murder, were put before the king (mwami). The objectives of traditional Gacaca had less to do with establishing guilt or exacting punishment and more to the restoration of social order. Gacaca intended to “sanction the violation of rules that are shared by the community, with the sole objective of reconciliation” through restoring harmony and social order and reintegration of the person who was the source of the disorder. Additionally, at times compensation was awarded to the injured party.

Gacaca was not initially formally institutionalised or attached to any state structure with an administrative component. It was simply a meeting that was convened by elders whenever there was a dispute between individuals or families in a community. The elders guided the discussion, which involved participants either of one family, several families, or the entire community, until a settlement was reached that was acceptable to all parties involved. Additionally, the “modern distinction between judges, parties, and witnesses was not relevant in traditional Gacaca; as the issue affected all members of the society, they were all ‘parties’ to the

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106 Ibid
conflict.” The uninstitutionalised practice of Gacaca during the colonial era typifies the legally pluralistic society of many African countries, whereby there are several components to a body of legal prescriptions. One reflects a set of “indigenous norms and mechanisms... which determine the generally-accepted standards of an individual’s and a community’s behaviour”; the other reflects state laws indicative of westernised notions of separation of powers, rule of law, etc implanted by the colonial power. The two types were permitted to coexist as the former was primarily used for the adjudication of local disputes and the ladder for the state level.

Some aspects of the modernised version of Gacaca can be compared to the goals and procedures of its indigenous origins. The courts remain true to their origins in their overriding restorative principles: trials will take place in local communities and try suspects in the areas where the crimes were committed; some of the decisions rendered will reflect the community’s desire for reintegration or compensation; the process of plea bargaining will encourage truth over punishment; important and respected members of the community will serve as elders in the courts. If these principles remain at the core of Gacaca when dealing with genocide crimes then its characterisation as restorative justice will be valid and it will contribute to reconciliation.

However, as will be shown, it is the elements of Gacaca that are new and modernised that raise concerns over its implications for the social and political context in Rwanda. The Government of Rwanda does not pretend that Gacaca strictly adheres to its indigenous form but argues that its reinvention takes the its current form that it does to better accommodate for the severity of the crimes in its mandate and the volume of cases to be tried. There are many divergences from its indigenous form: the severity of the cases tried, (namely some level of involvement or complicity in genocide); the primacy of punitive measures as the courts may

109 Ibid
111 Ibid: ¶ 18.44
hand down sentences of imprisonment; the attachment to state institutions and a highly administrative process; its grant of jurisdiction by the government and not the communities. Some of these differences may be necessary to accommodate for the number of cases and to ensure a very basic level of equity in the trial process. However, the question remains whether the emphasis on Gacaca as indigenous merely gives the illusion of restorative justice that masks a more divisive and political agenda.

**Organic Law**

The Government has explicitly stated its justification and goals for the reintroduction of Gacaca in a modernised form to prosecute genocide crimes:

a) It will enable the truth to be revealed about Genocide and crimes against Humanity in Rwanda.
b) It will speed up the trials of those accused of Genocide, Crimes against Humanity and other crimes.
c) It will put an end to the culture of impunity in Rwanda.
d) It will reconcile the people of Rwanda and strengthen ties between them.
e) It revives traditional forms of dispensing justice based on Rwandese culture.
f) It demonstrates the ability of local communities to solve their own problems.
g) Helps solve some of the many problems caused by Genocide. ¹¹²

The above list of goals is necessarily vague and appeals to many audiences. It appeals to the international community with its desire to “end impunity” and speed up the trials for those languishing in prison. Its appeal to Rwandans focuses on the anti-international justice approach of Rwanda solving “their own problems” though “traditional forms”. The reference that “it will enable truth to be revealed” is hoped to encourage witnesses to come forward in a non-threatening environment and to encourage suspects to plea bargain.

Rwandan Organic Law was conceived in 1996 to facilitate the prosecution of those suspected of committing acts of genocide. It applies both to the national courts and the local Gacaca courts. Several elements distinguish it from the ICTR in terms of judicial process, jurisdiction, and cultural relevance. The first concerns jurisdiction in which Organic Law allows the Rwandan government to prosecute genocide suspects. The stipulated period of October 1990 to December 1994 is much broader than the ICTR’s temporal jurisdiction and allows the government to accuse those who participated in the planning phases. The second concerns its categorization of responsibility and the various levels of punitive measures associated with each category.

Category one suspects will be prosecuted by the national courts of Rwanda who have the authority to hand out punishments of life imprisonment or the death penalty upon conviction for the following types of crimes:

a) Planners, organisers, instigators, supervisors, and leaders of genocide or a crime against humanity
b) People in positions of authority at national, prefectural, communal, sector or cell level, or in a political party, the army, religious organisations or in a militia who perpetrated or fostered such crimes
c) Notorious murderers who by virtue of their zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or wherever they passed
d) Persons who committed acts of sexual torture or violence

However, the ICTR also claims jurisdiction over these types of offences and as such, any suspects indicted of the above crimes may be removed from the jurisdiction of the national courts and placed into the custody of the tribunal.

The Gacaca courts holds jurisdiction over categories two to four of Organic Law for which the punishments vary but do not include the death penalty. Category two offences are

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those persons whose criminal actors or whose acts of criminal participation place them among the perpetrators, conspirators, or accomplices of intentional homicide or of serious assault against the person—causing death.\textsuperscript{114} Category three constitutes persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person.\textsuperscript{115} Category four constitutes persons who committed offences against property.\textsuperscript{116} Punishment for a category two conviction can be up to life imprisonment, while punishments from Categories three and four may carry various lengths of imprisonment but can also be reduced in years, to community service, or release upon a guilty plea.\textsuperscript{117}

Plea bargains that allow for substantial reductions in sentences if the accused confesses remain controversial. A Category Two defendant would normally face a sentence of twenty-five years to life; however, if he confesses during trial his sentence could be reduced by up to twelve years.\textsuperscript{118} Furthermore, if the defendant confesses prior to trial, his sentence will be reduced to community service or seven to twelve years, which in many cases is equivalent to time already served thus the suspect would be released.

Organic Law organizes Gacaca courts according to Rwanda’s four administrative levels, each with distinct categorical jurisdictions: cell level over Category Four; sector level over Category Three and appeals from the cell level; districts over Category Two and appeals from both the cell and sector levels.\textsuperscript{119} The prefect or provincial judges have jurisdiction over all appeals. Members are selected from each level to be represented on the next level of jurisdiction. Prosecution in Gacaca is communally participatory in that a general assembly acts

\textsuperscript{114} Ibid
\textsuperscript{115} Ibid
\textsuperscript{116} Ibid
as the prosecutor to identify perpetrators, victims, and present evidence. At the cell level the
general assembly constitutes all the adult members of that community; at the other levels the
general assembly constitutes representatives from the cellule general assembly.\textsuperscript{120} Gacaca has a
court-council at each level which consists of people elected by the general assembly and whose
primary responsibility is to try the cases.

\textit{Gacaca's Progress}

Despite the proclamations by President Kagame that “justice delayed is justice denied”,
the Gacaca courts have been progressing slowly and have encountered many obstacles.\textsuperscript{121} There
is little known of the process for the criminal trials. Many courts remain in the pre-trial stages.
These stages began with the elections of judges that were completed efficiently in 2001. This
was followed by the process of community members coming forward, with the prisoners present,
to provide their testimony. This testimony was necessary to establish the identity of the
perpetrators and the victims in that particular community and levels of compensation for crimes
that warrant it. This stage was to be followed by the categorisation of crimes according to the
four levels stipulated by Organic Law.

Several trial runs occurred in 2001 that carried through to the end of its stages. Those
who observed these trials reported on the role given to the community in providing evidence. A
prosecutor was quoted as saying:

\begin{quote}
You know what happened in our country in 1994. They (the
prisoners) are suspected of having participated in the genocide.
You are going to tell us what you know about them, either against
them of in their defence, how they behaved during the macabre
period... Beware of becoming too emotional. Don’t make false
accusations. Do not be afraid of telling the truth.\textsuperscript{122}
\end{quote}

\textsuperscript{120} Government of the Republic of Rwanda. “Genocide and Justice: Gacaca Courts” [on-line] [cited 12.03/2002]
[available:http://www.rwanda1.com]
\textsuperscript{121} Government of the Republic of Rwanda. “Position of the Government of the Republic of Rwanda on the ICTR”
\textsuperscript{122} UN OCHA IRIN. “Rwanda: Long-awaited Gacaca trial about to begin.” 18 November 2002. [on-line] [cited
Following this introduction, the accused introduced themselves and community members came forward to present their testimony with less hesitation than expected. While these trial runs were completed the rest of the prisoners in Rwanda await their trials. The remainder of this section will discuss the difficulties encountered the pre-trial stages that have occurred.

Gacaca judges are to be “people of integrity”, known as “Inyangamugayo”, and can be men or women. Their elections were held in October 2001 and 260,000 were selected. In order to qualify a judge must fulfil a series of conditions, that include: being a person of integrity, honesty, and good conduct; never having been in prison for more than six months and being above suspicion of involvement in the genocide or crimes against humanity; being free of sectarian and discriminatory attitudes; known for a spirit of encouraging dialogue. Judges at all administrative levels of Gacaca were trained for three months by local magistrates and final year law students on the principles of Organic Law and the process of the courts. This training program was coupled with a mass education campaign that cost the government US$32 million in the first two years.

The approximately 10,000 Gacaca courts are far behind in their scheduled trials. The trials have to be preceded by a seven step pre-trial process that includes identifying suspects and witnesses and establishing the appropriate categories for offences. In June 2002 twelve pilot trials began and were followed several months later by 760 courts beginning their pre-trial phases. The rest of the 10,000 courts have not begun their work and as of June 2003 less than

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127 Ibid
half of the pilot trials had finished their pre-trial phases.\textsuperscript{128} Furthermore, it was announced on 18 June 2003 that the remainder of the courts would not begin operating until after the presidential elections that are to take place at the end of August.\textsuperscript{129} Courts in pre-trial stages will continue to operate as usual.

