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The Gacaca Experiment: Rwanda's Restorative Dispute Resolution Response To The 1994 Genocide

Jessica Raper

“There is an urgent need for national reconciliation in Rwanda, but this must not be at the expense of justice, otherwise the opposite effect will be produced and the murderers reinstated.”

—Alain Destexhe¹

At the tenth anniversary of the Rwandan genocide of 1994, Rwanda remains faced with the social and legal challenge of resolving the same conflict. Justice Richard J. Goldstone has examined how truth commissions and tribunals are helping to bring peace and stability worldwide. He noted that, “justice can be a useful tool for peace-keeping or peace building. With it, countries emerging from periods of serious human rights violations can hope for an enduring peace. Without it, the terrible rate of war crimes will not abate.”² Justice Goldstone describes the options for a country attempting to recover from a period of lawlessness that has spawned violence and crime.³ According to Justice Goldstone, a country’s options are to: (1) grant a blanket immunity from prosecution for past criminal acts; (2) allow a regular justice system to operate and ordinary courts to try and sentence anyone proven guilty of criminal conduct; (3) establish a truth and reconciliation commission or its equivalent in order to enable confessions of guilt for past human rights abuses to be traded for indemnification; or (4) establish a modified truth commission under which the most serious offenders remain subject to prosecution.⁴

Since its rise to power in July of 1994, the Rwandan government has been committed to prosecuting all those accused of genocide. To prosecute the approximately 130,000 defendants, Rwanda has adopted a program called *gacaca*

1. Alain Destexhe, *Rwanda and Genocide in the Twentieth Century* 63 (1995).

2. Richard J. Goldstone, *Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals*, 28 N.Y.U. J. INT’L L. & POL. 485, 501 (1996). Justice Goldstone is the first Chief Prosecutor for the Yugoslav and Rwandan Tribunals and former head of the South African Commission of Inquiry into Political Violence and Intimidation.

3. *See id.* at 492.

4. *Id.*

(pronounced *ga-cha-cha*), based on Rwanda's traditional customary dispute resolution system.⁵ The *gacaca* law provides, as suggested by Justice Goldstone as noted above, a reconciliation component that allows defendants to trade confessions of past genocide crimes for indemnification, as well as a prosecution component that holds the most serious offenders accountable in a Western-style prosecution in a formal court of law.⁶ One of the main goals of *gacaca* is to end the so-called "culture of impunity" that has developed as a result of generations of cultural division between the Hutus and Tutsis.⁷

International media attention has focused largely on crimes committed during the killing spree that began on April 6, 1994, when "the daily killing rate was at least five times that of the Nazi death camps."⁸ However, the Rwandan government has committed to resolving numerous other problems, including: mistrust of the government, ethnic division, and the pervasive fear engendered by the persecution and pogroms preceding and culminating in the genocide of 1994 and the decades of endemic social disorder that preceded the wave of violence.⁹

RWANDA'S SOCIAL HISTORY

The 1994 genocide spawned international outcry, while the historic distinctions between the Hutu and Tutsi remain frequently misrepresented in the media.¹⁰ As the journalist Fergal Keane stated, at the time of the genocide, "[t]he general consensus among those of us watching the pictures and those who had taken them was that Rwanda was a madhouse, a primitive torture chamber where rival tribes were busy settling ancient scores."¹¹ To understand the 1994 genocide and why *gacaca* has been chosen as a method for punishment of Rwandans and reconciliation in Rwanda, it is necessary to have an understanding of Rwanda's true social history.¹²

5. Speech of Dr. Zac Nsenga, Ambassador of the Republic of Rwanda to the United States, given at Georgetown University on November 11, 2004 (hereinafter "Nsenga Speech"), quoting Organic Law No. 8/96 of August 30, 1996, on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990, available at <http://preventgenocide.org/law/domestic/rwanda.htm> (hereinafter "Organic Law No. 8/96"). The statute entered into force on September 1, 1996. *Id.*

6. Organic Law 8/96, *supra* note 5.

7. Nsenga Speech, *supra* note 5.

8. Gerard Prunier, *The Rwanda Crisis: History of a Genocide* 261 (1995).

9. Nsenga Speech, *supra* note 5.

10. FERGAL KEANE, *SEASON OF BLOOD: A RWANDAN JOURNEY* 6-8 (1995).

11. *Id.* at 6.

12. Nsenga Speech, *supra* note 5.

RWANDA'S SOCIAL GROUPS

The earliest documented Rwandan inhabitants are thought to be ancestors of today's Twa.¹³ Some researchers have posited that the Twa's ancestors were supplanted by Bantu-speaking farmer-traders known as Hutus, who arrived before the Tutsi and gradually forced the Twa from some of their traditional hunting land and deeper into the forests.¹⁴ The Tutsi, a generally taller, slimmer people than the Hutus or Twa, may have arrived later, around 1400 A.D.¹⁵ Some theories hold that the Tutsi arrived from lands north of Rwanda, gradually assimilated and took control before rising to the top of the Rwandan social structure and eventually, through conquest and an appeal to divine right, took over the position of king and his court.¹⁶ However, more recent theorists hypothesize that the Hutus and the Tutsis are descendants of people who began farming in Rwanda around 1,500 to 2,000 years ago.¹⁷

The history of the division between the Rwandan ethnic groups is undocumented in writing.¹⁸ As Alain Destexhe writes in *Rwanda and Genocide in the Twentieth Century*,

One thing is certain, the massacres in Rwanda are not the result of a deep-rooted and ancient hatred between two ethnic groups. In fact, the Hutu and Tutsi cannot even correctly be described as ethnic groups for they both speak the same language and respect the same traditions and taboos. It would be extremely difficult to find any kind of cultural or folkloric custom that was specifically Hutu or Tutsi. There were certainly distinguishable social categories in existence before the arrival of the colonisers, but the differences between them were not based on ethnic or racial divisions.¹⁹

Membership in the Hutu, Tutsi and Twa groups involved an occupational identity rather than an ethnic connotation.²⁰ Oral tradition documents a patron-client

13. Leo J. DeSouza, *Assigning Blame in Rwanda*, WASH. MONTHLY (Sept. 1997), reprinted in AFRICA, OPPOSING VIEWPOINTS 101 (William Dudley, ed., 2000). See also JOHN READER, AFRICA: A BIOGRAPHY OF THE CONTINENT 617 (1997). Because the Twa are such a small percentage of the population and as a result exert less influence in the Rwandan conflict, mention of this group is confined to items of general interest. This Note does not intend to fully treat the Twa experience.

14. READER, *supra* note 13, at 617.

15. DeSouza, *supra* note 13, at 101. See also RICHARD F. NYROP, ET AL., RWANDA: A COUNTRY STUDY 6 (1982).

16. DeSouza, *supra* note 13, at 101; NYROP, *supra* note 15, at 6.

17. READER, *supra* note 13, at 310.

18. See DESTEXHE, *supra* note 1, at 36.

19. DESTEXHE, *supra* note 1, at 36. Alain Destexhe was directly involved in the Rwandan relief effort following the 1994 genocide and was director of Doctors Without Borders International from 1991 to 1995.

20. Paul E. Nantulya, *The Gacaca System in Rwanda*, Conflict Trends, No. 4 (2001), available at <http://www.accord.org.za/xt/2001-4.htm>.

relationship resembling a feudal society: the Tutsi occupied the higher socio-economic and political positions of that of the feudal lords, while the Hutu acted as the serfs or loyalists of their Tutsi patrons.²¹ Hutu and Tutsi could change group membership based on their wealth and status.²² For example, a Hutu who gained cattle for any reason became a Tutsi, while a Tutsi who lost his cattle for any reason, including disease or famine, became a Hutu.²³ The third Rwandan group, the Twa, was comprised of forest dwellers.²⁴ This group of pygmy/pygmoid hunter-gatherers became known for their skill in music and dance at the Tutsi king's court.²⁵ The Twa made their living through making pottery, hunting and gathering.²⁶

GOVERNMENTAL ORGANIZATION

Beneath the king, there were three main tiers of governmental organization: (1) the chieftaincy of war, which oversaw Rwanda's common defense, (2) the chieftaincy of pasture, which handled pastoral and cattle breeding activities, and (3) the chieftaincy of land, which oversaw matters concerning farmers and their land.²⁷ In keeping with the two groups' social roles, the chiefs of pasture were predominantly Tutsi, and the chiefs of land were predominantly Hutu.²⁸ However, most of the higher-level administrative power was reserved for Tutsis.²⁹ From the fifteenth through the nineteenth centuries, the Tutsi king centralized the monarchy, reducing the power of Rwandan chiefs.³⁰ However, more distant areas of the kingdom, especially the Hutu-controlled northwest, were never brought under complete control, and even became a bastion of Hutu influence in the decade preceding independence.³¹

CULTURAL ORGANIZATION

Prior to colonization, Rwandan society involved a complex system of clans, language, culture, religion, kinship, governmental organization, and housing, all

21. DeSouza, *supra* note 13, at 101; NYROP, *supra* note 15, at 6-7; Nantulya, *supra* note 20.

22. DESTEXHE, *supra* note 1, at 40; Nantulya, *supra* note 20.

23. Nantulya, *supra* note 20.

24. NYROP, *supra* note 15 at 45; Nantulya, *supra* note 20. The Twa were considered to be inferiors by both Hutus and Tutsi. DESTEXHE, *supra* note 1, at 39.

25. NYROP, *supra* note 15, at 45-46.

26. Nantulya, *supra* note 20, at 53.

27. *Id.*

28. *Id.* There are, however, historical accounts showing that eighty percent of the chiefs in northern Rwanda were Hutu.

29. Philip Briggs & Janice Booth, *Rwanda: The Bradt Travel Guide 9-10* (2001).

30. NYROP, *supra* note 15, at 7-8.

31. *Id.* at 8.

of which combined to define a Rwandan citizen's place in society.³² Each citizen was imbued with a sense of national identity through membership in one of eighteen clans, all of which were made up of all three classes of Rwandan citizens: Hutus, Tutsis and Twa.³³ As historical accounts suggest, Rwandans found stronger identification with membership in their clan than with membership in their occupational status group.³⁴ Further, the three groups spoke the same language, with only minor local modifications.³⁵ There were also intermarriages, and there was an absence of state or self-selected segregation between the groups.³⁶

As Janice Booth notes,

Since our only source of information about these early days is oral tradition, which by its nature favours the holders of power, we cannot be certain to what extent the power structure was accepted by those lower down the ladder, to what extent they resented it and to what extent they were exploited by it. But, whether harsh, benevolent or exploitative (or possibly all three), it survived, and is what the Europeans found when they entered this previously unknown country.³⁷

Although we cannot know with any certainty the true nature of the pre-colonial power relationship, the fact that there was a national governmental structure and some semblance of national unity has been used as an educational tool of uniting today's Rwandan population.³⁸ But because there was such a strong governmental and social structure, the factors that served to unite pre-colonial Rwanda formed the basis for the development of the post-genocide *gacaca* process.³⁹

DIVISIVE COLONIAL POLITICS

The 1994 genocide resulted in part from colonial policies that developed the class system into divisions that were characterized as ethnic and racial distinctions.⁴⁰ Germany colonized Rwanda at the Berlin Conference of 1885, although it was not until nine years later that the first European traversed Rwanda.⁴¹ The colonizers used the distinctions between the Hutu and Tutsi social categories existent in Rwandan society at the time of colonization; they exaggerated stereo-

32. Nantulya, *supra* note 20, at 53.

33. *Id.*

34. *Id.*

35. READER, *supra* note 13, at 617.

36. Nantulya, *supra* note 20, at 53.

37. See BRIGGS & BOOTH, *supra* note 29, at 8.

38. Nsenga Speech, *supra* note 5.

39. Nantulya, *supra* note 20, at 51.

40. *Id.*

41. DeSouza, *supra* note 13, at 101; NYROP, *supra* note 15, at 9.

types and pitted the Tutsis against the Hutus to reinforce differences and develop ethnic distinctions from what had, before that point, been a class system.⁴² Germany supported the theory that the Tutsi were a superior race.⁴³ Early colonists developed the myth that the Tutsi were “black Aryans” who were more similar to Europeans than to Africans and could be entrusted with the duties attendant to colonial rule.⁴⁴ Thus, the German colonialists used the Tutsi population for assistance with colonization.⁴⁵ The German government ruled indirectly through the Tutsi monarchy and supplied military assistance to allow the king to eliminate the remaining independent Hutu kingdoms.⁴⁶ The German government ruled through the reigning Tutsi government, which provided effective control of the country due to the historically well-developed power structure.⁴⁷

Beginning in the early 1900s, German ethnographers reported that three strikingly different ethnic groups inhabited the areas now comprising Rwanda: the Twa, the Hutu and the Tutsi.⁴⁸ Those studying tribal differences developed a theory of classification based upon physical characteristics such as skin color, type of hair, and shape of the skull.⁴⁹ Reports stated that “[t]he Tutsi were . . . tall, handsome, slender, and well-proportioned. The Twa were grotesque little creatures whom the Germans referred to as dwarfs. Between the two stood the stocky aboriginal Bantu, the Hutu.”⁵⁰ In a further example, the Duke of Mecklenberg noted:

The Watussi are a tall, well-made people. Heights of 1.80, 2.00 and even 2.20 metres are of quite common occurrence, yet the perfect proportion of their bodies is in no wise detracted from . . . The primitive inhabitants are the Wahutu, an agricultural Bantu tribe, who, one might say, look after the digging and tilling and agricultural economy of the country in general. They are a medium-sized type of people . . .⁵¹

42. DESTEXHE, *supra* note 1, at 36.

43. *Id.* at 40. Despite a complete lack of scientific evidence in support of a racial distinction between the Tutsi and Hutu, German colonizers deemed the Hutu and Tutsi to be different races. *Id.* at 39-40.