The delays in the pre-trial process have been attributed to two factors that have legitimated the concerns over legal standards: lack of public participation and the competence of the judges. A report released by the National Unity and Reconciliation Commission of the Rwandan government indicated that only one quarter of Rwandans had participated in the Gacaca trials thus far.\textsuperscript{130} This lack of interest has been attributed to a fear of being denounced during the hearings, a lack of interest, and the expectation that witness’ testimony would not be heard.\textsuperscript{131} Reports that witnesses have been reluctant to attend because local authorities threatened them have become less frequent.

The issue of coercion by local authorities was initially a concern in regards to the selection of Gacaca judges. These positions were expected to be hijacked by political leaders. However, the real problem has been educating the judges. Most of them possess no formal education background and have received only the mandatory six weeks of training.\textsuperscript{132} Additionally, many of those elected to sit on the judges bench were subsequently accused by victims’ groups of being involved in the genocide as active participants or complacent observers. After these accusations were investigated some were removed from their positions and others were indicted for their suspected crimes.\textsuperscript{133}

\textsuperscript{128} Ibid
\textsuperscript{131} Ibid
\textsuperscript{132} Ibid
In attempt to lighten the docket for the Gacaca courts and respond to the accusations of horrid prison conditions, Kagame issued a presidential decree in January 2003 granting provisional freedom to a projected 49,376 detainees.\textsuperscript{134} The first phase entailed releasing 22,567 suspects at the end of April after spending three months in “solidarity camps.”\textsuperscript{135} Some of those released were among the sick and elderly and those who were considered youth at the time their crimes were committed. Others were those that, as determined during the pre-trial phases of Gacaca, had pleaded guilty to charges against them and had already spent longer in prison than the punishment that could be rendered against them if convicted. Some of those released were done so only on a provisional basis and will still face trial in Gacaca courts.

Many doubted the authenticity of the confessions and both prisoners’ and victims’ groups were uneasy over the prospects of having these genocide suspects reintegrated into their communities. After new accusations from victims’ emerged after the releases, 787 were rearrested in May and 5,770 in June of 2003.\textsuperscript{136} Many of those rearrested were done so upon accusation that they had killed several people during the genocide as opposed to the one they had confessed to, earning them a lighter sentence.

\textit{Gacaca: Mitigating the Failures of the ICTR through Restorative Justice}

To juxtapose the principles and procedures of Gacaca to the ICTR is to contextualise the normative differences between the two types of courts. The norms underlying Gacaca reflect both cultural traditions and the characteristics of restorative justice.

\textsuperscript{135} Ibid
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<tr>
<td>Justice Paradigm</td>
<td>Restorative Justice / Indigenous Tradition</td>
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<tr>
<td>Goal</td>
<td>Justice for reconciliation; ending impunity is secondary</td>
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<tr>
<td>Venue</td>
<td>Local Communities</td>
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<td>Due Process</td>
<td>Primacy of truth telling</td>
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<td>Establishing Guilt</td>
<td>Confession; Community Consensus</td>
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<td>Burden of Proof</td>
<td>Testimony / Accusations</td>
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<td>Compensation for Victims</td>
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<td>Punishment</td>
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The benefits that Gacaca will bring to the reconciliation process are tied to the integrity of its indigeneity and its adherence to the restorative justice paradigm. The limitations of the ICTR have already been established however it is necessary to contextualise the reinvention of Gacaca as a justice paradigm that make the principles and process more relevant to the Rwandan context. The benefits of the trials have been extolled by those who have made the importance of rules and procedures secondary to the goals of truth telling and reconciliation. Gacaca’s emphasis on community participation also allows for the recognition of an important demographic – namely women. It is women in particular that have felt their experiences and testimony have been excluded from the international justice approach. Gacaca has so far been one of the venues from which they can tell their stories and receive compensation for their losses. Additionally, it is useful to compare the support given by Rwandans to the Gacaca courts as opposed to their frustration with and indifference to the international tribunal.

An initial survey was carried out by Johns Hopkins University in coordination with the Rwanda Ministry of Justice and the Université Nationale in Butare in September and October of 2000; this study indicates a high acceptance and awareness level of Gacaca among most Rwandans.\(^{137}\) One of the results of their study is that most of the respondents have heard of

Gacaca, however, few have substantial knowledge of how the courts will function or the community’s expected role in the process. Additionally, the study revealed that Rwandans have optimistic expectations that Gacaca will solve the judicial problems of prosecuting genocide suspects and will lead to a sustainable peace in the country.

Not surprisingly, Gacaca has received widespread support from the genocide suspects in Rwandan prisons. The U.S.-based Internews Network has shown what is known as the “Arusha Tapes” in Rwandan prisons to give genocide suspects a view of what has been happening in the ICTR trials and to encourage debate on Rwanda’s own judicial process. The Arusha Tapes highlight the guilty plea of Kambanda, Rwanda’s prime minister during the genocide, the trial of George Rutaganda, former vice-president of the Interahamwe militia, Clement Kayishema, a former provincial governor of Kibuye and many other genocide leaders including district mayors and businessmen.\(^\text{138}\) Ironically, while the tapes are meant to generate support for the tribunal, they have had opposite effect on prisoners.

The reactions to the tapes of the ICTR proceedings have raised concerns among the prisoners over the absence of the death penalty at the tribunal and the luxurious living conditions of the tribunal prisoners as compared to those of the Rwandan prisons. The issue of the death penalty is significant, as one prisoner replied, “why is it that the tribunal gives them more lenient sentences than us, they are the ones who told us to kill on radio . . . how come we are paying the higher price?”\(^\text{139}\)

Objections and shock registered by the prisoners to the Arusha Tapes were reflected in their support of the Gacaca process as an appropriate and fair judicial process. Awareness and acceptance of the courts is evidenced by the high and increasing number of confessions among the prisoners, numbering in the tens of thousands, and a willingness to provide testimony and


\(^{139}\) Ibid.
evidence against other genocide suspects.\textsuperscript{140} It is acknowledged that some of these prisoners have opted for confession only on the basis of a personal cost-benefit analysis whereby they have their sentences reduced and can possibly indict someone with whom they hold a grudge. However, the personal intentions of suspects aside, confessions still provide a function of restorative justice that is the discovery of truth over punishment for the purpose of reconciliation.

The Gacaca courts are to have a community impact as Rwandans become participants as judge and jury of genocide suspects. A consensus is needed among the participants to either find someone guilty or allow them to be reintegrated into their society. Unlike those convicted by the ICTR, many Gacaca defendants will most likely be reintegrated into the community immediately or within several years if the confession system is widely accepted. Therefore, it is necessary for the community to make the decision on the desirability of an individual’s integration.

In contrast, those on trial at the ICTR were isolated from community life in Rwanda during the genocide. Many of the prisoners saw for the first time in the Arusha Tapes what the orchestrators and leaders of the genocide even looked like.\textsuperscript{141} As the tribunal is isolated from Rwanda in terms of its geography and impact, and its defendants equally distanced by their former elite status in the genocide, the indictment of the genocide leaders at the ICTR will have very little effect on reconciliation within Rwandan communities. In line with the restorative paradigm Gacaca is presented as a shift in power in the community, a sort of “populist response to a populist genocide”.\textsuperscript{142}

There are additional benefits that Gacaca brings to the reconciliation process that differentiates it from the norms of international criminal law. One such benefit is the recognition of a particular demographic, namely women, in the justice and reconciliation process. The

\textsuperscript{141} Ibid
demographics of post-genocide Rwanda illustrate a striking allocation of burden sharing for women. Immediately following the genocide the Rwandan government estimated that 70% of its population was female; by 1996, after a socio-demographic study was completed, this figure was changed to 53.7%, reflecting the return of a refugee population that was predominantly male. This figure is not a dramatic change from the pre-genocide population of women. However, if children are excluded the percentage of women rises to 57% in the 20-44 year age group. This high percentage of women in Rwanda after the genocide reflects the fact that more men were killed than women, and the absence of many men in society due to their imprisonment or cross border displacement.

The socio-economic burden placed on women increased dramatically after the genocide. As the heads of tens of thousands of households and the producers of up to 70% of the country’s agricultural output, they are overwhelming responsible for the livelihood and stability of their community. In the political realm there have been moderate improvements in the status of women. The Rwandan government has increased women’s representation both at the local and national levels through the formation of several new ministries that address family and gender issues. While, there still exists many cultural and structural impediments to women as political actors in Rwanda, human rights groups have noted several improvements: “the government is setting up women’s councils at the grass-roots and national levels, changing the inheritance laws, creating tools for women’s entrepreneurship, and requiring that girls be educated along with boys.” Additionally, through their own efforts and the help of aid agencies, women have

144 Ibid
145 Ibid
organized themselves into women’s associations that address both “women’s specific post-
conflict problems and the lack of social services normally provided by the state.”

The provisions of Organic and Law and the procedures of the Gacaca courts allow for
significant representation of women as judges and witnesses. In the elections of Gacaca judges
that took place in 2001 many women were chosen by their local communities as “people of
integrity”. In one particular cell level election, in Murambi, eight of the nineteen judges chosen
were women. Furthermore, during the election process many women stood up to make
accusations against or declarations on behalf of various candidates put forward. Having women
sit as judges during the trials is also expected to make women feel more comfortable providing
witness testimonies and coming forth with accusations of sexual violence than in front of an all
male panel. Many women at the Murambi election also expressed their faith in other women as
judges they expect women will be more honest and like are likely to inspire truth telling about
the events of the genocide.

Rwandan women have a lot invested in the success of Gacaca courts for several reasons.
The importance of women and the crimes committed against them is recognised in Organic Law
that stipulates crimes of sexual violence fall under Category One and will be tried in the national
courts. However, this does not negate the importance of women in the Gacaca trials. Some
women will be attending the trials of their husbands or family members who have been accused
and for whom they have been diligently bringing food and supplies while in prison. Others want
to accuse those on trial of crimes committed against them or their families and to tell their stories
as witnesses and victims. Additionally, some women will receive compensation from the

147 Heather Hamilton. “Rwanda’s Women: The Key to Reconciliation” in Journal of Humanitarian Assistance, 10
May 2000. [on-line] [cited 06/25/2003] [available:http://www.jha.ac/greatlakes/b001.htm]
148 Julia Crawford (Hirondelle News Agency). “Women Take Centre Stage in Election of ‘People’s Judges.” 4
149 Ibid
government or from a conviction if their property had been destroyed or the breadwinners in their family were killed by the accused.

Most importantly, Rwandan women seek to hear the confessions of the accused and an admission of guilt. As reconciliation for most Rwandans represents an act between two people where one confesses and the other forgives, for the accused to be reintegrated back into the community and the confession is a necessary first step. Rwandan women will be expected to live in the same communities as those who killed their families or sexually assaulted or tortured them. As judges and witnesses females will have the responsibility of determining punishment or the desirability of the suspect’s reintegration. In sum, while crimes of sexual violence will be prosecute in the national courts, the community basis of Gacaca allows women to participate on various levels recognise their role in the reconciliation process and bring their identity beyond that of victimisation.

Further to the restorative justice paradigm, decisions rendered by Gacaca courts will allocate compensation to victims. The Rwandan government has set up a genocide survivor’s fund that accounts for five per cent of the annual budget and assists destitute survivors. This fund will be replaced by a larger compensation fund, if approved, in 2003 that will account for eight per cent of the annual budget. Organic Law provides for the commutation of half of the sentences through Gacaca to community services. Therefore, the Gacaca courts will assist in supplementing the compensation fund from the property constructed and services provided by prisoners. The services provided that may constitute payments to the fund includes renovating houses partially destroyed during the genocide, or building new homes. To further aid reconciliation, the compensation fund hopes to ease the burden of female and child headed

152 Ibid
153 Ibid
households whose livelihoods were destroyed by the loss of primary income earners in the family during the genocide.

In sum, the Gacaca courts subscribe to the restorative justice paradigm most diligently in the elements that liken it to its indigenous form. The emphasis on reconciliation and reintegration over punishment is evident in the confession and plea bargain procedures stipulated by Organic Law. Whereas the ICTR does not consider reintegration to be a possibility due to the status of the suspects or the nature of the crimes that they are accused of having committed, it only has a remote impact on Rwandan communities. Furthermore, the array of participants is widely extended in Gacaca to include all those affected by the crimes and also who will be affected by the suspect’s return to the community. The trial process of the ICTR does not seek to acquire a confession and subsequent forgiveness from victims, but rather to establish guilt and punish. This limits the possibility that truth telling can contribute to reconciliation. These characteristics of restorative justice are also indicative of the purpose of Gacaca in its traditional form. The modernised version of Gacaca, because of these elements, carries enormous potential for reconciliation if it remains true to the principles of restorative justice.
V. Victor's Justice: The Tutsi Ethnocracy and the Politicisation of Gacaca

Despite the tremendous hope attached to Gacaca for its potential contribution to a reconciled and reintegrated Rwandan society, there exist many elements in the principles and practices of the Gacaca trials that render it a dangerous venue to refuel ethnic tensions. The nature of ‘modernised’ Gacaca is most dramatically a departure from its indigenous form as it represents a state-imposed mode of justice that threatens the community based principles of restorative justice. The modernised elements of Gacaca serve the interests of a government that can be characterised as a Tutsi ethnocracy. The result has and will be that the processes of Gacaca are highly politicised and the participants racialised by assumptions of guilt based on ethnic group membership. The domestic and regional policies of Kagame’s government have suggested that a particular discourse of the genocide and reconciliation agenda are being aggressively imposed. The need for justice and reconciliation has been mixed with political agendas that run contrary to the underlying restorative principles of what Gacaca was meant to be. In turn, the nature of this Tutsi ethnocracy has been woven through the government’s rhetoric of ending impunity and tainted the potential contribution Gacaca could make to reconciliation. The end result could be the imposition of a victor’s justice that is wrought with the very same ethnic tensions of pre-genocide Rwanda.

The purpose of this chapter is to recontextualise the mode of justice, that is restorative in nature, to the political context in Rwanda. The political context is one where a minority group seeks justice and the majority seeks democracy. When applied to the Gacaca courts, it becomes evident that human rights critiques seem misplaced and that there is an underlying political agenda to the justice process that represents the most serious of threats to reconciliation. This chapter begins with an outline of the mainstream critiques of Gacaca that are based on human rights arguments for the need to respects universal principles of criminal law and due process for prisoners. It is argued that these critiques prove impractical and culturally irrelevant in the
Rwandan context. This is followed by an introduction to the concept of victor’s justice and its connection to the widely accepted discourse on the genocide. Following from this, a historical overview of the RPF is used to illustrate how it has come to be known as an instrument of Tutsi power and the ascribed victor’s of the genocide. The RPF’s current hold on power is then discussed with reference to various regional and domestic policies that characterise it as an ethnocracy. The final section applies this characterisation to the Gacaca courts in terms of how ethnic identities continue to be a salient and dangerous factor in the pursuit of justice.

The International Community’s Response: The Human Rights and International Law Critique

Much of the criticism directed towards Gacaca, voiced primarily by human rights groups, centres on the practical limitations to Gacaca and the incapacity of the government and the community to safeguard against the consequences of the trials. Their strongest critique arises from Organic Law’s lack of adherence to the principles of international criminal law. Much of what the architects of Gacaca have had to respond to and defend are critiques of human rights violations, capacity problems, and legal procedures. The government of Rwandan has sensibly pointed out that many of these problems are unavoidable if Gacaca is to serve its pragmatic purpose of putting tens of thousands of prisoners on trial. Additionally they rightly point out that it is the very principles of Gacaca that do not adhere to standard of international law that make its justice and reconciliation goals possible.

The international community has not been silent on the Kagame government’s questionable domestic policies and threats to regional security; however, very few of these critiques have been aptly applied to their effect on the Gacaca trials. The legalistic and human

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155 The notable exception is the international community’s objections to the lack of RPF soldiers on trial in the Gacaca courts. This will be discussed further at a later point in this chapter. Additionally, the international community places a disproportionate amount of attention on Kagame’s regional military policies over the militarization of domestic policies. While both have an impact on Gacaca there is very little documentation on the
rights criticisms do not properly illustrate Gacaca’s potential dangers for refuelling ethnic tensions. To illustrate this it is necessary to put Gacaca in the context of political agendas that are based on the power and survival of Tutsis over Hutus. However, it is necessary to briefly identify the legalistic and human rights critiques as they do speak to a general context in which Gacaca must operate. Additionally, the position of the government in response to such criticisms indicates the persuasive components of the unity and reconciliation agenda.

One of the primary concerns centers on the lack of services available to deal with the level of psychological and social trauma that witnesses and survivors will experience during and after the trials. The Gacaca process involves many traumatised groups such as repatriated refugees who are dispossessed, rape victims, orphans, widows, and those who are physically and psychologically damaged from falling victim to or witnessing acts of genocide. The Rwandan government has not provided an adequate psychosocial support network for those participating in the trials. Tensions, ethnic or otherwise, could ensue from trials that will “reawaken memories of the genocide and its profound consequences and to renew feelings of grief, pain, fear, rage, outrage and hatred among the people of Rwanda.”

The procedures of the trials also pose practical constraints. One of the purposes of Gacaca is to relieve overcrowding in the prisons. However, the process of confessions to reduce sentences and allow prisoners to reintegrate into the communities only frees up space in prisons to allow for new arrests of genocide suspects that remain at large. The extent to which new arrests will be made is not fully known, however, it presents a legitimacy problem for Gacaca in that “the human rights flaws inherent in the Gacaca process are easier to overlook if the net result

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is to free people rather than to imprison them, and the international human rights criticism is bound to be fierce if the prisons fill up again.  

Abuse of Gacaca by local power holders and those who seek vengeance is also of great concern. While there have been few cases of intimidation and harassment of late, it was initially expected that local power holders would unfairly influence judges and witnesses. In Kigali an investigation was underway into the deaths of approximately twenty people who were believed to be killed to prevent them from testifying at Gacaca trials. Many Rwandans still express a fear of reprisals if they testify against people in their community. However, many of them also fear being coerced into testifying and attending by local authorities once the courts get beyond their pre-trial phases.

While many in Rwanda seek peace in their communities through a reconciliation of ethnic tensions and the unveiling of the truth, it is undeniable that there is a thirst for vengeance and retribution among many who will attend the Gacaca trials. Human rights organizations have warned of the violations of due process, the lack of training for judges and the inconsistencies expected with judgments after plea bargains. The absence of these safeguards is thought to increased the chance of “vigilante’s justice” as the flipside to community empowerment.

Those who suggest Gacaca is an inappropriate legal response to the genocide identify the various bodies of legal documentation and standards to which the government of Rwanda is bound. These arguments identify that Gacaca violates Rwandan domestic law (not Organic Law) and its treaty obligations under both the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples’ Rights (African Charter).

Rwanda’s domestic law also incorporates the Universal Declaration of Human Rights (UDHR). The Arusha Accords state, “the principles enshrined in the (UDHR) of the 10th December, 1948 shall take precedence over corresponding principles enshrined in the Constitution of the Republic of Rwanda, especially when the latter are contrary to the former.”

The principles and standards set forth in the UDHR, ICCPR and the African Charter, and thus Rwanda’s domestic law, are at first glance not adhered to by the Gacaca courts. International lawyers note that Gacaca does not separate the parties involved from the adjudicatory or prosecutorial roles, especially at the cell level courts, the whole community is involved in gathering evidence, making accusations and making judicial decisions.

Additionally, as stipulated previously, the brief training of “lay judges” also threatens the impartiality and independence of the judiciary and the courts. This is a criticism that is expressed in the international law community and as well by those in human rights organizations.