44. KEANE, *supra* note 10, at 13.

45. READER, *supra* note 13, at 617 (citation omitted). It is important to note that not all Tutsi participated in the ruling class, nor did all Tutsi participate in assisting the German, and later the Belgian colonization. However, all of the chiefs whom were selected to hold posts in the German colonial administration were Tutsi. *Id.* at 618.

46. DESTEXHE, *supra* note 1, at 40; NYROP, *supra* note 15, at 11. It is worth noting that the Tutsi kings, beginning in the seventeenth century, having systematically eliminated the Hutu kings and chiefs, may have developed ethnic tensions between the groups. DESTEXHE, *supra* note 1, at 40.

47. NYROP, *supra* note 15, at 10-11; READER, *supra* note 13, at 617; DeSouza, *supra* note 13, at 102.

48. READER, *supra* note 13, at 617 (citation omitted).

49. DESTEXHE, *supra* note 1, at 38.

50. READER, *supra* note 13, at 617 (citation omitted).

51. BRIGGS & BOOTH, *supra* note 29, at 9 – 10; READER, *supra* note 13, at 618.

However, although “anthropologists have since shown that these physical characteristics are neither so general nor so sharply defined as described by the German ethnographers, they are persistently cited as fact.”⁵² As stated by Alain Destexhe,

So it was that German, and later Belgian, colonisers developed a system of categories for different “tribes” that was largely a function of aesthetic impressions. Individuals were categorised as Hutu or Tutsi according to their degree of beauty, their pride, intelligence and political organisation. The colonisers established a distinction between those who did not correspond to the stereotype of a negro (the Tutsi) and those who did (the Hutu). The first group, superior Africans, were designated Hamites or white coloureds who represented a “missing link” between the Whites and the Blacks. “Any [good] quality attributed to an African group [was] . . . read as a sign of interbreeding with ‘non-negro’ cultures”⁵³

Rwanda’s colonial powers and missionaries adopted the theory that the Tutsi were immigrants and of different genetic stock than the Hutu.⁵⁴ They justified favoring Tutsis over Hutus based on the assessment that the Tutsis had superior political and social organization.⁵⁵ This assessment was based on the Tutsi custom, continued by colonizers, and perpetuated by the fact that cattle were owned by the Tutsi king, who allocated the cattle to other Tutsi chiefs, who in turn passed along the right to own cattle from father to son.⁵⁶ This custom ensured the continuation of Tutsi dominance.⁵⁷ Another custom signaling Tutsi superiority to the colonizers was the fact that the Tutsi chiefs provided protection to Hutu farmers in exchange for agricultural produce and labor, effectively forming a feudal system.⁵⁸ At the beginning of the twentieth century, colonizers began to view this class system as a racial division, which led to the practice of deeming the Hutu and Tutsi groups to be races.⁵⁹

THE WEAKENING OF THE MONARCHY

While noting that the physical characteristics attributed to the Tutsi and Hutu were far from universal due to their ability to switch between groups, Germany was fascinated by the physical characteristics exhibited by each group

52. READER, *supra* note 13, at 617 (internal citation omitted).

53. DESTEXHE, *supra* note 1, at 38 (internal citations omitted).

54. *Id.* at 39; *see also* READER, *supra* note 13, at 617.

55. DESTEXHE, *supra* note 1, at 39; READER, *supra* note 13, at 617.

56. DESTEXHE, *supra* note 1, at 39; READER, *supra* note 13, at 617.

57. DESTEXHE, *supra* note 1, at 39; READER, *supra* note 13, at 617.

58. DESTEXHE, *supra* note 1, at 39-40.

59. *Id.* at 39.

and their distinct roles in the Rwandan power structure.⁶⁰ The Duke of Mecklenburg was interested in the Tutsi king's level of authority, noting that:

Rwanda is certainly the most interesting country in the German East African Protectorate—in fact in all Central Africa—chiefly on account of its ethnographical and geographical position. Its interest is further increased by the fact that it is one of the last negro kingdoms governed autocratically by a sovereign sultan, for German supremacy is only recogni[z]ed to a very limited extent.⁶¹

Germany's presence remained limited, although it took several important actions, including institution of a head tax that caused the Hutu to see Germany as a protector, such as introduction of coffee as a cash crop, thus replacing cattle as the indicator of wealth and introducing a money economy, and education of a few Hutu along with the Tutsi who made up the vast majority of parochial school students.⁶² Despite these changes that weakened Tutsi power and the control exerted by the monarchy and seem significant in retrospect, the German domination continued to be largely unrecognized.⁶³

Even as late as the beginning of the twentieth century, despite the effects of German colonial rule and efforts to cultivate divisions between the Hutu and the Tutsi, the Rwandan groups were best described as a hierarchy of castes maintained through the custom of confining marriage to the members of one's own group or caste.⁶⁴ But, a number of factors still served to unite the Tutsi and Hutu.⁶⁵ For example, the two groups spoke the same local language (Kinyarwanda) shared the same social traditions, lived in the same areas, accepted mixed marriages, and participated together in military actions against neighboring kingdoms.⁶⁶ Furthermore, all Rwandans shared common crafts, taboos, divinations and medicines; worshipped the same ancestors; and consulted the same spirit mediums.⁶⁷ Another significant tradition that united some Rwandans, regardless of their occupational status as Hutus and Tutsis, was the bond of the blood vow, taken when two friends drank each other's blood to demonstrate their commitment to a lifetime bond as family members.⁶⁸ As a result of these types of commonalities, the bonds of Rwandan cultural history remained stronger than the attempts of colonizers to foster division.⁶⁹

60. *See generally* DeSouza, *supra* note 13, at 102.

61. BRIGGS & BOOTH, *supra* note 29, at 9-10. *See also* READER, *supra* note 13, at 618.

62. NYROP, *supra* note 15, at 11-12; READER, *supra* note 13, at 634.

63. BRIGGS & BOOTH, *supra* note 29, at 10-11. *See also* NYROP, *supra* note 15, at 11-12.

64. DESTEXHE, *supra* note 1, at 37.

65. *Id.*

66. *Id.* at 37. *See also* Nantulya, *supra* note 20.

67. Nantulya, *supra* note 20.

68. *Id.*

69. Nsenga Speech, *supra* note 5; NYROP, *supra* note 15, at 5.

BELGIAN COLONIZATION

Belgium took control of Rwanda in 1916.⁷⁰ Belgium, like Germany, maintained control of the colony through the Rwandan monarchy's power structure.⁷¹ Belgium strengthened the existing local power imbalances by introducing chiefdoms and sub-chiefdoms to strengthen Tutsi control in customary relationships, as well as deposing most of the remaining Hutu chiefs.⁷² However, the Belgian administration also intended to foster the Hutus' gradual social and economic progress, declaring that:

[T]he Government should endeavor to maintain and consolidate traditional cadre composed of the Tutsi ruling class, because of its important qualities, its undeniable intellectual superiority and its ruling potential. However, the mentality of this class must gradually alter. A way must be sought gradually to modify its conception of authority, which must be changed from one of domination exercised solely for the benefit of its holders, to one of a more humane power to be exercised in the interests of the people.⁷³

To that end, Belgium also undermined the authority of the monarchy, allowing a lessening in the traditional structures that kept the Hutus in a subservient role, although Hutus remained second-class citizens.⁷⁴

In 1931, Belgium deposed Rwandan King Musinga, who proved to be problematic in Belgium's development plans for Rwanda, and appointed a successor.⁷⁵ As Rwandans thought that the king ruled through divine right, the Belgian government's deportation of the king altered the perception of power in Rwandan society by exposing the myth of divine rule.⁷⁶

In 1935, the Belgian government issued each Rwandan an identity card that listed the citizen's ethnic group based on morphology and level of wealth.⁷⁷ Citizens were required to carry the card at all times and present it upon demand.⁷⁸ These cards served to deepen social divisions between the Hutu and Tutsi because they removed the ability for Hutus to elevate to the Tutsi class

70. See generally READER, *supra* note 13, at 618-21, for a more specific description of the negotiations leading to the Belgian acquisition of Rwanda after World War I.

71. DeSouza, *supra* note 13, at 102.

72. DESTEXHE, *supra* note 1, at 40; NYROP, *supra* note 15, at 13.

73. NYROP, *supra* note 15, at 14-15 (citation omitted).

74. BRIGGS & BOOTH, *supra* note 29, at 11-12; DESTEXHE, *supra* note 1, at 40-43; NYROP, *supra* note 15, at 13-17.

75. NYROP, *supra* note 15, at 13.

76. *Id.* at 14.

77. BRIGGS & BOOTH, *supra* note 29, at 12-13. These identity cards were still in use at the time of the 1994 genocide, and were used as a method of determining whom to target for genocide. *Id.* at 13. See also DeSouza, *supra* note 8, at 102.

78. KEANE, *supra* note 10, at 16.

through the acquisition of cattle.⁷⁹ The issuance of identification cards later proved to be a key factor in the execution of the genocide, both as a tool to target Tutsis, and as a method of establishing a group identity among those who committed crimes.⁸⁰ These cards, in effect, established the creation of the groups as “other.”⁸¹

In effect, the identity cards expressed to the Hutu that their lot in life was to toil, often in servitude, for the rest of their lives with no hope of self-betterment.⁸² The class divisions fostered by the cards became a self-fulfilling prophecy in the educational arena, where the Hutus’ level of educational attainment mirrored the disparity in social status.⁸³ The colonizers blamed the disparity in Tutsi and Hutu education on the Hutus’ lack of interest in education.⁸⁴ In fact, from 1945 to 1957, less than one-fifth of the students were Hutus in the Belgian-supported educational system.⁸⁵ However, the disparity was clearly the result of widespread discrimination in the colonial school system originally opened by the Germans.⁸⁶ In addition, the disparity was endemic in that the school system even “had a minimum height requirement which effectively reserved it for Tutsis.”⁸⁷ Nevertheless, as the spread of Christianity progressed, the levels of Hutu educational attainment began to change.⁸⁸

The Tutsi chiefs who became Christian began to convert their Hutu subordinates.⁸⁹ The seminaries welcomed these Hutu students more than the classical education system.⁹⁰ But, the subsequent denial of positions in the Tutsi government of a group of seminary-educated Hutus led many to later embrace the theory of ethnic separatism between the Hutus and Tutsis.⁹¹ A new generation of missionaries supported the educated Hutus’ protests, linking the movement

79. *Id.* at 16-17.

80. *Id.*

81. *Id.*

82. *Id.*

83. DESTEXHE, *supra* note 1, at 41.

84. *Id.* at 41. This perception of the Hutus’ lack of interest in education persisted to a much later time, as exemplified by the Belgian author, Omer Marchal, who wrote in 1994 that “[t]he majority of the Tutsi could read, but did not want to vote. The Hutu would all have liked to vote, but only a minority could read. This is the fault of their parents who regarded school as useless, while the Tutsi pushed to have their children educated.” *Id.* (quoting OMER MARCHAL, PLEURE, Ô RWANDA BIEN-AIMÉ (1994)).

85. BRIGGS & BOOTH, *supra* note 29, at 12.

86. *Id.* at 12; DeSouza, *supra* note 13, at 102.

87. BRIGGS & BOOTH, *supra* note 29, at 12; DeSouza, *supra* note 13, at 102.

88. DESTEXHE, *supra* note 1, at 41.

89. DESTEXHE, *supra* note 1, at 41; NYROP *supra* note 15, at 75.

90. DESTEXHE, *supra* note 1, at 41; NYROP *supra* note 15, at 75.

91. DESTEXHE, *supra* note 1, at 42. It is worth noting that, at this point, Rwanda was considered to be 65% Christian. *Id.* Today, Rwanda is around 75% Christian. BRIGGS & BOOTH, *supra* note 29, at 69; READER, *supra* note 13, at 635.

with the Catholic Church.⁹² The Tutsis, deprived of both leadership through divine right and the authority of the Catholic power structure, “began to question the power of the church and the Belgian authorities.”⁹³ Due to the Tutsis’ questioning, the Church suddenly shifted its support to the Hutu cause, which meant embracing republican ideas that hoped for Hutu emancipation.⁹⁴ Thus, the movement toward equality in the political and social structure began.⁹⁵

DECOLONIZATION AND POLITICAL DEVELOPMENT

As the number of educated Hutus gradually increased, the movement for Hutu rights became stronger, starting in about 1950.⁹⁶ Some members of the younger generations of Hutus and Tutsis adopted the colonial description of the ethnic differences between Hutus and Tutsis.⁹⁷ Although some Tutsis believed they shared the same ethnic origins with the Hutus, others subscribed to the theory of the Tutsis as superior Hamitic outsiders.⁹⁸ This distinction led to polarization, which extremists later manipulated as a factor in ethnic division.⁹⁹

Alain Destexhe described the transformation of political and socialized relationships between Hutu and Tutsi from pre-colonial to post-colonial times in the following passage:

[W]hat happened in Rwanda illustrate[d] a situation where the coexistence of different social groups or castes metamorphosed into an ethnic problem with an overwhelmingly racist dimension. The caricature of physical stereotypes, although they did not always hold true and were probably due to the principle of endogamy practised by each group despite the number of mixed marriages, was manipulated to provide proof of the racial superiority of one group over the other. Archaic political divisions were progressively transformed into racial ideologies and repeated outbreaks of violence resulting from the colonial heritage which was absorbed by local elites who then brought it into the political arena.¹⁰⁰

One Tutsi political group characterized the tension between the Hutu and Tutsi, saying,

92. DESTEXHE, *supra* note 1, at 42. Although many missionaries supported the movement for Hutu rights, the Roman Catholic Vicar Apostolic of Rwanda strongly supported the Belgian decision to continue support of the Tutsi power structure. *Id.* at 40-41.