Further accusations identify that those accused through the Gacaca courts do not have the right to access defence counsel and thus defendants are not provided with the same legal powers as the prosecution. As the prosecution will have access to evidence and witnesses that the defence will not, the defendants’ ability to make a case for themselves is threatened. The Gacaca courts do have an appeal process stipulated in Organic Law, however, appeals are only heard at the next highest level of Gacaca courts and not by a higher tribunal such as an ordinary Rwandan court. The sum of these due process violations have led critics to conclude that Gacaca is incapable of providing a fair and impartial trial for genocide suspects and that, as

161 Ibid
162 The guarantee of “impartial and independent” tribunals is required by Article 14 (1) of the ICCPR, by Articles (1) and 26 of the African Charter and Article 10 of the UDHR.
The right to counsel and to call and examine witnesses is guaranteed under Article 14(3)(b) and (d) of the ICCPR and Article 7(1) of the African Charter.
164 This violates the right to a higher tribunal as guaranteed by Article 14(5) of the ICCPR,
traditional courts, they are not exempt from the provisions of the UDHR, the ICCPR and the
African Charter.¹⁶⁵

Many who support the Gacaca process, as its architects, participants, or observers, have
questioned the relevance of international criminal law in a post-genocide society where there are
so many perpetrators and victims. Peter Uvin has identified many of the practical and theoretical
falsehoods of applying international legal standards to the Gacaca courts. His first response is
one of practicality: "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."¹⁶⁶ A corollary to this, and what the
Rwandan government argues as well, is that the current national court system (as designed to
adhere to all the aforementioned standards of international law) has failed both in terms of
upholding civil and political rights and guaranteeing due process. As the government has
repeated time and again, prosecuting genocide suspects through the national court system is a
violation of human rights in itself. The number of prisoners is not comparable to the capacity of
the courts to provide proper counsel and expeditious trials.

There are also arguments to suggest that the Gacaca courts do not violate the
international criminal law standards as flagrantly as its opposition accuses. Uvin identifies
Article 4 of the ICCPR which states that, "in a time of public emergency which threatens the life
of the nation and the existence of which is officially proclaimed, the State Parties to the Present
Covenant may take measures derogating from their obligation under the present Covenant to the
extent strictly required by the exigencies of the situation."¹⁶⁷ While is it questionable whether
Rwanda is in a "time of public emergency" almost a decade after the genocide, it is justifiable to

¹⁶⁵ Ibid
¹⁶⁶ Peter Uvin. “The Introduction of a Modernized Gacaca for Judging Suspects of Participation in the Genocide and
the Massacres of 1994 in Rwanda” Discussion Paper prepared for the Belgian Secretary of State for Development
Cooperation. [on-line] [cited 12/03/2002] [available: http://fletcher.tufts.edu/humansecurity/pdf/Boutmans.pdf]
¹⁶⁷ Ibid.
identify the circumstances as exceptional, not appropriately accounted for by current standards, and that the government has gone to some extent to ensure fairness and consistency in the trials.

Finally, Uvin identifies the cultural inappropriateness of the international law critiques of the Gacaca courts: “the practice of Gacaca may well be able to respect key conditions of fair trial and due process, but in an original, locally appropriate form, and not in the usual western-style form.”\textsuperscript{168} Formalized notions of witnesses, prosecutors and defendants were not relevant to Gacaca in its indigenous form. The interplay of argument and counter-argument between community members and the emphasis on consensus does not adhere to the individualisation of roles in western trial processes. Uvin concludes with the importance of indigeneity when evaluating “modernised” Gacaca and the important role of the international community in ensuring that the “spirit of Gacaca” is respected.\textsuperscript{169}

These aforementioned critiques highlight important concerns of human rights issues that if left unmonitored and unaddressed may inflame old tensions. However, those who support Gacaca, including its participants, claim that these violations are necessary evils and compromises in finding a judicial solution to the genocide. Essentially the argument that there is no better alternative has won out over those who want assurance for the civil and political rights of every participant in Gacaca. Those who place paramount importance on the standards of international law, both human rights and criminal, adhere to a set of legal principles and formalized roles in the trial process that is neither culturally appropriate nor practically feasible. In response to such critiques, the Gacaca courts should be evaluated for its culturally relevant approximations to these standards and roles and the exceptional circumstances under which they operate.

\textsuperscript{168} Ibid
\textsuperscript{169} Ibid
It is unfortunate that the legality and its associated dangers for Gacaca have occupied much of the literature and rhetoric whereas few analysts have examined the political and social context under which they courts have been reinvented and will proceed. When examining the political environment, the nature and intentions of the architects of these courts, and the social context within which the participants live, an entirely different set of concerns is raised about Gacaca. The questions then turn to, who do the participants, beneficiaries and architects represent? To whose benefit does the nature of these courts and their outcomes serve? Are ethnic identities still relevant? What will be the political consequences, and not just the legal and punitive, be for Rwandan communities?

The sum of Gacaca’s potential consequences for reconciliation reveals that it is more of a political strategy than a legal one. This is based on the argument that Gacaca represents a victor’s justice that privileges the Tutsi government and grants them impunity. The dangers of victor’s justice are that politicised and racialised identities in the trial process can hinder any contribution that justice can have for reconciliation. It will be shown how the current government represents the victors in Rwanda and how it deserves characterisation as a Tutsi ethnocracy. Its behaviour has demonstrated the salience of political and ethnic identities in a way that will corrupt the contributions that a truly indigenous Gacaca and restorative justice could provide.

Victor’s Justice

This notion of victor’s justice is tied to what is considered an appropriate judicial response to crimes committed during warfare. It is also closely tied to the rhetoric of the conflict and how it is to be characterised after the violence has ceased. “Victor’s justice” has been historically characterised as a critique of the Nuremburg and Tokyo Tribunals after World War II: the imposition of retributive justice by the victorious side of the conflict on the leadership of losing side with virtual impunity for crimes committed by the victor. The ad hoc tribunals have
sought to avoid the appearance of victor’s justice that impedes the legitimacy of legal proceedings and fails to act as a deterrent to future crimes. Despite this caution and awareness, the ICTY and ICTR have been accused of victor’s justice. Specifically, the NATO victory over Serbia and the impunity over war crimes committed by NATO serve this allegation. The Rwandan tribunal has also suffered under this characterisation as they have yet to indict any RPF soldiers (despite stating intentions to do so). The placement of the ICTR in Arusha was justified solely for the purpose of avoiding victor’s justice; therefore, there is an international recognition of the RPF government as the victorious party to the conflict. The concern over the implications of victor’s justice should not be relegated to the international tribunals but also to the legitimacy of the Gacaca courts.

The dangers of victor’s justice are very much dependent on the context of the conflict and composition of the post-conflict society. Parties to the conflict of World War II were states and not members of the same society who were expected to coexist side by side in the same communities once the violence had ceased. Even many of those who were the victims, German Jews, did not remain inside Germany after the war. In Rwanda both parties to the conflict, the militaries and militias who represented the two ethnic groups, remain in the same communities together after the genocide. Thus the dangers of victor’s justice are much more significant for post-genocide Rwanda than they were for post World War II society. Impunity was granted for the states considered part of the Allied forces after WWII; punitive measures were exacted primarily against the leadership of German and Japanese forces and not individuals who were lower ranked. The difference with Rwanda is that both the genocide and its perpetrators are individualised in the legal process and the proceedings extend far beyond the elite criminals. Individuals who are victims must coexist in the same social and political space with those who were the perpetrators. Therefore, the tension between these two groups becomes much more acute and localised if punitive actions are perceived as victor’s justice.
The events preceding the Rwandan genocide have been characterised by the Rwandan
government as a "civil war" and likewise so too are the events that followed it. According to the
government and the international community it is the RPF that ended the civil war, of which
genocide was a component, and thus their claim to political power is legitimate. Mamdani notes
the consequences of an RPF victory are that they must constantly be on guard as to protect the
spoils of war; to protect their hold on power and ensure their survival, "the price of victor’s
justice is either a continuing civil war or a permanent divorce."^170 Despite the government’s
insistence that ethnic divisions are a thing of the past, there is nothing to indicate that local
communities accept this policy as anything more than naïve political rhetoric.

The accusation that Gacaca truly represents a victor’s justice is juxtaposed to its
alternative: survivor’s justice. Mamdani suggests that redefining identities to break the bipolar
notions of victims and perpetrators is possible through the identification of all Rwandans who
currently reside in the territory, and not just those who experienced violence during the genocide,
as survivors. ^171 The dilemma is that the minority in power desires "justice" and the assurance of
their survival, while the majority seeks its power through democracy. ^172 The consequence has
been the Tutsification of the Rwandan state to provide for the desires and assurances required by
the minority. Justification of this characterisation is necessary to identify the continuing salience
of political and ethnic identities.

Origins of the RPF and Tutsi Power

The Rwandan Patriotic Front’s (RPF) ascension to power is steeped in a history of
conflict over identity that explains how it became characterized as dominated by Tutsis. The
identity of the RPF as a highly militarised Tutsi party has not always been purposive or overt.
Initially it was a characterisation imposed on the RPF by Hutus that assumed their agenda was to

^172 Ibid: 274.
overthrow all Hutu power. Who the RPF represents cannot be determined by their official policy which proclaims that everyone is Rwandan and thus as the governing party the RPF should be representative of Hutus and Tutsis. The origins of the RPF, the repeated clashes between Hutus and Tutsis over many decades, the composition of its membership and support, and the government’s elitist and divisive policies underscore their characterization as a Tutsi ethnocracy.

Integral to understanding the differences between the Hutus and Tutsis is to recognize that their identities are historically periodized and range from distinctions of race, citizenship, and ethnicity. A common thread between these distinctions is that Hutus and Tutsis remained political identities that changed with the changing structure of the Rwandan state. In the decades preceding the 1994 genocide in Rwanda the notions of Hutu versus Tutsi were consolidated by struggles over political governance and redress of historical grievances characterized episodes of violence. Increasingly the conflict was defined in terms of ethnicity as claims of violence were made against “Tutsi rebels” (RPF), and “Hutu radicals” (Habyarimana regime) who sought to threaten the peace accord brokered in Arusha.