93. *Id.* at 43.

94. *Id.*

95. DESTEXHE, *supra* note 1, at 42-43.

96. *See generally* DeSouza, *supra* note 13, at 102.

97. DESTEXHE, *supra* note 1, at 41-42.

98. *Id.* at 42.

99. *Id.*

100. *Id.* at 47.

Relations between us and them have forever been based on servitude; therefore, there is no feeling of fraternity whatsoever between them and us . . . Since our Kings have conquered all of the Hutu's lands by killing their monarchs and enslaving their people, how can they now pretend to be our brothers?¹⁰¹

Although, of course, the German and Belgium colonial governments modified the political relationships between the Hutu and the Tutsi, at the time of decolonization, the "single most important fact in [Rwandan] preindependence history was the domination of the Hutu majority by the Tutsi minority. Two periods of colonial rule did not basically alter the traditional structure; in fact, for reasons of expediency, the colonial administrations served to reinforce Tutsi control."¹⁰²

The era of decolonization in Africa brought stirrings for independence in the 1950s.¹⁰³ In 1957, the High Council of Rwanda, Rwanda's governing body, called for "rapid preparation" for total independence from Belgium.¹⁰⁴ The ruling Tutsi class sought immediate independence from Belgium, because the swift pace would allow the existing political power structure to remain intact.¹⁰⁵ As tensions mounted, the Tutsi government tightened control on the Hutu population in an attempt to maintain control after decolonization had occurred.¹⁰⁶ Meanwhile, Hutu political movements formed to combat abuses.¹⁰⁷ Some factions made a bid for power under the premise that the Hutu natives had been invaded and exploited by Tutsis who had treated the Hutus no better than the colonials.¹⁰⁸

An ethnic problem developed from the social power imbalance between the Hutus and the Tutsis.¹⁰⁹ In response to the High Council's call for independence, nine Rwandan Hutu intellectuals produced a powerful response.¹¹⁰ The document, *Bahutu Manifesto* (or *Manifeste des Bahutu*), subtitled *A note on the social aspects of the indigenous racial problem in Rwanda*, expressed the first open opposition to Tutsi social and political domination, and asserted that all Africans should have greater participation in their own government.¹¹¹ The

101. DeSouza, *supra* note 8, at 102-03.

102. NYROP, *supra* note 15, at 5.

103. DESTEXHE, *supra* note 1, at 43.

104. *Id.* at 17.

105. *See* DeSouza, *supra* note 13, at 102.

106. *Id.* at 103.

107. DESTEXHE, *supra* note 1, at 42; NYROP, *supra* note 15, at 18-19.

108. DESTEXHE, *supra* note 1, at 42; NYROP, *supra* note 15, at 18-19.

109. DESTEXHE, *supra* note 1, at 42; NYROP, *supra* note 15, at 17.

110. DESTEXHE, *supra* note 1, at 42; NYROP, *supra* note 15, at 17.

111. NYROP, *supra* note 15, at 17; DESTEXHE, *supra* note 1, at 42 (stating the full name of the unpublished paper); READER, *supra* note 13, at 635. As stated in LEARTHEN DORSEY, HISTORICAL DICTIONARY OF RWANDA, AFRICAN HISTORICAL DICTIONARIES, NO. 60, 292 (1994):

The manifesto attacked the whole concept of Belgian administration and maintained that the basic problem of the country was the conflict between Hutu and Hamite. It blamed the prevailing atmosphere and the *ubuhake* system for the lack of African initiative and

Hutu political movement sought change to a democratic system reflecting the Hutu majority before independence was granted.¹¹² As the 1950s came to a close and the move toward independence continued, international support for the Hutu political movement increased.¹¹³ In addition, new Hutu and Tutsi political parties continued to form.¹¹⁴

THE BEGINNING OF VIOLENCE

The 1994 genocide in Rwanda was the last in a series of massacres that occurred in 1959, 1963, 1964, 1973, 1990, 1992 and 1993.¹¹⁵ The first large-scale violence between the Tutsis and the Hutus occurred in 1959, when a series of massacres resulted in the death of more than twenty thousand Tutsis.¹¹⁶ Amid rumors of Belgian involvement, the mysterious death after a medical treatment of the Rwandan King, followed by the succession of one of his half-brothers, spawned the violence in July of 1959.¹¹⁷ The Belgians, having recognized that free elections would inevitably lead to Hutu rule, did little to stem the violence or save Tutsi lives or property.¹¹⁸ After continued arrests and small incidents of violence, the tension erupted into a massacre when young Tutsi members of an opposing political party attacked and beat a Hutu political party leader.¹¹⁹

In response, Hutu gangs surfaced, burning Tutsi huts, looting, and killing.¹²⁰ The Tutsis retaliated, killing several Hutu political leaders.¹²¹ By the time the violence had calmed, around three hundred people had died.¹²² In response,

the Hutu's lack of economic success. It objected to the assumption that the Tutsi political, economic, and social monopoly, which the Belgian administration had fostered, had led to a cultural monopoly. While the manifesto acknowledged that the Hutu was unskilled and poor, it warned that their condition would remain so under the prevailing system.

Id.

112. NYROP, *supra* note 15, at 18.

113. For example, the Catholic Church encouraged Hutus to form political parties. Belgium shifted support to the Hutu majority, even going so far as to begin to refer to Tutsis as "feudal colonialists." See DESTEXHE, *supra* note 1, at 43; see also READER, *supra* note 13, at 672.

114. NYROP, *supra* note 15, at 18-21.

115. Nantulya, *supra* note 20, at 51.

116. BRIGGS & BOOTH, *supra* note 29, at 14; DESTEXHE, *supra* note 1, at 43. Other estimates have put the death numbers at between ten and one hundred thousand. See, e.g., KEANE, *supra* note 10, at 18.

117. BRIGGS & BOOTH, *supra* note 29, at 14; NYROP, *supra* note 15, at 19.

118. KEANE, *supra* note 10, at 18; READER, *supra* note 13, at 672.

119. NYROP, *supra* note 15, at 20.

120. *Id.*

121. *Id.*

122. BRIGGS & BOOTH, *supra* note 29, at 14.

Belgian authorities arrested 1,231 people (919 Tutsis and 312 Hutus).¹²³ The country was placed under Belgian military rule, led by Colonel Guy Logiest, who began replacing Tutsi leaders with Hutus.¹²⁴ Asserting his supposed goal to correct the power imbalance between the Hutu and Tutsi that had been perpetuated through colonization, Logiest played a barely concealed role in attacks against the Tutsis.¹²⁵ Scores of Tutsis fled the nation while the violence persisted, unchecked by the Belgian military presence.¹²⁶

Belgium organized and then delayed a referendum on the monarchy.¹²⁷ On January 25, 1960, Belgium granted a right of self-governance to the Provisional Government of Rwanda to assuage the unrest caused by the delay of the referendum.¹²⁸ A few days later, Rwanda's local administrators declared Rwandan independence, and held elections for the new regime.¹²⁹ The Belgian administration granted *de facto* recognition of the new regime, but soon withdrew it based on charges of collusion with Hutu political leadership.¹³⁰ After refusing to recognize the 1960 elections, the United Nations accepted Rwanda's independence and oversaw new elections in September of 1961.¹³¹ The same Hutu political party, headed by Grégoire Kayibanda, was again victorious.¹³²

The violence between the Hutu and Tutsi groups continued as the year 1961 progressed.¹³³ In that year, approximately one hundred and fifty Tutsis were killed, five thousand homes were burned, and twenty-two thousand people were displaced.¹³⁴ After the confirmation of Rwanda's independence in 1962, Mr. Kayibanda became the new president.¹³⁵ As the country became more unsafe for the Tutsis, they continued to seek refuge in neighboring countries.¹³⁶ Between 1961 and 1966, Tutsi militants who had fled to Uganda, Tanzania, Burundi, and Zaire initiated ten major attacks from these neighboring countries.¹³⁷

123. *Id.*

124. BRIGGS & BOOTH, *supra* note 29, at 14; READER, *supra* note 13, at 672.

125. BRIGGS & BOOTH, *supra* note 29, at 14.

126. *Id.* at 14; DESTEXHE, *supra* note 1, at 43-44; READER, *supra* note 13, at 671-72.

127. BRIGGS & BOOTH, *supra* note 29, at 14; NYROP, *supra* note 15, at 23.

128. NYROP, *supra* note 15, at 23.

129. BRIGGS & BOOTH, *supra* note 29, at 14; NYROP, *supra* note 15, at 23; READER, *supra* note 13, at 672.

130. NYROP, *supra* note 15, at 23-24 (emphasis added).

131. BRIGGS & BOOTH, *supra* note 29, at 14; NYROP, *supra* note 15, at 24; READER, *supra* note 13, at 672.

132. BRIGGS & BOOTH, *supra* note 29, at 14; NYROP, *supra* note 15, at 24; READER, *supra* note 13, at 672.

133. BRIGGS & BOOTH, *supra* note 29, at 14; READER, *supra* note 13, at 673.

134. BRIGGS & BOOTH, *supra* note 29, at 14; READER, *supra* note 13, at 673 (citation omitted).

135. BRIGGS & BOOTH, *supra* note 29, at 14; DeSouza, *supra* note 13, at 103; DESTEXHE, *supra* note 1, at 44.

136. BRIGGS & BOOTH, *supra* note 29, at 15.

137. DeSouza, *supra* note 13, at 103. Burundi and Rwanda share the same ethnic mix of Hutu and Tutsi and were once part of the same colony. *Id.* Because of the similarities, events in Burundi

In response, Hutu propaganda groups began an anti-Tutsi campaign and dubbed these Tutsis *invenzi*, or “cockroaches.”¹³⁸ Meanwhile, the Kayibanda government continually obstructed the return of Tutsi refugees.¹³⁹ Consequently, the number of refugees grew from an estimated one hundred thirty-five thousand to one hundred fifty thousand persons.¹⁴⁰

DISCRIMINATORY POST-COLONIAL GOVERNMENT

The “discriminatory and sectarian policies pursued by immediate post-independence governments, reinforced the divisions created during the colonial period” and eventually developed into the policy that orchestrated the genocide.¹⁴¹ Among other policies, the Hutu government instituted quotas favoring the Hutu.¹⁴² The new quota system was based on the fact that because the Tutsis comprised approximately ten percent of the population—schools, universities and civil service workplaces were to be limited to no more than ten percent Tutsis.¹⁴³ The country’s poor economic status caused fierce competition for jobs and further radicalized ethnic tensions between Hutus and Tutsis.¹⁴⁴ Meanwhile, Tutsi refugees continued to make sporadic military forays into Rwanda, stirring up hostility that led to severe reprisals.¹⁴⁵ One of the most brutal acts of retaliation occurred in late 1963, when up to ten thousand Tutsis were killed following a Tutsi attack from Burundi.¹⁴⁶

In 1965 and again in 1969, President Kayibanda was re-elected, and his regime became increasingly dictatorial and corrupt. Nevertheless, there was a period of relative quiet prior to the 1970's that produced an increased number of mixed Hutu-Tutsi marriages.¹⁴⁷ President Kayibanda’s administration continued

mirrored and to some extent exacerbated problems in Rwanda as the Tutsi ruling class in Burundi attempted to regain control. *Id.* This culminated in a 1972 massacre aimed at eliminating the educated Hutu and Burundi, leaving two hundred fifty thousand Hutu dead. *Id.* See also READER, *supra* note 13, at 673.

138. DESTEXHE, *supra* note 1, at 28; READER, *supra* note 13, at 673.

139. See William A. Shabas, Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems, 7 CRIM. L.F. 523, 531-33 (1996).

140. See BRIGGS & BOOTH, *supra* note 29, at 15; see also DeSouza, *supra* note 13, at 103.

141. Nantulya, *supra* note 20.

142. DESTEXHE, *supra* note 1, at 44.

143. *Id.*; READER, *supra* note 13, at 673-34 (citing PRUNIER, *supra* note 8, at 60).

144. DESTEXHE, *supra* note 1, at 44. Although tensions grew in cities, issues of job competition were virtually unknown to the peasants living in Rwanda’s countryside, where the vast majority of employment was agricultural. *Id.*

145. See DeSouza, *supra* note 13, at 103.

146. *Id.* at 103; READER, *supra* note 13, at 674 (citing PRUNIER, *supra* note 8, at 60).

147. DESTEXHE, *supra* note 1, at 44.

the use of ethnic identity cards in a campaign to target and harass those who participated in mixed Hutu-Tutsi marriages.¹⁴⁸ The campaign against mixed marriages was not specifically anti-Tutsi, but rather a campaign against those who were modernly educated.¹⁴⁹ Nonetheless, the quotas and other anti-Tutsi governmental policies were considered so rigid that even some Hutus became apprehensive about the level of governmental control.¹⁵⁰

After a military coup removed President Kayibanda from power, Major General Juvenal Habyarimana took over as the second Hutu president in 1973.¹⁵¹ The several years following the coup were quite stable, and between 1973 and 1990 there were no massacres.¹⁵² However, issues relating to ethnicity remained culturally significant, as groups formed divisions by protecting the memories of those who had been massacred.¹⁵³ Rwanda was further polarized due to the president's political manipulation campaigns and favoritism manifested in unequal distribution of resources, which ultimately resulted in heightened regional tensions.¹⁵⁴ Despite this polarization, Habyarimana ran for president, unopposed, and was reelected in 1978, 1983 and 1988.¹⁵⁵

In 1979, Rwandan Tutsis exiled in Uganda formed a political organization that later became the Rwandan Patriotic Front ("RPF").¹⁵⁶ Although many of the Ugandan RPF members were born outside of Rwanda, spoke English in place of French, and did not have personal knowledge of Rwanda, they nonetheless felt a tie to their Rwandan heritage, and thus sought the return to their homeland.¹⁵⁷ On the other hand, many Rwandan Hutus associated these Ugandan Tutsis with the Tutsi aristocracy that left Rwanda in 1959, a link to historical inequality that made the RPF movement suspect.¹⁵⁸

148. *Id.*

149. *Id.*

150. READER, *supra* note 13, at 674.

151. DeSouza, *supra* note 13, at 103; DESTEXHE, *supra* note 1, at 44-45; READER, *supra* note 13, at 674.

152. DESTEXHE, *supra* note 1, at 45.

153. *Id.*

154. *Id.*; READER, *supra* note 13, at 674. Habyarimana came from northern Rwanda, and was known for showing favoritism to the Hutus of northern Rwanda, as well as for persecution of the Tutsi minority. DESTEXHE, *supra* note 1, at 45. Northern Hutus, as a group, were the most hateful and divisive due to their past experiences "at the hands of the Germans and their Tutsi allies, who subdued the north in the early part of the century." KEANE, *supra* note 10, at 21.

155. *See generally*, *supra* note 97, at 100-18.

156. DESTEXHE, *supra* note 1, at 45. Although the RPF has been characterized as a Tutsi party, the RPF has always taken "care to include Hutus within its ranks and avoided presenting an image of an exclusively Tutsi party." *Id.*, citing, generally, Gérard Prunier, *Element pour une histoire du Front patriotique Rwandais*, POLITIQUE AFRICAINE, No. 51 (October 1993). According to Destexhe, "The article challenges a number of stereotypes connected with the RPF, particularly regarding its ethnic composition." DESTEXHE, *supra* note 1, at 87. *See also* READER, *supra* note 13, at 674.

157. DESTEXHE, *supra* note 1, at 44-45.

158. *Id.* at 45.

The Ugandan political regime was hostile to Rwandan refugees and encouraged Uganda's political youth groups to attack the refugees and their property.¹⁵⁹ As a result of the success of the youth groups' attacks in 1982 and 1983, the Rwandan refugees in Uganda attempted to return to Rwanda.¹⁶⁰ The Rwandan government responded by closing its borders.¹⁶¹ Meanwhile, due to falling coffee prices and food shortages, a wave of economic and social pressures disrupted the Rwandan government's level of control to the extent that criticism of the government policies and charges of corruption and mismanagement became public.¹⁶² The international aid community acquired President Habyarimana's agreement to establish a multi-party democracy and to leave the country's development open to debate.¹⁶³ Although President Habyarimana agreed to the changes in principle, the changes were never implemented.¹⁶⁴

RADICALIZED POLITICS

According to Alain Destexhe, the years prior to 1994 were a time of intense political growth. Destexhe writes:

It is not as well-known as it should be that for the previous two or three years [prior to the genocide] an impressive movement in favour of a multi-party system, the rule of law and a respect for human rights had grown up in Rwanda. There were a large number of [individual] initiatives, the monopoly of one-party power had been breached and independent human rights organisations set up. In the eyes of the [two powerful racist political parties, the] CDR and MRND these democrats were traitors who only merited the fate of all traitors. Although there were certainly many obstacles, political change seemed inevitable and reconciliation hovered on the horizon, but only at the expense of the racist parties who had the most to lose from them—and everything to gain by preventing them.¹⁶⁵

The Hutu power structure first developed an extremist agenda around 1990, when the RPF presented its first serious military challenge.¹⁶⁶ On October 1, 1990, the RPF, headed by Major General Fred Rwigyema, invaded Rwanda.¹⁶⁷ The RPF insisted that its goal was to not to reinstate a Tutsi government, but

159. PRUNIER, *supra* note 8, at 69.

160. *Id.* at 69-70.

161. *Id.*

162. DESTEXHE, *supra* note 1, at 45; PRUNIER, *supra* note 8, at 89.

163. PRUNIER, *supra* note 8, at 89-90.

164. *Id.* at 90.

165. DESTEXHE, *supra* note 1, at 29. The two Hutu power parties were the Coalition for the Defense of the Republic ("CDR") and a branch of the Movement Republican National for Development ("MRND"). *Id.* at 28-29.

166. *Id.* at 28.

167. DORSEY, *supra* note 111, at 116-18. *See also* DeSouza, *supra* note 13, at 104; DESTEXHE, *supra* note 1, at 46; READER, *supra* note 13, at 675.

rather to bring democracy to Rwanda.¹⁶⁸ Meanwhile, the extremist Hutu government's anti-Tutsi propaganda presented Tutsis as a wealthy foreign minority, and the root of Rwanda's economic and social problems.¹⁶⁹ The invasion incited ethnic tension since the RPF's goal was perceived as an attempt to overthrow the Hutu government and install a Tutsi government, returning the Hutus to a position of servitude.¹⁷⁰ The invasion was unsuccessful and Rwigyema was killed in the fight, but as a result, President Habyarimana increased the Rwandan army from about five thousand troops in 1990 to about thirty-five thousand by 1993.¹⁷¹

Out of revenge for the RPF's invasion in October of 1990, President Habyarimana began a series of pogroms against thousands of Tutsis and opposition Hutus.¹⁷² Starting that same month, the Habyarimana government instigated and participated in increased numbers of unpunished Tutsis massacres.¹⁷³ Later estimates show the government killed up to two thousand Rwandan Tutsis and anti-government Hutus between October, 1990 and January, 1993.¹⁷⁴ The government instituted radical anti-Tutsi propaganda in order to stunt the growing political opposition led by Tutsis and moderate Hutus, an opposition that was feared to potentially result in governmental power-sharing.¹⁷⁵ The Hutu power structure's extremism grew in response to its leader's desire to retain power.¹⁷⁶ At this time, Tutsis were at a serious political disadvantage: there were only two Tutsi members of parliament, one Tutsi town mayor, no Tutsi regional mayors, and one Tutsi ambassador.¹⁷⁷

The government continued to develop an ethnically motivated agenda.¹⁷⁸ In September of 1992, Rwandan Armed Forces headquarters issued a document targeting the principal enemy and the enemy's supporters.¹⁷⁹ The document defined the principal enemy as "Tutsis inside the country or outside, extremists and longing to return to power, who have never recogni[z]ed and never will recogni[z]e the reality of the 1959 social revolution [when the Tutsi were thrown

168. DeSouza, *supra* note 13, at 104; READER, *supra* note 13, at 674.

169. DESTEXHE, *supra* note 1, at 28. This characterization is similar to Nazis' stigmatization of the Jews. *Id.* The Rwandan national army was supported by troops from Zaire, Belgium and France. READER, *supra* note 8, at 675.

170. DESTEXHE, *supra* note 1, at 46.

171. READER, *supra* note 13, at 674. The troops were armed with weapons from France, South Africa and the United States. *Id.*

172. DESTEXHE, *supra* note 1, at 46; READER, *supra* note 13, at 674.

173. DESTEXHE, *supra* note 1, at 28; READER, *supra* note 13, at 674.

174. BRIGGS & BOOTH, *supra* note 29, at 17; READER, *supra* note 13, at 675. *See also* DESTEXHE, *supra* note 1, at 46.

175. KEANE, *supra* note 10, at 24.

176. *See id.*

177. *Id.* at 23.

178. DESTEXHE, *supra* note 1, at 29.

179. *Id.* at 29.

out of power], and who would take back power in Rwanda by any means possible, including the use of arms.”¹⁸⁰ The enemy’s supporters were “anybody who gives any kind of support to the main enemy.”¹⁸¹

Unrest and outbreaks of violence continued throughout the country.¹⁸² The violence caused Tutsi population movements, making Hutu peasants vulnerable to extremist Hutus’ claims that the Tutsis were coming to take the Hutu peasants’ land.¹⁸³ Due to national and international pressure, President Habyarimana again agreed to introduce multi-party democracy, and to cease the use of the ethnic identity cards instituted by the Belgian government, although these changes were not implemented.¹⁸⁴

Radicalized power politics took a new turn as the *Interhamwe* (a Rwandan word meaning “those who attack together”) and the *Impuzamugambi* (“those who have only one aim”), the youth branches of the MRND and CDR, respectively, quickly developed fifty thousand members.¹⁸⁵ These groups worked with the Rwandan army to develop a strategy for the government to retain control of the media, and to train and form civilians into militias.¹⁸⁶ Both the media and the militias were used extensively to perpetrate the 1994 genocide.¹⁸⁷ The *Interhamwe* and *Impuzamugambi* engaged in raiding and intimidation against Tutsis and moderate Hutus who supported a democratic government.¹⁸⁸ Meanwhile, the RPF, now headed by Major Paul Kagame, continued guerrilla warfare against Habyarimana’s regime, striking at targets throughout Rwanda and increasing the number of RPF troops to nearly twenty-five thousand.¹⁸⁹

Once again, Habyarimana bowed to international pressures and in August, 1993 agreed to a number of government reforms pursuant to the Arusha Accords.¹⁹⁰ These reforms included establishment of the rule of law, political accountability and multi-party power, repatriation and resettlement of refugees, and integration of the RPF into Rwanda’s armed forces.¹⁹¹ Although the Arusha

180. *Id.* at 30.

181. *Id.*

182. *See id.* at 46.

183. *See* KEANE, *supra* note 10, at 22-23.

184. *See generally* BRIGGS & BOOTH, *supra* note 29, at 17.

185. DESTEXHE, *supra* note 1, at 29.

186. *Id.*; *Genocide in Rwanda*, 6 HUM. RTS. WATCH/AFR. 2 (1994), available at <http://hrw.org/reports/world/rwanda-pubs.php>.

187. DESTEXHE, *supra* note 1, at 29.

188. *Id.*

189. BRIGGS & BOOTH, *supra* note 29, at 17; READER, *supra* note 13, at 675.

190. DESTEXHE, *supra* note 1, at 46; KEANE, *supra* note 10, at 26-27; READER, *supra* note 13, at 675.

191. BRIGGS & BOOTH, *supra* note 29, at 17; DESTEXHE, *supra* note 1, at 46; KEANE, *supra* note 10, at 26-27; READER, *supra* note 13, at 675; Shabas, *supra* note 139, at 524.

Accords were signed, the vocal opposition by both Hutu and Tutsi hardliners prevented the agreement from being implemented.¹⁹² Unfortunately, although Habyarimana agreed to the political and social reforms, the Hutu political power structure responded by becoming increasingly radicalized because the Arusha accords “offered credible possibilities for national reconciliation and peace for the majority of Rwandans at the expense of the ruling Hutu parties.”¹⁹³ At this point, Hutu extremists formulated their plan to target Tutsis and moderate Hutus.¹⁹⁴ Ethnic tensions and hostilities deepened, to the extent that the United Nations Human Rights Commission reported a warning of future violence.¹⁹⁵ Despite the Human Rights Commission’s warning and with the French government’s assistance, the Rwandan Armed Forces grew from five thousand to forty thousand troops, and began to provide arms and military training to members of the militia such as the *Interhamwe*.¹⁹⁶

Besides the Rwandan military and militias, the Habyarimana government used several other outlets that sought to indoctrinate Rwandans with extremism and hatred. The government also made extensive use of the transistor radio as a method for political indoctrination and to create tensions between the Hutus and the Tutsis.¹⁹⁷ In the year prior to the beginning of the genocide, two of Habyarimana’s associates set up Radio Mille Collines, a private radio station broadcasting hate propoganda and calling for violence against the Tutsis.¹⁹⁸ In addition, the newspaper *Kangura* published similar calls to violence and urged Rwandans to use any means necessary to cause negotiations with the RPF to fail.¹⁹⁹ The radio and newspaper outlets were developed and cultivated as a comprehensive approach to reach the vast majority of Rwandan citizens.²⁰⁰ These media outlets were successful because the government instituted a process of personally contacting citizens through a web of leaders trained at persuading and pressuring citizens into compliance and agreement.²⁰¹ The program of indoctrination was even more successful because the government had already fostered a “culture of impunity and violence, which had been created by successive governments that had actively and publicly promoted the killings of Tutsi individuals, as well as anyone else who resisted this call.”²⁰²

192. DESTEXHE, *supra* note 1, at 47; Shabas, *supra* note 139, at 524.

193. DESTEXHE, *supra* note 1, at 28; *see also* KEANE, *supra* note 10, at 27; READER, *supra* note 13, at 676.

194. DESTEXHE, *supra* note 1, at 28; READER, *supra* note 13, at 676.

195. DESTEXHE, *supra* note 1, at 29.

196. *Id.*

197. DESTEXHE, *supra* note 1, at 30; READER, *supra* note 13, at 676.

198. DESTEXHE, *supra* note 1, at 30; KEANE, *supra* note 10, at 10.

199. DESTEXHE, *supra* note 1, at 30.

200. *Id.* at 31.