The importance of the RPF is in its formation from the large exiled Rwandan population, primarily of Tutsis, that was present long before the 1994 genocide. Rwanda gained its independence in 1962 following a bloody social revolution to oust the Tutsis from their colonially acclaimed position of power. The demographic consequence was the initial displacement of approximately 120,000 Tutsis into neighbouring countries. Over the next two decades the exiles made repeated efforts to return to Rwanda by armed force and border raids

173 Tutsis were seen having a particular “ethnic identity” previous to the formation of a Rwandan state as supported by the “migration hypothesis”: the origins of Tutsis and Hutus are from different parts of Africa and both groups migrated into the Great Lakes region. This seeks to explain the supposed physical distinctions of Tutsis as lighter skinned, taller, and thinner. Hutus were seen as originating from simpler Bantu origins that were intellectually and physically inferior to Tutsis, thus giving cause to the colonial Belgian exploitation of Hutus as a servile class to the Tutsis. The identities of Hutu and Tutsi were strongly racialised by the colonial power as Hutus were placed in a position of servitude to the Tutsi until the policy was reversed just prior to independence.


under the control of the RPF, thus provoking violent reprisals from Hutus. By the end of the 1980s some 480,000 Rwandans – approximately seven per cent of the total population of Rwanda and half of its Tutsi community – had become refugees, primarily in Burundi, Uganda, Zaire, and Tanzania.\textsuperscript{175}

The RPF has its origins in Uganda and accumulated its strength and support by way of participating in Museveni’s army and from the large number of Rwandan refugees in the country.\textsuperscript{176} The strength that the Rwandan Tutsi refugees provided to the RPF was largely due to its numbers. These exiles arrived into the Great Lakes region, and Uganda in particular, in three waves: the Tutsi elite from 1959-61; Tutsi victims of repression from 1963-63; expulsions of the political crisis in 1973.\textsuperscript{177} Common estimates of the total number of Rwandan Tutsi refugees in the Great Lakes region in 1990 are half a million; those in Uganda were faced with discrimination on the basis of race and citizenship.\textsuperscript{178}

It is conventional wisdom to see the RPF invasions into Rwanda beginning in 1990 as the end result of decades of planning and hope for repatriation. Born of this was the leadership of two Tutsi refugees who had fled to Uganda in the first wave of exodus: Fred Rwigyema and Paul Kagame, current President of Rwanda.\textsuperscript{179} Additionally, these two men found leadership positions in Museveni’s National Resistance Army (NRA) opposing Obote’s oppressive regime. By the time the NRA took power in Uganda in 1986, over one quarter of its ranks were Tutsi

\textsuperscript{175} Ibid, 265.
\textsuperscript{176} While Rwandans identified themselves within Rwandan borders as either Hutus or Tutsis, once exiled in Uganda they also came to define themselves, in terms of race and citizenship, as Banyarwanda. Banyarwanda constitutes those who speak the Kinyarwanda language; there are approximately 17 million Banyarwanda comprising the populations of Rwanda, Burundi, and sizable populations in the DRC, Tanzania and Uganda. The Banyarwanda in Uganda are a distinct cultural group that constitute a large part of the Rwandan political diaspora. It is argued that the RPF invasion into Rwanda in 1990 from Uganda was primarily due to the political crisis created by the Museveni’s National Resistance Army (NRA) that gave rise to the expulsion of Rwandan refugees constituting the Banyarwanda.
\textsuperscript{177} Ibid, 160.
refugees.\(^{180}\) However, upon Museveni’s acquisition of power there was widespread criticism over the basis of his support lying within a non-indigenous population and his promises of citizenship and land entitlement for them.\(^{181}\) The Rwandan Tutsi refugees turned to their Ugandan trained refugee leadership for an armed repatriation to Rwanda. After decades in exile Museveni’s Tutsi ranks were transformed into the RPF with the goal of repatriating refugees and “liberating” Rwanda from the clutches of Hutu power.

The approximately half a million Rwandan refugees in Uganda by 1992, spread over eight camps in western Uganda, launched an armed repatriation into Rwanda under the RPF leadership of Rwigyema and a core of “refugee warriors” in October 1990.\(^{182}\) Despite having Ugandan support on the condition that they did not return to Rwanda, the RPF’s attempt at armed repatriation in October 1990 was a dismal failure. Undergoing training at Fort Wentworth, Kansas, Kagame returned to regroup and lead the RPF. By 1991 he had amassed a force of 15,000 and by 1992 had acquired a strip of territory along the border extending thirty-two kilometres into Rwanda.\(^{183}\) However, his military successes were met with political failure as the Hutus in Rwanda saw the armed repatriation as an armed invasion. This further legitimised the Habyarimana government in Rwanda whose power grew extensively with each case that legitimised the victimization of Hutus under the Tutsis.

RPF controlled areas in Rwanda created an extreme level of internal displacement among Hutus in Rwanda. In February 1993 the RPF had doubled its territory of control it had displaced approximately 950,000 Hutu peasants from their homes and districts.\(^{184}\) The flight of Hutus that correlated with the arrival of the Tutsi refugee soldiers, left little for the RPF to “liberate” and no

\(^{180}\) Ibid, 170.
\(^{184}\) Ibid, 187.
population over which to exert political control. For decades Hutu power had been associated with Tutsi displacement. This reassertion of Tutsi power displaced hundreds of thousands of Hutus with genocidal consequences for the Tutsi. Playing into the campaign of the Habyarimana government the RPF invasions furthered the Hutu Power claims of Tutsis as foreigners, reracialized their identity, and became reminiscent of the *inyenzi* raids of the revolution.\(^\text{185}\)

Once the genocide had come to a conclusion the RPF was in control of Kigali and it became clear that they were deserving of the title of victor, irrespective of the crimes they had committed. The Hutu elite that had orchestrated the genocide had all fled to neighbouring countries and the primary task of the genocide, eradicating the Tutsi population, had nearly been completed. In mid-July 1994 a new power sharing arrangement meant the RPF appeared willing to adhere to the Arusha Accords it had signed in 1993 which called for: the establishment of a broad-base coalition government, elections within two years (1995), the institution of the rule of law, and the fusion of the RPA (the armed wing of the RPF) and the government army into a single new force.\(^\text{186}\) The power sharing arrangement at the outset displayed a moderate level of cooperation between moderate Hutu parties and the RPF.\(^\text{187}\)

*The Tutsi Ethnocracy*

In its days as a rebel movement the RPF saw itself, and was seen by most outside of Hutu extremists, as having noble and modest goals of repatriation and democratisation in Rwanda. Christian Scherrer offers an exceptionally positive description of the RPF’s agenda as having a “discourse that is nationalist, antiethnic, not only republican but popular democratic, in the form of a ‘multiethnic’ democracy.”\(^\text{188}\) After the RPF began their series of cross border raids in 1990 the fear among Hutus was that they represented an untamed militia who sought to reintroduce a

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\(^\text{185}\) *Inyenzi*, in Kinyarwanda, means “cockroaches”, a term used in the genocide to refer to all Tutsis and carried historical relevance to the early 1960s when *inyenzi* raids into Rwanda were to assert to Tutsi power.


\(^\text{187}\) Ibid: 147.

\(^\text{188}\) Ibid: 52.
repressive feudal regime. The formation of the RPF as dominated by Tutsis, while successful in
their repatriation goals, aided the propaganda that demonised the Tutsi and spread the fear that
Hutus would be eliminated if the Tutsis were not.

Since coming to power in Rwanda after the genocide, the RPF under the continuing
leadership of Paul Kagame, has been characterized inside and outside of Rwanda as an
ethnocracy that propagates the survival of Tutsis over the well being of Hutus. The “Tutsification
of the state” has been articulated both by academics and human rights groups that express their
concerns regarding the democratisation process and the militarisation of the state. Citing
complaints from moderate Hutu parties opposed to the RPF, Mamdani states that “not only are
the structures of power in Rwanda being Tutsified, civil organization- from the media to
nongovernmental organizations – are being cleansed of any but a nominal Hutu presence.” He
identifies the founding ideology of Tutsi power as based on the memory of the genocide and that
in order to adhere to the “never again” manta, there is the “conviction that Tutsi power is the
precondition for Tutsi survival”. This conviction and ideology is more evident in the
practices of the Kagame government than in the unity rhetoric they espouse.

Mark Drumbl cites examples of limits on civil society, state influence on church leaders,
resistance to power sharing and an aggressive foreign policy as indicative of the “authoritarian
behaviour of the RPF.” He argues that as the Tutsi can only count on Tutsis for support,
ethnicity is still a significant factor in Rwanda. Given this he warns that “among the factors most
closely related to the (re)occurrence of genocide is a “ruling elite whose ethnicity is politically
significant but not representative of the entire population.” Finally, reports on post-genocide
politics and human rights have given unfavourable reviews on Kagame’s ability to promote

189 Mahmood Mamdani. When Victims Become Killers: Colonialism, Nativism and Genocide in Rwanda.
190 Ibid: 271.
191 Mark Drumbl. “Punishment, Post-Genocide: From Guilt to Shame to Civis in Rwanda” in New York University
192 Ibid: 1312.
democratisation and its adherence to ensuring basic civil liberties and political rights. As will shown in the forthcoming examples, the Tutsification of the state in Rwanda is well under way and is evident in a variety of policies ranging from militarisation, democratisation, and social agendas.

The identity cards that bifurcated Rwanda society prior to the genocide are gone and the government has proclaimed that everyone is now Rwandan. However, ethnic identity has been key to the justification of many of the government’s controversial policies. President Kagame and the RPF led government have justified many breaches of civil and political liberties under the rhetoric of preserving national unity and reconciliation. Additionally, the government has been wary of multi-party politics and power sharing between ethnically dominated political factions. Post-conflict governance based on this model has not been successful in neighbouring Burundi which has similar demographics to Rwanda with disproportionate and divided Hutu-Tutsi population. Furthermore, as the numerically deficient group Rwandan Tutsis have little hope of electing a party or president to power that is perceived as representing Tutsis survival at the expense of Hutus.