201. *Id.*

202. Nantulya, *supra* note 20, at 51.

THE GENOCIDE

“The grave is only half full. Who will help us fill it?”
–Radio Mille Collines, Rwanda, April 1994²⁰³

By March of 1994, citizens were beginning to evacuate Kigali in anticipation of future violence.²⁰⁴ On April 6, 1994, President Habyarimana was assassinated when his plane was shot down near the Kigali airport.²⁰⁵ The newspapers and radio had already created an environment of anti-Tutsi hysteria, and Habyarimana’s murder, which was blamed on the RPF, provided the catalyst to begin the genocide.²⁰⁶ The assassination spawned a Rwandan military and *interhamwe* killing process that was well planned and quickly executed.²⁰⁷

The killing campaign began before dawn the following day, with the Presidential Guard and militia members killing political opposition leaders and moderate Hutus.²⁰⁸ Also among the first targeted were politicians, journalists and civil rights activists.²⁰⁹ Kigali became increasingly violent, as more Tutsis were hunted and massacred.²¹⁰ The killing was often violent and hand-to-hand:

The militia carried out their gruesome task with a variety of weapons – AK-47 assault rifles, grenades, and pangas (the all-purpose, heavy bladed machetes). Some killed their victims with a club, studded with nails . . . The scale and brutality are horrifying: rape, torture, mutilation, unspeakably cruel murder; mothers forced to watch their children die before being killed themselves; children forced to kill their families. Mutilations were common, and macabre ritual was evident: brutality . . . [did] not end with murder. At massacre sites, corpses, many of them those of children, have been methodically dismembered and the body parts stacked neatly in separate piles.²¹¹

203. DESTEXHE, *supra* note 1, at 30.

204. KEANE, *supra* note 10, at 196.

205. PRUNIER, *supra* note 8, at 211-21; DESTEXHE, *supra* note 1, at 31; READER, *supra* note 13, at 676.

206. KEANE, *supra* note 10, at 28-29.

207. READER, *supra* note 13, at 676. For specifics on the genocide killing processes, see KEANE, *supra* note 10, at 74-81, 88-91.

208. PRUNIER, *supra* note 8, at 229-30; DESTEXHE, *supra* note 1, at 31; READER, *supra* note 13, at 676.

209. READER, *supra* note 13, at 677.

210. PRUNIER, *supra* note 8, at 231. French and Belgian troops evacuated almost every white person from Rwanda within several days, but the soldiers conducting the evacuation were ordered to ignore the plight of the Rwandans being massacred. DESTEXHE, *supra* note 1, at 48.

211. READER, *supra* note 13, at 677 (internal citations omitted).

The United Nations, embassies and non-governmental organizations generally did not evacuate their Rwandan personnel, leaving them at the mercy of the killers.²¹²

On April 8, the RPF launched a military campaign to end the genocide and regain control of the Rwandan government.²¹³ Meanwhile, the government-sponsored killing continued.²¹⁴ A new Hutu government was formed to replace Habyarimana, and Radio Mille Collines continued to incite violence with statements such as one broadcast at the end of April 1994, that “[b]y 5 May, the country must be completely cleansed of Tutsis.”²¹⁵ The media also targeted children, with statements such as, “We will not repeat the mistake of 1959. The children must be killed too.”²¹⁶ Rwanda’s official state radio constantly called on Hutus to defend Rwanda against invasion by the *invenzi* (meaning “cockroaches”).²¹⁷ The media convinced Hutu peasants that they were under threat, and asked them to “‘make the Tutsis smaller’ by decapitating them.”²¹⁸ The media was so effective that peasants in the northern areas were “astonished that the Tutsi soldiers did not have horns, tails and eyes that shone in the dark,” as described on the radio.²¹⁹

There have been estimates that, by the end of April 1994, one hundred thousand people were killed.²²⁰ Meanwhile, the world watched and declined to act.²²¹ As Fergal Keane documented, “[t]here were some fearful pictures coming out of Kigali: mounds of bodies and roadblocks manned by machete-wielding gangs.”²²² The United Nations called for a ceasefire, but also reduced the number of its troops in Rwanda from two thousand five hundred to two hundred seventy.²²³ The United Nations Security Council debated the situation occurring in Rwanda but refrained from, in all paperwork, deeming the killing a genocide in order to avoid the international law requirement to intervene in the conflict.²²⁴ The United States declined to act for a number of reasons, but

212. DESTEXHE, *supra* note 1, at 48. For an analysis of the United Nations’s role in Rwanda, see, e.g., MICHAEL BARNETT, EYEWITNESS TO A GENOCIDE: THE UNITED NATIONS AND RWANDA (Cornell University Press, 2002).

213. KEANE, *supra* note 10, at 196.

214. *Id.* at 196-197.

215. DESTEXHE, *supra* note 1, at 32.

216. *Id.*

217. KEANE, *supra* note 10, at 10.

218. DESTEXHE, *supra* note 1, at 32.

219. *Id.*

220. *Id.* at 32.

221. DESTEXHE, *supra* note 1, at 48.

222. KEANE, *supra* note 10, at 10.

223. DESTEXHE, *supra* note 1, at 48.

224. *Id.* at 50. At this time, Rwanda had a seat on the United Nations Security Council and Rwanda’s ambassador was a member of Habyarimana’s regime. *Id.* At this point, the United Nations’ military role was limited to peacekeeping, not actively entering into military conflict. *Id.*

largely in reaction to the killing of American soldiers in Somalia.²²⁵ Belgium had already evacuated its nationals and withdrawn its troops subsequent to the RPF offensive in October, 1990.²²⁶ Only France, after having provided the main support for the Habyarimana regime after the RPF attack in 1990, and having played the pivotal role in stopping RPF advances in 1992 and February of 1993, finally stepped in and sent seven hundred peacekeeping troops to establish a "security zone" for civilians.²²⁷

In May, the United Nations agreed to send six thousand eight hundred troops and police to Rwanda to defend civilians, but the implementation was delayed due to discussions about logistical support and costs.²²⁸ By mid-May, the death toll had reached an estimated two hundred thousand, and an estimated five hundred thousand by the end of May.²²⁹ Those Tutsis who survived the genocide escaped the country, if possible, or fled to areas under RPF control.²³⁰ Still, the killing continued.²³¹ On July 4, the RPF captured Kigali and the Hutu government fled to Zaire.²³² As the RPF continued to advance, the genocide planners organized an intimidation campaign forcing the remaining Hutu to flee the country and causing a humanitarian crisis that captured international media attention.²³³ In all, within one hundred days, up to a million Tutsis and politically moderate Hutus had been murdered.²³⁴

225. *Id.* at 49-50. In fact, the United Nations force in Kigali had been cut, due to pressure from the United States and Belgium, from two hundred fifty thousand troops to two hundred fifty troops. KEANE, *supra* note 10, at 123.

226. DESTEXHE, *supra* note 1, at 52.

227. *Id.* at 53-55. The "security zone" was used by both victims and *genocidaires*, and Radio Mille Collines continued to broadcast from that area until mid-July. *Id.* at 54. See KEANE, *supra* note 10, at 25-26, for information regarding France's role in defending Habyarimana's regime. In brief, France supported Habyarimana's regime, at least in part, to preserve a Francophone Africa, which would not have been possible under RPF rule because the RPF, having been located in English-speaking Uganda, was led by those who were largely English-speaking. KEANE, *supra* note 10, at 25-26.

228. KEANE, *supra* note 10, at 196.

229. DESTEXHE, *supra* note 1, at 49.

230. *Id.* at 55.

231. *Id.*

232. *Id.* at 83.

233. *Id.* The humanitarian crisis involved not only issues relating to disease, food distribution and return home of the refugees, but also issues relating to power struggles between militias representing political groups that were attempting to exert influence in the refugee camps. *Id.* at 56-57; KEANE, *supra* note 10, at 100-01. For example, the easiest way for aid organizations to organize the refugee camps was to use the power structures that existed in Rwanda, structures that were headed by local leaders who were *genocidaires* and resisted removal from their positions of leadership or indeed consolidated their power. DESTEXHE, *supra* note 1, at 57; KEANE, *supra* note 10, at 95-96, 101-07. These issues resulted in the risk of humanitarian aid contributing to the consolidation of the previous power structure in a similar power play to the Khmer Rouge in Cambodia, who seized

By July 17, 1994, the RPF had established the Government of National Unity, bringing the civil war to an end.²³⁵ On July 18, 1994, the RPF announced itself victorious and declared a cease-fire.²³⁶ The United Nations Security Council sent forces that replaced the French troops by the end of August.²³⁷ For the next three years, violence continued sporadically as tensions persisted at and around refugee settlements.²³⁸ Hutus continued guerrilla attacks planned from outside Rwandan borders.²³⁹ The RPF retained control, and the United Nations withdrew its troops in March 1996.²⁴⁰ As Rwandan Hutu and Tutsi refugees returned home, the country continued to recover from the effects of genocide.²⁴¹

THE AFTERMATH OF TRAGEDY

Arrests for genocide-related crimes averaged between one thousand and three thousand per month from July 1994 through September 1998.²⁴² The prison population within Rwanda increased from ten thousand in 1994 to nearly one hundred thirty thousand by 1998.²⁴³ The RPF government made little attempt to investigate genocide charges, often arresting those accused of genocide purely on the basis of an accusation.²⁴⁴ The government entered villages in which most Tutsis had been killed and arrested all those who appeared to have committed genocide.²⁴⁵ Defendants' cases received no further attention after arrests were made, as what remained of Rwanda's judicial system was a sham-

power through the manipulation of humanitarian aid. DESTEXHE, *supra* note 1, at 57-58. For information regarding the aid issues paralleling those in Cambodia, *see generally* ALAIN DESTEXHE, *L'HUMANITAIRE IMPOSSIBLE OU DEUX SIÈCLES D'AMBIGUITÉS* (Armand Colin, 1993); WILLIAM SHAWCROSS, *THE QUALITY OF MERCY: CAMBODIA, HOLOCAUST AND MODERN CONSCIENCE* (Simon and Schuster, 1984).

234. The vast majority of those killed were Tutsis, with moderate Hutus numbering in the tens of thousands. *See* ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* 14 (1999).

235. *See* Shabas, *supra* note 139, at 523.

236. DESTEXHE, *supra* note 1, at 83.

237. *Id.*; BARNETT, *supra* note 212, at 151.

238. BARNETT, *supra* note 212, at 150-151; *see* BRIGGS & BOOTH, *supra* note 29, at 19.

239. BARNETT, *supra* note 212, at 150; BRIGGS & BOOTH, *supra* note 29, at 19.

240. BRIGGS & BOOTH, *supra* note 29, at 19.

241. *Id.* at 20-21 (citation omitted).

242. International Crisis Group, *Five Years after the Genocide in Rwanda: Justice in Question*, ICG Report Rwanda No. 1, at 10 (1999), available at http://www.icg.org/library/documents/report_archive/A400224_07041999.pdf.

243. Mark Drumbl, *Rule of Law amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 571 (1998).

244. *See* Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 352 (1997).

245. *Id.*

bles.²⁴⁶ Many former judges and prosecutors were either killed in the genocide or fled the country, some having been implicated in the killings themselves.²⁴⁷

Further complicating matters, in mid-July 1994, approximately eight hundred fifty thousand Rwandans, most of Hutu origin, fled with the defeated Rwandan Army of the former Hutu government and the militias into what is now the Zaire.²⁴⁸ The Rwandans fled to refugee camps, which sparked an enormous humanitarian crisis.²⁴⁹ This provided a shield for the Hutu Rwandan army and militias which enabled them to regroup in the camps and to call for renewed war by spreading propaganda that the RPF was responsible for genocide against the Hutus and denying the slaughter of the Tutsi.²⁵⁰ Human rights organizations have since charged the RPF with the use of excessive force and brutality in attempting to disband Hutu extremists groups that were organized in refugee camps.²⁵¹ Meanwhile, as the RPF attempted to maintain peace across the border in Rwanda, RPF troops engaged in several massacres of unarmed and unresisting civilians; these abuses were largely ignored by the government.²⁵²

246. See *id.* at 353.

247. BRIGGS & BOOTH, *supra* note 29, at 20-21; *Rwanda: A New Catastrophe? Increased International Efforts Required to Punish Genocide and Prevent further Bloodshed*, 6 HUM. RTS. WATCH/AFR. 11 (1994) (hereinafter "*Rwanda: A New Catastrophe?*"). Retrospectively, it is interesting to note that Francis Deng, the United Nations Secretary-General's Representative on Internally Displaced Persons, reported that "in the absence of a functioning judicial and law enforcement system," alternative dispute resolution methods were recommended for the resolution of property and land disputes related to the illegal occupation of property following the end of the genocide. See Report of the Representative of the Secretary-General, Mr. Francis Deng, Addendum, Internally Displaced Persons: Note on the mission to Rwanda, E/CN.4/1995/50/Add.4, paragraph no. 21, submitted pursuant to Commission on Human Rights resolution 1993/95, United Nations Economic and Social Council, Fifty-first session, Agenda item 11(d) (February 1995), available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/G95/110/91/PDF/G9511091.pdf?OpenElement>. Mr. Deng specifically proposed customary legal traditions such as *gacaca*, and noted that involving elders and other community authorities appeared a promising option. *Id.*

248. See Shabas, *supra* note 139, at 524.

249. *Rwanda: A New Catastrophe?*, *supra* note 247, at 3.

250. *Id.*

251. See KEANE, *supra* note 10, at 177. Author's note: This criticism is in no way meant to compare the RPF actions with those of the *genocidaires*. See DESTEXHE, *supra* note 1, at 3-4. Raphaël Lemkin was a Polish-born World War II-era advisor to the United States War Ministry who coined the term "genocide" and whose efforts brought about the Convention for the Prevention and the Punishment of the Crime of Genocide which was approved by the General Assembly of the United Nations in Resolution 260 A (II) of December 9, 1948 and entered into effect on January 12, 1951. *Id.* He offered the theory that genocide is not a war crime, and the immorality of a crime such as genocide should not be confused with the amorality of war. *Id.* (citing ANDRÉ FOSSARD, *LE CRIME CONTRE L'HUMANITÉ* (Robert Laffont, 1987)).

252. *Rwanda: A New Catastrophe?*, *supra* note 247, at 8-10.

TEN YEARS OF HEALING

From its inception in 1994, the Government of National Unity has refused to grant any amnesties and has been committed to prosecuting all those accused of genocide.²⁵³ The decision to prosecute all the accused was not without peril as it required the commitment of virtually limitless time and resources on the part of the new Rwandan government.²⁵⁴ At this time, the government was in its earliest stages and had few resources at hand for any sort of undertaking.²⁵⁵ However, the government felt that addressing the issue of collective blame, in hopes of finally uniting Rwandan Hutus and Tutsis as “Rwandans,” was necessary to the formation of a functioning society.²⁵⁶ As Destexhe states, the goal was to avoid:

a situation where no individuals are to be singled out as guilty or responsible because blame is laid at the door of historical fate and ‘unfortunate circumstances,’ ‘the climate of the time’ and sheer bad luck. It would be hard to deny that some form of evil has always existed in the world. But if such evil is seen in general, impersonal terms such as barbarism, ‘man’s inhumanity to man,’ chance circumstance or plain hatred, then there are no individual culprits at whom an accusing finger can be pointed. On the other hand, if everyone is considered to be somehow involved and therefore somehow responsible, then the picture becomes hazy and guilt and innocence are somehow confused. This so-called collective blame is just another way of denying the facts.²⁵⁷

Destexhe’s point about collective blame notwithstanding, the 1994 genocide is, often rightly, explained in light of factors such as the civil war, President Habyarimana’s assassination, the mob mentality created by fear and ancient hatred, the citizens’ justifiable anger at social conditions, and the historical domination of the country by the Tutsis.²⁵⁸ The *gacaca* process is an attempt to address the duality of issues such as collective blame, on the one hand, and true social conditions that should be considered mitigating factors when any one person’s crimes are judge, on the other hand.²⁵⁹ The validity of these explanations, when applied to some cases, is clearly a factor in the choice of *gacaca* as a process to resolve the crimes.²⁶⁰ *Gacaca* provides a fluid process that allows the courts and communities to hold defendants accountable for their individual actions based on the application of “collective blame” factors as well as individual circumstances.²⁶¹

253. *Id.* at 9.

254. BRIGGS & BOOTH, *supra* note 29, at 20-21.

255. *Id.*

256. Nsenga Speech, *supra* note 5.

257. DESTEXHE, *supra* note 1, at 7.

258. *Id.* at 13.

259. Nsenga Speech, *supra* note 5.

260. *Id.*

261. *Id.*

THE INTERNATIONAL JUSTICE PROCESS

In November of 1994, the United Nations Security Council established the International Criminal Tribunal for Rwanda (“ICTR”).²⁶² The ICTR’s mandate is to “pronounce judgments and impose sentences and penalties on persons convicted of *serious* violations of international humanitarian law” and genocide-related crimes between January 1 and December 31, 1994.²⁶³ The ICTR’s work has had groundbreaking effects in the international community, as it was the first international court to render a judgment on the crime of genocide, and was the first international court to indict and subsequently convict former heads of state for the crime of genocide.²⁶⁴

However, the ICTR’s impact on Rwandan citizens has been limited. The ICTR is perceived by many Rwandans to be a slow international process that does not affect Rwanda.²⁶⁵ But, despite criticism from local political forces, prosecutions and convictions by international war crimes tribunals have fostered a more moderate political climate in Rwanda.²⁶⁶ Accountability has an effect on high-level political leaders who might otherwise have fomented ethnic divisions as a method of retaining power.²⁶⁷ However, as of September 2004, in the more than nine years since the tribunal commenced, only twenty-three cases have been resolved through trial or negotiation.²⁶⁸ The country of Rwanda is faced with the task of resolving the approximately one hundred thirty thousand other

262. *Rwanda: A New Catastrophe?*, *supra* note 247, at 3.

263. Statute of the International Criminal Tribunal for Rwanda, Art. 22, § 1 (emphasis added), available at <http://www.ictor.org/ENGLISH/basicdocs/statute.html>.

264. *Achievements of ICTR: Message from Kofi Annan*, at <http://www.ictor.org/about.htm>.
Author’s Note: The international standard for criminal trials requires a Western concept of due process that is embodied in the United Nations Statute of the International Criminal Tribunal for Rwanda. Statute of the International Criminal Tribunal for Rwanda, *supra* note 263. Guaranteed rights include the right to fair trial, prepare a defense, present witnesses, cross examine opposing witnesses, free interpreter, legal assistance paid for by the ICTR if the accused cannot afford counsel, and retaining the right against self-incrimination. *Id.*

265. Speech of Mr. Brian A. Kritz, former Resident Legal Advisor to the Prosecutor General’s Office of the Republic of Rwanda, given at Georgetown University on November 11, 2004. A common perception among members of the Rwandan public is that ICTR employees from third world countries are much more interested in the continuation of the organization’s existence than they are interested in speeding the course of justice, as these employees are making far more money working for an international organization than they would working for an employer in their home countries. *Id.*

266. Ruth Wedgwood and Harold K. Jacobson, *Foreword, Symposium: State Reconstruction After Civil Conflict*, 95 AM. J. OF INT’L LAW (2001).

267. *Id.*

268. ICTR: The Tribunal at a Glance: Status of Cases, available at <http://www.ictor.org/default.htm>.

cases in which the defendants are currently held in the Rwandan prison system.²⁶⁹

DIFFICULTIES IN IMPLEMENTING A RWANDAN JUSTICE PROCESS

The *gacaca* system is meant to address individual cases, as well as overarching issues of reconciliation so that Rwanda can develop into a stable country with a harmonious culture.²⁷⁰ Reconciliation is an important goal because after decolonization, and especially the four years prior to the 1994 genocide, crimes based on ethnic hatred against Tutsis were decriminalized to the point that people could commit ethnically motivated crimes with little or no fear of prosecution.²⁷¹ Given the history of impunity and prosecutorial misconduct, the new government of Rwanda remains faced with the task of both carrying out the administration of justice, and also building the population's trust in a historically at best impotent, and at worst biased and corrupt national government and prosecution system.²⁷²

Some of the practical problems facing Rwanda when *gacaca* was first considered as a potential solution to the genocide have been described as follows:

- A weak judicial sector, resulting from widespread destruction, both before and during the genocide;
- The administrative strain created by the presence of more than 135,000 inmates who have not yet been tried, and the presence of several other suspects who have not yet been brought to justice;
- The weaknesses of the classical justice system in addressing the psychological aspects of the genocide, which has a lot to do with negative mass mobilization and ideological manipulation, both of which have been systematically cultivated for several years;
- The legal complexities surrounding classical justice, which makes it difficult for ordinary people to participate, and for community healing to occur;
- The non-reconciliatory nature of the classical justice system, which does not holistically or organically address the rehabilitation of convicts or the fundamental causes of the genocide. Consequently, the securing of convictions does not automatically translate into the eradication of a culture of impunity—something which was at the source of the 1994 genocide, as well as others in Rwanda.²⁷³

269. Interview with Geraldine Umugwaneza, Judge/Trainer, *Gacaca* Jurisdictions (hereinafter "Umugwaneza Interview"). As of spring 2004, the categorization process, through which defendants are formally charged, is nearly complete. *Id.*

270. Nantulya, *supra* note 20, at 51-53.

271. Shabas, *supra* note 139, at 531. For example, there was a massacre of Tutsis in March 1992. *Id.* Although upwards of four hundred individuals were arrested, they were subsequently released and the prosecutor's office did not pursue the matter further. *Id.* at 531-32.

272. *Rwanda: A New Catastrophe?*, *supra* note 247, at 9.

273. Nantulya, *supra* note 20, at 53.

Rwanda had ratified the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.²⁷⁴ However, another theoretical legal difficulty arose because of the fact that crimes based on ethnic hatred, genocide or crimes against humanity were excused under Rwandan law and unpunished in the years leading up to the 1994 genocide provided notice to Rwandans that genocidal acts were not criminal.²⁷⁵ Consequently, the post-genocide Rwandese Transitional National Assembly, charged with consideration of which judicial system to adopt to address the genocide, struggled with the question of how to adopt new measures to adequately satisfy the requirements for justice, without raising *ex post facto* issues.²⁷⁶

On a practical note, the Rwandan government was also faced with issues related to health care, education, development and nation building, for a largely peasant citizenry that had been dealt a great deal of psychological damage due to trauma inflicted by members of its own population.²⁷⁷ These factors were among those framing the discussion about post-genocide justice.²⁷⁸ In order to understand why the Rwandan government chose *gacaca* as the solution to these and many other factors, one must take into account the unique history of Rwanda's legal system, and the role that the *gacaca* customary dispute resolution process has played in the country's social fabric.²⁷⁹

THE HISTORY OF GACACA

Traditional *gacaca* was a community-based dispute resolution forum in pre-colonial Rwanda.²⁸⁰ *Gacaca* customary dispute resolution forums were fostered by a sense of unity felt among Rwandans during the pre-colonial time period.²⁸¹ *Gacaca* was the customary legal and social code used via the power structure of

274. Convention on the Prevention and Punishment of the Crime of Genocide, United Nations General Assembly Resolution 260 (III) A, December 9, 1948, entered into force January 12, 1951, in accordance with Article XIII, acceded to (in relevant part) by Rwanda on April 16, 1975.

275. Law on General Amnesty on political offences committed between 1st October 1959 and 1st July 1962, official Gazette of the Republic of Rwanda 1963, P. 229, cited in "Codes et Lois du Rwanda," Vol.1, 2nd Ed., 431; Decree Law of 30th November 1974, granting Amnesty to certain Political crimes, official Gazette of the Republic of Rwanda, 1974, 629.

276. Lawyers Committee for Human Rights, *Prosecuting Genocide in Rwanda: A Human Rights First report on the ICTR and National Trials*, ¶ VIII.c (1997), available at <http://www.lchr.org/pubs/descriptions/rwanda.htm> (hereinafter "Lawyers Committee for Human Rights") (citation omitted).

277. BRIGGS & BOOTH, *supra* note 29, at 20-21.

278. *Id.*

279. Nsenga Speech, *supra* note 5.

280. BRIGGS & BOOTH, *supra* note 29, at 22.

281. Nantulya, *supra* note 20, at 53.

chieftaincies, and was composed of courts that settled conflicts among family or community members.²⁸² Because communities participated in the *gacaca* courts, punishment of those who were found guilty was meted out by the collective society.²⁸³ In addition, communities also performed collective welcoming rites for persons who had completed their punishments, in order to recreate the sense of belonging within the community.²⁸⁴

Gacaca has been translated to mean “justice under the tree,” in reference to community elders’ practice of hearing cases while sitting under a tree.²⁸⁵ Traditionally, *gacaca* matters were judged by a respected community leader or leaders who involved the entire community in the dispute resolution process.²⁸⁶ In Rwanda, unlike in some African countries, girls and women participated in the *gacaca* system, even after marriage.²⁸⁷ While the parties gave their sides of the story and stated an expectation for the outcome, the final decision fell to the elder or elders judging the matter.²⁸⁸ After the *gacaca* resolution, the two parties were expected to maintain a social relationship.²⁸⁹

Gacaca disputes generally involved less serious civil matters, including cases related to inheritance, civil liability, failure to repay loans, and marital issues.²⁹⁰ *Gacaca* was also used in some criminal matters such as minor matters of violence, theft, destruction of property, or domestic concerns.²⁹¹ Punishments resembled civil damages rather than imprisonment.²⁹² Sanctions were imposed to: (1) cause the accused individual to appreciate the gravity of the damage caused, and (2) allow the accused individual a mechanism for reintegration into the community.²⁹³ These two objectives are foundational to the use of *gacaca* in the effort toward reconciliation in the wake of genocide.²⁹⁴

282. *Id.*

283. *Id.* at 53-54.

284. *Id.*

285. J. Sarkin, *The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide*, 45 J. AFR. LAW 143, 159 (2001).

286. See generally Bolaji Owasanoye, *Dispute Resolution Mechanisms and Constitutional Rights in Sub-Saharan Africa*, 14 UNITAR DOCUMENT SERIES: ALTERNATE DISPUTE RESOLUTION METHODS, available at http://www.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.pdf.

287. Nantulya, *supra* note 20, at 53; Owasanoye, *supra* note 286, at 18 (describing the fact that women have been historically excluded from African customary dispute resolution processes).

288. Owasanoye, *supra* note 286, at 18.

289. *Id.*

290. Sarkin, *supra* note 285, at 159.

291. Nantulya, *supra* note 20, at 53; see also Owasanoye, *supra* note 286, at 18.

292. Stef Vandeginste, *Justice, Reconciliation and Reparation after Genocide and Crimes Against Humanity: The Proposed Establishment of Popular Gacaca Tribunals in Rwanda* (1999).

293. See *id.* at 15.

294. Interview with Johnson Busingye, Attorney General, Office of the Prosecutor General, Republic of Rwanda (hereinafter “Busingye Interview”).