The notion that Tutsi Power preconditions Tutsi survival has been aptly illustrated by the elimination of Hutu-based opposition parties and expansion of Tutsi influence in politics. Post-genocide governance is based on “Fundamental Law” which is to guide Rwanda through the unity and reconciliation process and mitigate ethnic tensions in politics through power sharing. As the military victor after the genocide, the RPF was the dominant political party. However,

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194 Fundamental Law comprises the 1991 constitution, the 1993 Arusha Accords, the July 17th 1994 declaration of the RPF, the November 1994 agreement among politics parties that divides official posts among various political parties.
there was initially a great deal of power sharing with the MDR (Mouvement démocratique républicain), and two smaller groups. While there was a great deal of parity among posts allocated to the RPF and MDR after the genocide, over the years the RPF has gradually appropriated more posts for itself. As of 2002 the Presidential position, twelve of fifteen party-affiliated ministers, the chief judges on the Constitutional Court and the Court of Cassation, the prosecutor general, eleven of twelve governors, thirteen of fifteen ambassadors, seven of nine heads of security services, and nineteen of seventy-four assembly members were RPF members.

The RPF has also expanded its power by way of recruitment and its membership base. Despite a mutual agreement between parties to refrain from grassroots organising and recruitment during the transition period leading up the 2003 elections, the RPF’s membership has greatly increased. While the RPF has claimed that these were spontaneous requests from citizens to whom the RPF could not deny their political right to join a party, there have been many reports from those who felt they were threatened or coerced into joining. The RPF has been accused of using the rhetoric of unity and loyalty to obtain new members claiming the party represents a “family”, and that all Rwandans should belong to such a family if they truly support unity and reconciliation.

The upcoming elections have highlighted the dangers associated with transitions to democracy in a post-genocide society. Many see that continuing stability is unlikely as opposition parties become banned, leadership control is being tightened, and restrictions are still in place for party and civil organizations. According to the Arusha Accords, elections were

196 Ibid
197 Ibid. It is difficult to ascertain whether the increase in RPF membership is among Tutsi populations only as Rwandans are officially no longer listed by their ethnic identity.
198 Ibid
199 Ibid
supposed to be held after five years in 1999. The Rwandan government pushed that date forward four years to 2003 in the interests of "unity". There has been little pressure from the international community to make democratisation a big part of the development agenda.

According to Peter Uvin, the concept of democracy and multiparty elections in a post-genocide society can be unrealistic and inappropriate if attempted to early and thus democracy has been traded for stability.200

The Rwandan government has capitalised on the international community's concern for stability over democratisation in the upcoming national and Presidential elections. The banning of the MDR and the contestation of Kagame for the Presidency has been a key issue for testing the tension between democratisation and stability. The MDR, predominantly supported by Hutus, was banned for promoting a "divisive" ideology and was accused of supporting Hutu extremists.201 The banning of forty-seven MDR members was significant as the party was proving to be the only one capable of presenting a significant challenge to the RPF in the national elections. Many of the smaller parties had been previously banned for actively participating in the genocide. At the end of June 2003 the Transitional Assembly passed new laws governing political parties and politicians in the new multiparty system that is outlined in the recently approved constitution. Among the many standard rules and regulations that address registration, fundraising, etc., the law stipulates that political parties should not be created on the basis of blood relations, ethnicity, regionalism, religion, gender or any other relations that would foster division.202

The Presidential election competition between incumbent President Paul Kagame, former Premier and MDR representative Faustin Twagiramungu, and the two other Hutu backed

candidates has to date been very controversial leading up to elections on 25 August 2003. Twagiramungu has been living in exile and has chosen to run as an independent after his party was banned. As he is the only competition for Kagame he is expected to have a broad base of support from his former party members. Kagame ran unopposed for the leadership of the RPF and as of early July 2003 four other parties had endorsed his candidacy over Twagiramungu. As there are only eight parties in the assembly and two of the parties backing Kagame have the same number of seats as the RPF, Kagame's Presidential election is appearing high predictable.

President Kagame's rhetoric during the election campaign resounds with expected calls for unity, warnings of divisiveness, and critiques of multiparty democratic models of governance. In speeches attacking "divisionism" Kagame has issued warnings to those who hold such a divisive ideology that exist inside and outside of Rwanda. He stated in a 31 March 2003 speech that, "I am sure that it is also your view and your wish to have national security, unity, development and democracy. Anyone who would bring in division – because I know that the views of those who intend to come back are based on division – will not be elected." Furthermore, Kagame has made comments that blame the international community for promoting inappropriate policies that support democracy over stability. He criticised the "bad policy of foreigners who support division" by aiding civil society.

In an attempt to forge unity under the RPF agenda the Rwandan government has expanded its rhetoric into a social and educational context. The Rwandan government and its National Unity and Reconciliation Committee has organized what is unpopularly known as "solidarity camps", now known by its Kinyarwandan name ingando. These camp are meant to

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203 The four parties that have backed Kagame's leadership are, the Liberal (Parti Liberal, PL), Social Democratic (Parti Social-Democrate, PSD), Islamic (Parti Democratique Islamique, PDI), and Labour (Parti Rwandais, PSR) Arthur Asiimwe. "Kagame Surges Ahead As Four Parties Give Him the Nod" in the East African (Nairobi) 7 July 2003. [on-line] [cited 07/11/2003] [available: http://allafrica.com/stories/200307080646.html
205 Ibid
assist in the reintegration process for refugees and those released from prison who were incarcerated upon suspicion of participation in the genocide, educate youth, and provide military training. While there has been little reported on these camps, most have characterised them as a negative combination of militarisation and one-sided political propaganda in favour of the RPF. Human Rights Watch has reported that the “camps were meant to promote ideas of nationalism, to erase the ethnically charged lessons taught by the previous government, and to spur loyalty to the RPF.”

There are two types of camps that operate throughout Rwanda’s provinces. Officials, community leaders, students inhabit the first kind, and the general population who attend in order to learn to military tactics and discipline, learn French and Kinyarwanda and are “taught to accept RPF lessons about the past and future of Rwanda.” These camps generally last for one month and many families have sent their children there to learn their native language and history. The second types of camps are meant to provide political education for people from regions that were strongly supportive of the Hutu militias during the genocide, namely Ruhengeri and Gisenyi, and for Hutu refugees returning from the Congo. While there is no law requiring people to attend the camps, many attend because they were reportedly forced to go after being captured abroad or out of fear of the authorities. These camps generally last three months and unlike those who attend the first type of camps, there is little flexibility to return home to attend crops and sustain a livelihood.

Those released from prison also attend the second type of camps that involved a considerable attempt at political re-education. The initial provisional release of 22,000 suspects

207 Ibid
208 Ibid
209 Ibid
from the prisons in early 2003 was followed by their attendance in solidarity camps. Prisoners were expected to return to their local communities after their re-education where they would await trial and sentencing for the genocide crimes they confessed to. A public relations officer for the Rwandan Ministry of Justice stated “they have mainly taught how to be good citizens and how to re-establish themselves in society.”

The correlation of Tutsi power and Tutsi survival has also been evident in the militarisation of the state – primarily through an aggressive foreign policy agenda. The role of Rwanda in the continuing conflict in the Congo is an issue of great political and military complexity and will not be discussed at length. However, the militarisation of the RPF has served the interests of the Tutsi ethnocracy by justifying the elimination of Hutus in the name of unity. It is widely recognized that the Kagame government has been supporting militias in the DRC under the pretext of securing its own borders and for capturing Interahamwe militia and ex-FAR (former Rwanda military under the Habyarimana regime) who are said to be propagating violent reprisals against Tutsis. The Hutu extremists operating in the DRC have organised under the name of the Armée de Liberation du Rwanda (AliR) and comprise not only ex-FAR and Interhamwe who fled after the genocides but also a substantial number of new combatants. Many of the new recruits were picked from refugee camps in the DRC or recruited beginning in 1997 when the conflict in the DRC began to escalate. The AliR comprise

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212 See ICG reports that focus heavily on the militarisation of the Rwandan government and its policies in terms of its regional security policies:

approximately 12,000 combatants, who are said to be weak, lightly armed and incapable of mounting a successful incursion into Rwanda.\textsuperscript{214}

Kagame has been defending his actions in the DRC by recounting the attacks by AliR combatants against Congolese Tutsis and the threat they pose to unity and reconciliation in Rwanda. Furthermore, he claims that many of the genocidaires who are Interhamwe and ex-FAR combatants need to be captured and brought back to Rwandan to be charged with genocide crimes. However, his military rationale is inconsistent with the domestic political rhetoric of unity through a “Rwandaness” that is irrespective of ethnicity. It is not sufficient to claim that post-genocide unity and stability have been achieved for Rwanda when Hutus and Tutsis continue to massacre each other because the conflict is displaced to another locale. The RPF’s justifications reveal the “extent to which its notions of political obligation and political community are ethnic, transnational, and diasporic. Can the RPF act both as the protector of all Tutsi everywhere and as the national government of the Rwandan people?”\textsuperscript{215} The Tutsi diaspora is of utmost importance to the survival of the Tutsi ethnocracy in Rwanda has been aptly illustrated by Kagame’s foreign policy.

Reconciling the nature of a political regime to the mode of justice and its potential for contributing to reconciliation is a difficult but important one for post-genocide societies. The current political context of Rwanda is marred by a Tutsi ethnocracy. While the rhetoric of the Rwandan government has been promoting unity through a single Rwandan identity, the policies of the government have been the promotion of unity by way of repressing opposition and preserving the RPF’s power. Kagame’s government has been wary of multiparty politics that would undoubtedly crush their minority representation. This is a fundamental tension of a population whose demographics represent a massive split in numbers between the majority and

\textsuperscript{214} Ibid, 79.
minority. Mamdani expresses the dichotomy this way: “The minority fears that democracy is a
mask for finishing an unfinished genocide. The majority fears the demand for justice is a
minority ploy to usurp power forever.” This leaves us to conclude that “justice and
reconciliation is not the function of the justice system alone. If other government policies foster
injustice and divisiveness, the best court system in the world will not produce reconciliation.”

It is under this guise of the Tutsi ethnocracy that the indigeneity of Gacaca has been sacrificed as
a mode of restorative justice to one of victor’s justice. The result will be that the beneficiaries of
justice will also be its political architects.

**Gacaca and Recontextualising Identity**

One of the dangers that the Tutsi ethnocracy poses to the success of the Gacaca is that it
serves the government’s agenda of assigning guilt to those considered Hutus based on
assumptions of group membership. Identity in post-genocide Rwanda is not as ethnically
dichotomised as it was previous to the genocide. Identities have now been recontextualised to
conform to the unity and reconciliation agenda that attempts to take the emphasis off of
ethnicity. However, the result has been that Rwandan identities, as tied to their participatory role
in the genocide, still correlate to ethnicity. Identity can be recontextualised in post-genocide
Rwanda in a way that divides the population into categories of victims, victors, survivors and
perpetrators. These categorisations may not be mutually exclusive, however, despite the
government’s agenda of forging a single political identity of Rwandans, the identity of
participants in the justice process deploys a dangerous link to ethnicity.

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According to Mamdani, *victims* refer to both Tutsis and Hutus that were targeted in the genocide. However, the living victims refer almost solely to “Tutsi genocide survivors” and “old case load refugees” who were primarily Tutsis that had fled after the 1959 Hutu Revolution. The term *survivor* is referred to all Tutsis who remained in the country during the genocide and survived. The assumption is that all Hutus who had opposed to Habyarimana regime were killed and thus those Hutus who were in Rwanda during the genocide and were not killed were never targeted. A corollary to identifying *victims* and *survivors* is the need to identify some as *perpetrators*; the danger is that all Hutus are deemed perpetrators as their survival of the genocide is said to assume their participation or complicity.

To identify the *victors* of the genocide requires putting Rwandan history in the context of civil war in which the victors are undoubtedly the RPF who constitute the consolidation of post-genocide Tutsi power. While the Rwandan government denies the continuing distinction of Rwandans as either Hutus or Tutsi, its use of national and local judicial processes to label participants as survivors and perpetrators further entrenches politicised ethnic identities. The Organic Law and its division of labour between the national court system and Gacaca purport to promote reconciliation through a survivor’s justice. Thus survivors are by way of their Tutsi identity also the victors; this combined with the state-imposed Organic Law leaves Rwandan justice as nothing more than victor’s justice and closely associates justice with Tutsi power. Mamdani presents the dilemma to which the process of Gacaca must respond and from which the international community must discern its level of support: “the form of justice flows from the form of power. If victor’s justice requires victor’s power, then is not victor’s justice simply revenge masquerading as justice?”

For Gacaca to overcome these limited and ethnically charged characterisations, the notion of a survivor and perpetrator must include both Hutus and Tutsis. Additionally, the idea

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219 Ibid, 272.
that a Hutu’s survival during the genocide depended solely on their participation or complicity serves to generalise blame among Hutus and explains the characterisation of perpetrators as mostly Hutus. These characterisations that only Tutsis can be survivors and only Hutus can be perpetrators ignores many of the individual circumstances of the genocide. Many Hutus survived, not because they were in agreement with extremists, but because they chose to hide, or simply keep from publicly denouncing the crimes. Furthermore, many Hutus were targeted and survived such as those who were mistaken as Tutsis, those who survived their injuries, and women who suffered from sexual violence.

This critique of the ascribed ethnic identities to the participants in Gacaca also speaks to the importance of individualising the circumstances surrounding the crimes committed. One of the important components of the “new narratives” on the genocide is the attempt to individualise mass violence. However, this has been an academic approach that has its utility in assessing the individual motivations and incentives to commit the crimes. The actual act of committing the crime is much more difficult to individualise. Therefore the need to individualise mass violence is much better suited to assessing mobilisation and motivation than, as will be shown, the physical acts of genocide killings.

One of the benefits ascribed to Gacaca, as a mode of restorative justice, its that its trials prosecute individuals and differentiate between members of a group and thus individualizes responsibility. This deters the accusing member from exacting undifferentiated vengeance on Hutu individuals based on their ethnic membership. However, the criminal acts of genocide perpetrators in Rwanda are unlike those of conventional homicide cases in that individualizing guilt is very difficult. In circumstances in which a family was killed by a group of several to a dozen in the militia, each of whom maybe have contributed in one way or another to the death of

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an individual, how is the Gacaca court to decide who was ultimately responsible for whose
death? The nature of the Gacaca process in which consensus decisions will be based very
minimally on evidence and heavily on accusations from community members implies that
consensus will be easier to reach upon assumption of group membership and hearsay than on the
extent of an individual’s participation. This need for consensus in Gacaca and the difficulty of
individualizing responsibility will further politicise the ethnic identity of perpetrators as Hutus
and the victims and survivors as Tutsis.

The Government of Rwanda’s agenda of reducing identity to that of “Rwandan” and
dehistorising and depoliticising ethnicity has only been successful in the formal and public
sphere of government rhetoric and bureaucracy. The social conditions of post-genocide Rwanda
remain constructed in terms of ethnic identity and as relegated to the private sphere render them
more destructive. As a Hutu woman stated, “If you ban these terms…they take a different form
that’s even more exclusive”; Rwandans now ask each other ‘is he one of us?’

After the expected release of many prisoners into the community as a result of their confessions in the
Gacaca process, it would be unreasonable to expect a sudden social reconstruction of ethnic
identity that no longer adheres to the exclusivity of Tutsi and Hutu. The government’s agenda of
eliminating ethnicity is a fallacy in Rwandan society and will be exacerbated by the prosecution
of genocide suspects based on their group membership as Hutu and by the release of such
suspects into the community.

Gacaca and the Violations of its Indigeneity

The control over the processes of justice by the government is also evident in the top-
down, state-imposed nature of the Gacaca process. The government, as the architect of the
courts, abuses the indigeneity of Gacaca that is meant to be community initiated. Many

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criticisms of Gacaca in terms of its relationship to the state point to a history of communal action under state compulsion. Under the precolonial Tutsi king there was a form of regular communal work called umuganda. The Belgian colonizers and the post-colonial Habyarimana regime exploited this practice to conscript forced labourers for public works and infrastructure projects. Gacaca presents a similar tone in its call to justice and reconciliation that bears on every Rwandan the state-imposed responsibility of bringing perpetrators to justice and to participate in the post-genocide society. Kagame’s rhetoric in the preamble to Gacaca law “gives a strong whiff of command justice declaring that the ‘duty to testify is a moral obligation, nobody having the right to get out of it for whatever reason it may be.’” There is an irony presented here in the relationship between populist and grassroots participation that is state-imposed. This characteristic of Gacaca furthers the forced unity agenda that aids the continuance of power for the Tutsi ethnocracy.

Top-down approaches are ever present in post-genocide Rwanda. Both the villagisation and the sensitisation program of the Government of Rwanda bear a similar tone and have had a deleterious affect on reconciliation. The “villagisation program” was put in place to relocate Rwandans from rural communities in the hills to newly created towns and villages. This has left many Rwandans feeling estranged in new communities and contributed to a significant decline in agricultural output. This has destroyed the traditional communities that are said to be the basis for participation in the Gacaca general assemblies and the target areas of reconciliation. This has been exacerbated by the return of 750,000 Tutsi refugees, those considered old caseload from decades earlier, which need to be integrated into these newly formed communities. The “sensitisation program” has aimed to keep Rwandans informed and knowledgeable regarding

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222 ibid.
223 ibid.
Gacaca, however, like other government initiatives has remained limited, top-down and elitist upon allegations that very little of the Gacaca literature is in Kinyarwanda.225

Victor's justice is most clearly problematic and volatile in the Government's decision not to allow crimes committed by the Rwandan Patriotic Army (RPA), the military arm of the RPF during the genocide, to be tried in Gacaca. While the genocide targeted the Tutsis as the primary consumers of violence, Tutsi refugees and the RPF committed extensive war crimes prior to the genocide that also credits them as perpetrators of violence. Prior to the signing of the Arusha Accords to end hostilities between the RPF and Rwandan government forces, the Forces Armées Rwandais (FAR), the RPF had forcibly removed Hutus and committed violations paramount to war crimes. According to Human Rights Watch they destroyed property, recruited child soldiers against their will, and displaced thousands in order to create free-fire zones.226 Additionally, mass human rights violations, also tantamount to war crimes, occurred with the RPF advancement post-genocide that was justified by revenge killings and the desire to remove Hutus from positions of social and political power.227 The Gersony Report, which was to be issued by UNHCR but prevented by the UN Secretary General out of sympathy to the newly formed government under RPF control, identified that the RPF "organized massacres of tens of thousands civilians as its soldiers advanced in Rwanda" with an estimated death toll of 25,000 to 45,000 from April through August of 1994.228

Kagame has insisted that any human rights violations committed by RPF soldiers were isolated cases; he "dismisses any charges of RPF massacres as shameless attempts to equate that

227 Bjorn Willum. Foreign Aid to Rwanda: Purely Beneficial or Contributing to War?, dissertation submitted 22 October 2001 to the University of Copenhagen, Department of Political Science. [on-line] [cited 11/12/2002] [available: http://www.willum.com/dissertation], 9
228 Ibid, 9
behaviour with the genocide." A few individual soldiers in the RPF's army have been tried and convicted in Rwanda's national courts. However, these remain token sacrifices in comparison to the widespread violations that have been reported. Kagame continues to insist that these crimes will be tried in regular military tribunals and that the priority of the Government is to deal with the genocide cases first and foremost. Additionally, an African Rights report on Gacaca supports adhering to the distinction between genocide crimes and human rights violations committed by the RPF during what is referred to as the "civil war". They state that the "confusion and tension" over why RPF crimes would not be prosecuted by Gacaca "reflects the lack of public awareness and acceptance of the distinctive aspects of the genocide in terms of ethnic targeting, planning and implementation, something that perhaps only further education by human rights and civil society groups can help to remedy." 

The decision not to prosecute RPF crimes in Gacaca highlight two controversial issues in relation to the government's imposed narrative of the genocide and the purpose of the courts. The first issue is the nature of war in which RPA inflicted deaths are assumed by the government to be a result of the civil war and not the genocide. Second, the participants, the RPF, are assumed to be military personnel deserving of a military tribunal and not genocide militia whose justice is left in the hands of a community tribunal. However, the Organic Law stipulates a jurisdiction over crimes committed between October 1990 and December 1994 that includes both the civil war and the genocide.