The colonial period facilitated the transition from a decentralized *gacaca* system toward a more formalized legal system that applied the law of the colonial powers.²⁹⁵ However, *gacaca* generally continued to provide the basic method of dispute resolution for local Rwandan legal matters.²⁹⁶ Courts established during colonial times often accepted customary law handed down by *gacaca* judges as binding, and there are cases in which courts actually reviewed appeals of *gacaca* decisions, rather than re-litigating entire matters.²⁹⁷

Historically, the *gacaca* and the formal Rwandan court system have complemented each other.²⁹⁸ The historic complement between Rwanda's customary and Western systems is one of the most important reasons that the *gacaca* process will be an effective model for resolving genocide cases.²⁹⁹

DECISIONS ON JUSTICE

In searching for a methodology to resolve the vast number of genocide cases pending disposition in Rwanda, the Government of National Unity hosted an international conference entitled "Genocide, Impunity and Accountability," at which international legal and policy experts and Rwandan leaders convened to discuss the prosecution of the 1994 genocide.³⁰⁰ The conference made a number of new recommendations for methods of handling the genocide cases, including the creation of "specialized chambers of the existing courts, a classification scheme to separate the main organizers of the genocide from criminals with lesser degrees of responsibility, and a unique scheme aimed at encouraging offenders to confess in exchange for substantially reduced sentences."³⁰¹ Further, the conference drafted legislation entitled "Organic Law on the Organization of Prosecution for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990" (hereinafter "Organic Law 8/96").³⁰²

295. Nsenga Speech, *supra* note 5.

296. *Id.*

297. Nantulya, *supra* note 20, at 53.

298. Nsenga Speech, *supra* note 5.

299. *Id.*

300. Shabas, *supra* note 139, at 528.

301. *Id.* at 530.

302. *Id.* The Organic Law, as drafted, provided the foundation for the *gacaca* system as it is now conceived, including "a classification scheme to separate the main organizers of the genocide from criminals with lesser degrees of responsibility, and a unique scheme aimed at encouraging offenders to confess in exchange for substantially reduced sentences." Shabas, *supra* note 140, at 530.

On August 30, 1996, the Rwandan National Assembly adopted Organic Law 8/96 which prescribed the methodology for carrying out the genocide trials.³⁰³ Organic Law 8/96 established four categories of genocide suspects.³⁰⁴ Classification of these offenders was necessary because, as Mr. Busingye says, genocide crimes were often the result of strong state supervision and control, an important mitigating factor in consideration of the crimes perpetrated by many Rwandan *genocidaires*.³⁰⁵ The classifications are:

Category 1.

- a. persons whose criminal acts or whose acts of criminal participation place them among the planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity;
- b. persons who acted in positions of authority at the national, prefectural, communal, sector or cell level, or in a political party, or fostered such crimes;
- c. notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed;
- d. persons who committed acts of sexual torture;

Category 2.

persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death;

Category 3.

persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person;

Category 4.

persons who committed offences against property.³⁰⁶

Further, Organic Law 8/96 created Western-style special chambers within the twelve Tribunals of First Instance to try people accused of more serious crimes and genocidal acts.³⁰⁷

Finally, Organic Law 8/96 instituted a confession and guilty pleading procedure in order to counterbalance the numerous atrocities in which the only available information is the eyewitness testimony of fellow *genocidaires*.³⁰⁸ The pleading procedure allows those who confess in accordance with legal provisions and provide evidence or testimony against other suspects to receive a

303. Organic Law No. 8/96, *supra* note 5.

304. *Id.*; Busingye Interview, *supra* note 294.

305. *Id.*

306. Organic Law No. 8/96, *supra* note 5, at Art. 2.

307. *Id.* at Art. 19.

308. *Id.*; Nsenga Speech, *supra* note 5.

considerable reduction in penalty.³⁰⁹ The pleading procedure also serves a reconciliation goal, to establish the truth of the genocide, which has continued to be challenged by extremist Hutu revisionism.³¹⁰

In order to expedite prosecution and retroactively correct civil rights violations that occurred, the Rwandan government enacted Organic Law 9/96, which took effect on April 6, 1994.³¹¹ Organic Law 9/96 provided that individuals who were arrested before its enactment were to have an arrest record created, with an arrest warrant issued by December 31, 1997, and the opportunity to appear before a judge within ninety days of the issuance of the arrest warrant.³¹² Individuals detained after the enactment of Organic Law 9/96 were to have an arrest warrant issued within four months of their actual arrest, and were to appear before a judge within three months after the warrant had been issued.³¹³ However, the deadlines were unrealistic, and were eventually extended by the Rwandan government effectively providing little benefit to the tens of thousands of detainees being held without case files for years after the genocide ended.³¹⁴

Given Rwanda's lack of success in expediting the justice process, releasing prisoners became the next solution to overcrowding in the prisons.³¹⁵ Despite widespread public protest and cries from genocide survivors' organizations, by June 15, 1999, 3,365 pre-trial detainees of the ten thousand promised had been released.³¹⁶ The release proved to be a poor solution, however, because those who were released from detention were often targets of violent acts of retribution, causing some individuals to seek refuge back in prison, and making reintegration difficult for others.³¹⁷

Given the demanding caseload, the difficulty in expediting the traditional justice system, and the violence accompanying the release of prisoners, on October 17, 1998 the Rwandan president, in consultation with Rwandan officials and citizens, established a Commission chaired by the Minister of Justice to investigate increasing public participation in the justice process.³¹⁸ On June 8,

309. Organic Law No. 8/96, *supra* note 5, at Art. 19.

310. See VANDEGINSTE, *supra* note 292, at 3-4; see also Shabas, *supra* note 139, at 539.

311. VANDEGINSTE, *supra* note 292, at 9.

312. Drumbl, *supra* note 243, at 574.

313. *Id.*

314. See *id.*

315. *Report of the Special Representative of the Commission on Human Rights on the Situation of Human Rights in Rwanda*, Michel Moussalli, U.N. GAOR, 55th Sess., Agenda Item 116(c), at 30, U.N. Doc. A/55/59 (2000) (hereinafter "*Report of the Special Representative*").

316. VANDEGINSTE, *supra* note 292, at 9.

317. *Report of the Special Representative*, *supra* note 274.

318. VANDEGINSTE, *supra* note 292, at 1.

1999, the Commission published a proposal for *gacaca*.³¹⁹ The government's plan called for the creation of more than ten thousand *gacaca* tribunals, composed of ordinary citizens, to operate in each of Rwanda's 12 préfectures, 145 communes, 1,531 secteurs, and 8,987 cellules.³²⁰ The government's proposal provided for approximately one hundred eight thousand citizens to sit as judges on the tribunals at the cellule level, thirty thousand to sit as judges at the secteur level, and two thousand to sit as judges at the commune level.³²¹ The goals of the new system included "establish[ing] the truth about what happened, with the communities which were the eye witnesses of the crime giving witness about the crimes," fighting impunity by punishing genocide-related crimes, and promoting national reconciliation by achieving "reintegration into society" of the guilty parties.³²²

The *gacaca* draft legislation drew comment and criticism from human rights activists, lawyers' groups, and academics over the decrease in the scope of human rights protection it afforded.³²³ The fact that lay *gacaca* judges could subject defendants to further imprisonment was an additional concern.³²⁴ Further, victims' rights organizations were worried that any abbreviation in the justice system would trivialize the seriousness of the crime of genocide.³²⁵ Notwithstanding the criticisms, following the conference the Rwandan Ministry of Justice prepared legislation carrying out the recommendations made at the conference.³²⁶ The *gacaca* law was passed on January 26, 2001.³²⁷ With the adoption of the *gacaca* process, the government developed three main goals: (1) to reduce the number of trials, (2) to encourage people to come forward and testify

319. *Id.*

320. Leah Werchick, *Prospects for Justice in Rwanda's Citizen Tribunals*, 8 HUM. RTS. BRIEF (Fall 2000), available at <http://www.wcl.american.edu/hrbrief/08/3rwanda.cfm> (citing "Gacaca Tribunals Vested With Jurisdiction Over Genocide, Crimes Against Humanity and Other Violations of Human Rights which Took Place in Rwanda from 1 October 1990 to 31 December 1994," a publication released by the Rwandan government in July 1999).

321. *Id.*

322. *Id.*

323. See generally Sarkin, *supra* note 285, at 159.

324. Werchick, *supra* note 320.

325. Press Release, Amnesty International USA, *Rwanda: The Troubled Course Of Justice*, News Service: 075/00, AI Index: AFR 47/15/00 (April 26, 2000), (hereinafter "Rwanda: The Troubled Course of Justice") available at <http://www.amnestyusa.org/news/2000/14701500.htm>; *Prosecuting Genocide in Rwanda: The Gacaca System and the International Criminal Tribunal for Rwanda*, (hereinafter "*Rwanda: The Gacaca System and the International Criminal Tribunal for Rwanda*") Report by The Norwegian Helsinki Committee for Human Rights, Report II/2002, p. 21 (2002).

326. See generally Shabas, *supra* note 139, at 530.

327. Organic Law No. 40/2000 of January 26, 2001, Setting Up Gacaca Jurisdictions and Organizing Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Between October 1, 1990 and December 31, 1994, (hereinafter "Organic Law 40/2000") available at <http://www.kituoachakatiba.co.ug/ORGANIC%20LAW%20N%2040.htm>. The statute entered into force on January 26, 2001. *Id.*

about events in order to facilitate other prosecutions, and (3) to enhance the process of reconciliation in the country.³²⁸

GACACA DEVELOPMENT: THEORY AND PRACTICALITIES

Would the state of Rwanda have chosen a *gacaca* system if there were enough resources to pursue a more Westernized version of due process? If the government had enough money, it would have pursued a traditional trial system. However, a traditional justice system would not have achieved what *gacaca* will achieve.

—Johnson Busingye, Office of the Prosecutor General³²⁹

The *gacaca* system was one of many alternatives considered when the country of Rwanda began discussions about resolution of the criminal cases pending after the genocide.³³⁰ The dialogue surrounding how to best conduct the genocide prosecutions was difficult because of the large number of people who committed genocidal acts.³³¹ Up to one million people were killed in the genocide.³³² Of the remaining seven million citizens, over one hundred thirty thousand were imprisoned for crimes related to the genocide.³³³ Some argued that defendants, particularly *genocidaires* and those accused of human rights violations, should be subject to the most severe punishment available under the law, as a deterrent to future atrocities.³³⁴ Others argued that a punitive emphasis would hinder the effort for reconciliation, as virtually every family and community were implicated in the violence, and because the Hutus who were subject to extreme punishment would feel further isolated from the new Rwandan government.³³⁵ Because of the need to address social issues as well as prosecute genocide cases, and because of the shortfall in funding for traditional legal institutions of developed countries, the government decided to use Rwanda's historic customary dispute resolution system, *gacaca*, to design an alternative justice program, rather than following the traditional Western prosecutorial system for genocide trials.³³⁶

328. Lawyers Committee for Human Rights, *supra* note 276.

329. Busingye Interview, *supra* note 294.

330. *Id.*

331. *Id.*

332. KEANE, *supra* note 10, at 29.

333. Amnesty International Rwanda Report 1998 (covering January through December 1997), available at <http://www.amnesty.org/ailib/aireport/ar98/afr47.htm>.

334. Umugwaneza Interview, *supra* note 269; Busingye Interview, *supra* note 294.

335. Busingye Interview, *supra* note 294.

336. Nsenga Speech, *supra* note 5.

In summary, the practical need to introduce *gacaca* jurisdictions was based on the following factors: (1) the need for community involvement in the justice process; (2) the need to capitalize on the unity of Rwandans; (3) the need to respond to the psychological aspects of the genocide, which the classical justice system is not structured to address; (4) the need to create a basis for future reconciliation; (5) the need to ease administrative strains on the classical judicial system.³³⁷

The involvement of all Rwandan citizens in the *gacaca* process encourages unity based on a shared history of customary laws, principles, and procedures, which were part of a shared heritage and continued to be practiced in different ways even after the colonial and post-independence phases.³³⁸ Because the implementation of *gacaca* was so delayed, the opportunity for early reconciliation was not realized. The delay should be considered a great opportunity lost. Both parties have had almost ten years to develop stronger positions and biases, reinforcing negative stereotypes and fostering anger toward the other group. However, despite the delay in implementation, *gacaca* educators are finding that the education process is becoming more effective, and that citizens are beginning to respect the institution of *gacaca*.³³⁹ Although there is the possibility that a public airing of the facts of the 1994 genocide will further aggravate ethnic tensions, leading to revenge killings of defendants, victims, and witnesses, the hope is that as Rwandan communities become engaged in and gain control of the new *gacaca* system, the process of reconciliation can begin.³⁴⁰

The *gacaca* system is an attempt to address the aforementioned concerns, because rather than focusing on the mandates and rigid structure of international criminal law, *gacaca* provides a way for Rwandans to “learn to deal with our past.”³⁴¹ As conceived by Mr. Busingye, learning to deal with the past is the method through which Rwanda can build a future.³⁴² As a transformative or restorative model of justice, *gacaca* will address more than individual disputes or cases.³⁴³ The goal of *gacaca*, as of restorative justice, is to increase social cohesion and address broad social issues in order to repair the social fabric.³⁴⁴ By placing power in the hands of communities instead of professional jurists, social relationships stand a better chance of being reconciled, even after a traumatic event such as the mass genocide that occurred throughout Rwanda.³⁴⁵

337. Nantulya, *supra* note 20.

338. *Id.*

339. Umugwaneza Interview, *supra* note 269.

340. Nsenga Speech, *supra* note 5.

341. Busingye Interview, *supra* note 294.

342. *Id.*

343. Pearl Eliadis, *New Paths to Justice: Instruments for Resolving Conflict*, 6 POLICY RESEARCH INITIATIVE, available at http://policyresearch.gc.ca/page.asp?pagenm=v6n1_art_16.