What the government does not delineate between is RPA killings as a result of the civil war prior to 1994 and revenge killings during and immediately after the genocide. Additionally, there is considerable suspicion that many Hutus were eliminated by the RPA as "planned


exterminations of political opponents" and as such can be considered acts of genocide.\textsuperscript{231} As the RPF is the party in power its armed forces are considered military personnel retroactively, whereas the armed forces and militia of the Habyarimana regimes are considered \textit{genocidaires}. This furthers the notion of victor’s justice as those in the RPF, as Tutsis, will not stand trial against accusations from primarily Hutu communities. Furthermore, it reveals the truth that one’s view on justice is dependent on one’s view of the genocide. Kagame espouses that the genocide was a crime of the state, while RPF killings were individualized crimes of excess.\textsuperscript{232}

These distinctions in the rhetoric of the Kagame Government highlight the imposed harmonization between ethnicity and the participants of justice and re- emphasise that what is driving justice is the very same politicisation of ethnicity that drove the genocide. If perpetrators are represented as Hutus and not widows, orphans or survivors, and victims are represented only as Tutsis and not defendants or perpetrators, Gacaca offers very little hope for reconciliation. As a state-imposed judicial process, Gacaca adheres to the agenda of the Tutsi ethnocracy and as such becomes a form of victor’s justice that violates the indigeneity of Gacaca.

One must recognise that “the Tutsification of state institutions cannot be an effective guarantee against a repeat of genocidal violence”.\textsuperscript{233} As such, the characterisation of the architects of justice is an integral factor. Gacaca only holds potential for reconciliation if it remains true to its indigenous mode of restorative justice is not subject to an authoritarian and ethnocratic doctrine of unity. The Kagame government has used the indigeneity of Gacaca as a pinnacle of his unity agenda that stresses the importance of a monolithic “Rwandaness”. Under this agenda the Tutsi ethnocracy has flourished through the elimination of Hutu-based opposition

and the pursuit of genocidaires to end Rwanda's culture of impunity. However, the lack of RPF crimes being prosecuted in Gacaca implies that for the great majority of Rwanda's population the RPF is the ultimate beneficiary of impunity. Gacaca holds as much potential to ignite ethnic tensions as it does for reconciliation if justice continues to be politicised by its architects and not legitimated by its beneficiaries.
VI. Conclusion

Rwandan politics is presently in a transition phase that will have significant implications for the justice and reconciliation process. Additionally, changes in the political environment and the progress of Gacaca will open up further avenues for research in several areas. While it has been emphasised throughout this thesis that Rwanda is unique, both in terms of the violence that it experienced and the approaches it has taken to reconcile two ethnic groups, broader implications for international justice can be identified.

Suggestions for Further Research

Several of the theoretical components and analytical frameworks used in this thesis could be expanded and elaborated upon. Mark Drumbl's post-genocide society typology is only fully elaborated in the dualist society that is exemplified by Rwanda. The remaining two types, the homogenous and pluralist, are not fully explicated in the typology. For a full comparative analysis and suggestions for appropriate models of justice, this framework needs to be expanded and all possible cases explored.

Additionally, the two paradigms of retributive and restorative justice provided excellent templates from which to examine the ICTR and Gacaca courts. However, the relevance of experiences in the Truth and Reconciliation Commission in South Africa can also be informative. The notions of truth telling are incorporated into Gacaca but the idea of granting amnesty, while embraced in South Africa, has been fully rejected in Rwanda. The significance of this in relation to the types of society that experience violence should be explored further.

In regards to normative arguments made about the ICTR, there is a great need to further explore the emergence and genealogy of norms in international criminal law. As the inception of the ICC is recent and the ad hoc tribunals have yet to complete their mandate, the literature on the norms embodied in these institutions is minimal. Furthermore, the relationship between
culture and norms has been explored in various ways however it remains to be applied to international criminal law.

The limited impact that the ICTR has had on reconciling Rwandans should inform the creation of the International Criminal Court in terms of its mandate and jurisdiction in two ways. First, international justice may set its standards of success too high if the mandate of court is to reconcile a society that has experienced mass violence. The failings of the ICTR in this respect have indicated that international standards of justice and the political eliteness of the participants in the process render it remote and irrelevant to some cultures and societies. Additionally, the presence of an international court to aid in ending impunity should not preclude the use of alternative modes of justice, indigenous or otherwise. International courts, local restorative approaches, and truth commissions can all be accommodated within the same society and can simultaneously reach their respective goals of punishment, reintegration, and the unveiling of truths.

Further study of the Gacaca courts may involve invoking different perspectives based on the participants in the justice and reconciliation process. The Rwandan government and the international community have heavily favoured both youth and women as key demographic groups to aid reconciliation. The importance of women in post-genocide Rwanda was discussed previously, however, a gendered approach to Gacaca may reveal that notions of punishment, justice and reconciliation mean different things to different demographics. The role of youth is often overly diminished. Many of those on trial in Gacaca were youth when they were first imprisoned. Other youth are heading households and becoming involved in rebuilding their communities. A youth perspective on Gacaca may reveal whether restorative justice will have a long-term impact on local communities and whether ethnic identities remain salient factors among younger generations.
Further monitoring of Gacaca throughout its actual trials after the presidential elections is necessary to highlight several components. First, as many have expressed apprehension at telling their stories or accusing those on trial, the courts should be monitored to ensure that participants are allowed to speak freely. Second, the reintegration of suspects back into the community will undoubtedly cause a great deal of tensions among local citizens. If former prisoners are not welcomed back home, as they have been asked to do by the government, then Gacaca will fail in regards to the reintegration principle of restorative justice. Finally, continuous surveying of the numbers of participants at the trials and their thoughts on the legitimacy of Gacaca will ultimately be the test of its success. Gacaca will not be true to its indigenous form if the community is not adequately represented or if its participants see its process as benefiting something other than the reconciliation among of their own neighbours.

There are several areas of Rwandan politics that have been underreported that have contributed to the ignorance of the true dangers behind Gacaca and suggest further areas of research. The “militarisation” of Rwandan politics is often stated with little respect to domestic policies. The extent of the RPF’s presence in local communities and whether they are perceived by Rwandans as legitimate protectors of both Tutsi and Hutu interests is yet to be addressed. Furthermore, the ingando, or solidarity camps, are an extension of this militarisation. The Kagame government has allowed very little information to be released about these camps, their conditions, or the impact they have had on its inhabitants.

Evaluating Gacaca and Future Prospects

There are many elements that will contribute to the success of Gacaca as measured by reconciliation between Hutus and Tutsis in Rwanda. The salience of ethnicity remains and is manifested in many elements of Gacaca politics and justice issues. The concept of “Rwandaness” is reinforced in political rhetoric while being Hutu or Tutsi remains relevant in local communities. Indeed even at the elite political level ethnicity characterises the
demographics of political recruitment and is the rationale behind opposing multi party politics. Ethnicity has its most destructive potential when power is tied to survival. As Mamdani so succinctly suggests, it will be difficult to reconcile a majority who wants power and survival through dominant representation and a minority who seeks power through justice.

The puzzle of Gacaca is its characterisation as both restorative justice and victor’s justice; to resolve this was to emphasise the political intentions behinds the architects. It may be possible that Gacaca will be granted more legitimacy from its participants and overcome the shortcomings of injustice that are perceived when the victors are the architects. Gacaca’s test will be to survive a change in political leadership if that is to come at the end of August 2003. However, as the Tutsification of the state proceeds even further into elite competition there is little likelihood that this test will be presented.

The courts have already experienced enough delays and controversies that the principles behind Organic Law are being questioned in local communities. The perception that justice is being done still lies with the politics of the state that resurrected this tradition. If the suspects feel as if they are being tried as Hutus by Tutsis then the characterisation of victor’s justice is fitting. If the victims and participants in the trial feel as if justice is not being served by the release and reintegration of those that have been accused then there will be no reconciliation. For Gacaca to meet its goals an adherence to the principles of its indigenous tradition and restorative justice paradigm is necessary and its architects must be perceived as neutral and not vengeful.

The upcoming presidential elections will be significant for the legitimacy of the Gacaca process. If a Hutu backed candidate is elected to the office of President and the expansion of the RPF throughout government positions is minimized, the trials of RPF soldiers could be incorporated into Gacaca and the national courts. This change would alter the notions of who constitutes perpetrators and survivors to include both Hutus and Tutsis. However, the likelihood of anyone but Kagame winning the election is slim and the Gacaca court will continue as
planned. It will be difficult to ascertain the legitimacy of a Kagame win. The ethnocratic nature of his politics is subtle to the eyes of the international community that have set a high bar for what is considered ethnic conflict in Rwanda.

Several scenarios can be envisioned assuming that, given the political context it operates within, Gacaca will fail to provide a legitimate form of justice. For Gacaca to fail would mean that its participants did not perceive it to be a legitimate process. This perception is possible if witnesses testimonies were not respected, if they were not given the opportunity to express themselves, of it the punishments, or lack thereof, for suspects were perceived as inappropriate. The extreme scenario of this failure would be a widespread or even small scale resurgence of ethnic violence. This is likely to happen after many of the suspects have been reintegrated and were not subsequently welcomed back into their communities.

Another possibility is the cancellation of the Gacaca process and the continued imprisonment of genocide suspects to await trial either in the national courts or by another process. This is an unlikely scenario given the high cost, financial and political, of retaining suspects. The alternative would be for the international community to invest in the national court system, by way of financial and human resources, to increase the capacity for these trials.

The final scenario entertains the idea that reconciliation can be attempted without justice. Whether genocide suspects are reintegrated or remain in prison, it must be questioned if justice is a necessary or only a significant component for reconciliation. The genocidal violence in Rwanda was partly attributed to a culture of impunity that has become so integral to the justice rhetoric. However, differing notions of what justice entails, be it punitive, truth telling, or reintegrative, means that there will always be some who perceive a certain level of impunity. In the Rwandan context, the danger lies in impunity being associated with a particular ethnic group. The remaining question is whether it is safer to have impunity lie with those who hold power or those who are subordinate to it.
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