344. See e.g., *id.*

345. *See id.*

Restorative justice focuses on the settlement of conflicts arising from crime and the resolution of the underlying causal problems, recognizing the community, in addition to the criminal justice system, as a forum for crime control.³⁴⁶ The development of knowledge and understanding of the past requires a process distinct from one dealing with the past in the context of punishment. *Gacaca* is the answer to that requirement.³⁴⁷

At the same time, however, a restorative model of justice such as *gacaca* cannot be concerned only with repairing the social fabric and creating cohesion because reconciliation cannot be achieved unless those responsible for genocide crimes are brought to justice.³⁴⁸ But, in applying Rwandan law, punishment becomes an issue because, if convicted, thousands of people would be sentenced to death for committing premeditated murder during the genocide.³⁴⁹ Given that the vast majority of people imprisoned for genocide crimes are Hutus, the current Tutsi-run government can not impose the death sentence on thousands of Hutu *genocidaires* without reinforcing the ethnic divisions that the government is attempting to diminish.³⁵⁰ The reinforcement of ethnic divisions is not conducive to the reconciliation that is one of the primary goals of the Rwandan government.³⁵¹ In theory, *gacaca* will be effective in meeting the victims' need to see those responsible for violations brought to justice while addressing and hopefully narrowing the divisions that already exist and that will be reopened through testimony at trial.³⁵²

The government hopes that *gacaca* can strike the balance between punishment and reconciliation in most cases.³⁵³ However, *gacaca* will not replace the existing judicial system, as the government's *gacaca* program is a community dispute resolution program for accused *genocidaires* with lesser degrees of responsibility in the genocide.³⁵⁴ The formal court system will prosecute those accused of Category 1 crimes, while the aim of *gacaca* is to support the existing system and to compensate for its weaknesses.³⁵⁵

As mentioned earlier, *gacaca* employs a pleading system, a system aimed at encouraging offenders to confess, apologize, and provide evidence or testimony

346. Eliadis, *supra* note 343.

347. Umugwaneza Interview, *supra* note 269.

348. *Id.*

349. Busingye Interview, *supra* note 294.

350. *Id.*

351. *Id.*

352. Umugwaneza Interview, *supra* note 269.

353. *Id.*

354. Werchick, *supra* note 320.

355. Nantulya, *supra* note 20.

against other suspects, in exchange for substantially reduced sentences.³⁵⁶ One obvious drawback to the pleading process is that those accused may confess and apologize without truly feeling remorse. The counterpoint is that, although the apologies may lack true remorse, many of the accused have already served ten years in prison, longer than what many international statutes allow for convictions for similar crimes. Furthermore, there are social service agencies to ensure that those who are released from custody become reintegrated, so that the offender will be watched carefully for recidivist behavior.³⁵⁷

Another drawback to the pleading program is that some *genocidaires* will not admit to crimes if they think there were no witnesses or that there is no evidence to link them to the crimes. As Mr. Busingye said, “human nature is to not disclose what you think no one else knows.”³⁵⁸ Under a social science rubric this policy is not inconsistent with a theory of reconciliation, as Mr. Busingye says, because a *genocidaire* may be equally haunted by a crime that he will not admit to having committed.³⁵⁹

The aforementioned theoretical and practical issues weighed heavily in the decision of how to proceed with the genocide trials.³⁶⁰ Even if the fledgling government had the resources to handle the large volume of trials through a traditional Western criminal system that focuses on the goal of punishment, a Western criminal justice system would not address the essential issues of unity and reconciliation.³⁶¹ The Rwandan government determined, and continues to feel, that these issues are important to Rwanda’s continued growth, and ensure that the conflict between the Hutus and the Tutsis does not return to violence. As Mr. Busingye said, in Rwanda, there is a commonly heard saying that, although there is little hope for reconciling adult Hutus and Tutsis today, their children will play together, and their grandchildren will be friends.³⁶²

356. Organic Law No. 8/96, *supra* note 5, at Arts. 4-9. Category I suspects are not able to avail themselves of reduced sentencing for confession. *Id.* at Art. 5. Suspects in Category II may attempt to receive a reduced sentence of seven to fifteen years imprisonment for confession and implication. *Id.* at Arts. 15-16. Suspects who do not confess and implicate others will face life imprisonment if found guilty. *Id.* at Art. 14. Category III suspects may also seek drastically reduced sentences, even one-half to one-third of the full sentence. *Id.* at Arts. 5, 15-16.

357. Umugwaneza Interview, *supra* note 269.

358. Busingye Interview, *supra* note 294.

359. *Id.*

360. *Id.* at 296. Mr. Busingye characterized the debate as one involving complex issues such as unity, history, reconciliation, punishment, and eradication of the culture of impunity that has historically surrounded genocide crimes. *Id.*

361. Busingye Interview, *supra* note 294.

362. *Id.* As Mr. Busingye noted, evidence of the success of the government’s education efforts can be found in a visit to a Rwandan school, where, if asks children to which tribe they belong, the majority will not know the answer: today, it is much more difficult to get Rwandan school children to name one another or themselves as Hutu or Tutsi.

IMPLEMENTATION OF GACACA

The government's *gacaca* is designed to operate throughout the country.³⁶³ The stages of the *gacaca* process include: (1) election of judges; (2) information gathering; (3) categorization of *genocidaires*; (4) trials. Each community has already elected judges from among the members of the community, and the information gathering and categorization phases are nearly complete.³⁶⁴ Category 1 defendants' cases are forwarded to the Rwandan conventional prosecutor's office, while *gacaca* tribunals have jurisdiction over all Category 2, 3, and 4 offenses.³⁶⁵

The *gacaca* process begins at the cellule (or "cell") level, where the entire adult population of an area constitutes the "council."³⁶⁶ The council, made up of ordinary citizens, provides the initial investigation of all genocide suspects in the community and formally classifies the accused into categories.³⁶⁷ The council also elects the cellule level *gacaca* "court" and "coordination council."³⁶⁸ The court will be responsible for issuing decisions and the coordination council will direct the court's activities.³⁶⁹ The trial process will begin with the cellule *gacaca* tribunals trying suspects accused of Category 4 crimes, and passing the dossiers on more serious offenders up to the next level *gacaca* structure.³⁷⁰ The process will be repeated, with the secteur (or "sector") level tribunals trying the Category 3 cases, and passing along the more serious dossiers to the commune tribunals trying the Category 2 cases.³⁷¹ The prefecture level controls and coordinates activities at the commune jurisdictional level.³⁷² The *gacaca* plan does not provide for Western-style appeals, although secteur and commune level *gacaca* decisions may be appealed to the next-highest *gacaca* tribunal.³⁷³ This limitation on the appeals process provides a level of finality to judgments that will in turn speed the process.

363. Nantulya, *supra* note 20.

364. Umugwaneza Interview, *supra* note 269.

365. Werchick, *supra* note 320.

366. *Id.*

367. *See id.*; *see also* Nantulya, *supra* note 20. The process of investigation includes receiving accusations and testimony from citizens, and drawing up lists of alleged victims and accused. Nantulya, *supra* note 20.

368. Werchick, *supra* note 320.

369. *Id.*

370. *See id.*; *see also* Nantulya, *supra* note 20.

371. *See* Werchick, *supra* note 320; *see also* Nantulya, *supra* note 20.

372. Nantulya, *supra* note 20.

373. Werchick, *supra* note 320.

Gacaca tribunals are vested with the legal authority of both the Rwandan courts and prosecutor's office, including the powers to: summon any person to appear and testify, issue warrants, conduct searches, attach personal goods, and impose sentences up to and including life imprisonment.³⁷⁴ Those who participate in the program to confess and plead guilty will be eligible for greater reductions in sentences than currently exist under conventional Rwandan law, and may even opt for substituting community service for prison time.³⁷⁵

Despite Rwanda's progress toward instituting *gacaca* trials, there are still significant hurdles to be overcome. Fortunately, the publicity and educational programs that developed prior to the commencement of the trial process have already delivered significant social benefits. For example, the process is counterbalancing Rwandan fears of a continued culture of impunity that is based on continued charges of excessive force by the RPF in seeking out extremist groups.³⁷⁶ As a result, citizens are expressing more faith in the Rwandan government by participating in the process.³⁷⁷

ANALYSIS OF GACACA

Geraldine Umugwaneza, a Judge and Counselor in the Department of *Gacaca* Jurisdictions and one of the Rwandan government's most valuable grassroots educators who is helping *gacaca* to become an institutionalized entity, feels that, although the *gacaca* education process is showing some progress, one of the most difficult hurdles *gacaca* still faces in the international community is the fact that the West generally does not expect effective African solutions for African problems—that the Western perception is that “nothing good can come from Africa.”³⁷⁸ By the same token, Western legal analysis of *gacaca* often compares the system to Western criminal justice theory and finds *gacaca* lacking.³⁷⁹ Exercises comparing *gacaca* to Western trial models are, of course, valuable in the comparative law and human rights contexts. This article is a discussion of *gacaca* in the context of international standards for alternative dispute resolution (ADR) processes, in order to determine whether this ADR process meets the standards for an ADR mechanism. This type of analysis is relatively rare, even in the ADR field.³⁸⁰ In fact, ADR research has tended to

374. *Id.*

375. *Id.*; see also Busingye Interview, *supra* note 294.

376. Umugwaneza Interview, *supra* note 269.

377. *Id.*

378. *Id.*

379. See, e.g. Werchick, *supra* note 320; *Rwanda: The Troubled Course of Justice*, *supra* note 329.

380. Eliadis, *supra* note 343.

focus on economic issues, at least in the context of litigation, while comparatively little has been done in conflict resolution focused on social issues.³⁸¹

ALTERNATIVE DISPUTE RESOLUTION BACKGROUND

ADR has been a complementary form of solving disputes for as long as institutional dispute resolution processes have existed.³⁸² Shortcomings in formal litigation have resulted in formal and informal dispute resolution forums for alternative processes now known under the mantle of ADR.³⁸³ Litigation is adversarial, formal, and inflexible, with often cumbersome and complex substantive and procedural rules. Traditional customary dispute resolution, however, allows an almost unlimited amount of flexibility.³⁸⁴ While dispute resolution methods are flexible in design such that multiple processes may be used in each forum, the processes all function as valid alternatives to more formal legal systems.³⁸⁵

One of the chief benefits of ADR is that countries are able to adapt processes flexibly to resolve disputes using mechanisms that maintain the “cohesion, economic and political stability of the state.”³⁸⁶ In developed countries, dispute resolution participants are able to choose among multiple dispute resolution forums, picking the dispute resolution method that best suits the parties’ needs.³⁸⁷ However, many African countries have not developed institutionalized ADR process, instead relying on the traditional African system of dispute resolution.³⁸⁸

In consideration of the aforementioned issues, Rwanda has created a governmental process based on Rwanda’s traditional *gacaca* system, that combines elements of mediation, arbitration, and conciliation processes. Mediation is a process through which the parties are guided to design their own solution to their dispute.³⁸⁹ Arbitration allows the parties to appoint a neutral who hears the parties’ arguments and makes an independent decision based on legal, equitable, or hybrid considerations.³⁹⁰ Conciliation is a method through which a neutral

381. *Id.*

382. Owasanoye, *supra* note 286.

383. *Id.*

384. *See generally* Owasanoye, *supra* note 286 (citing the Nigerian case: Lewis v. Bankole, 1 N.L.R 81, 100 (1908)).

385. Owasanoye, *supra* note 286.

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.*

discusses the dispute with the parties and then prepares a binding or non-binding solution based on the conciliator's recommendation for a just compromise.³⁹¹ The conciliator attempts to satisfy the parties, hoping to achieve consensus with the suggested solution.³⁹² *Gacaca* takes elements from these existing processes: the parties are encouraged to, as in conciliation, talk out their positions and, as in mediation, make a case for an outcome and resolve their differences in a compromise solution that is, as in arbitration, rendered as a decision by a third party. These more modern forms of institutionalized ADR, mediation, arbitration, and conciliation, are merely nomenclature used to describe part of the *gacaca* process, which is based on Rwanda's fully-developed traditional dispute resolution system.

INSTITUTIONALIZED STRUCTURE

Gacaca relies on community participation, as well as neutrals who consider *gacaca* law, customary rules of law, as well as equitable factors, such as historic and interpersonal issues, in coming to decisions with the goal of restoring social harmony.³⁹³ Although participation in the government's *gacaca* system is more formalized than the historic process, the historic system was, to some extent, just as compulsory, in that there were potent sanctions in the form of social ostracism if parties did not participate in the system or comply with decisions. Today's *gacaca* is an ADR attempt to rescue Rwandan society from one of the main causes of the genocide, which was "community disintegration and suspicion between the Hutu, Tutsi and Twa communities, due to divisive policies and a state ideology which sought to categorise these communities as ethnically and racially distinct, despite the fact that they all share one ethnicity, one language and a common heritage."³⁹⁴ Like Western ADR processes, *gacaca* offers conventional advantages compared to developed countries' trial models, such as being less expensive, quicker, and more flexible than litigation, and also allowing the parties to work toward a long-term relationship or reconciliation. Because *gacaca* is an institutionalized branch of the Rwandan government, *gacaca* has become less flexible than the traditional dispute resolution process, due to standardization and formalization of the *gacaca* process.³⁹⁵ Obviously, some level of standardization and formalization of process is required for decisions to have any meaning outside the context of the forum that made the decision. However, *gacaca* administrators are charged with balancing the need for flexi-

391. *Id.*

392. *Id.*

393. Busingye Interview, *supra* note 294.

394. Nantulya, *supra* note 20, available at <http://www.accord.org.za>.

395. Umugwaneza Interview, *supra* note 269.

bility with the goal of ensuring a perception of fairness of the process, in order to assist in rebuilding citizens' trust in the Rwandan government.³⁹⁶

While governmental involvement presents some costs and some benefits to the implementation of *gacaca*, the involvement provides a model for other countries that are attempting transformative justice programs. For example, Western governments are coming to recognize that the Western approach does not always serve victims and the community, not to mention defendants, because of the Western system's complexity and the failure of the process to attempt to foster reconciliation between the parties. These formal systems may "leave some victims powerless and emphasize guilt rather than individual responsibility toward community."³⁹⁷ The Law Commission of Canada's research and studies have determined that a justice system structured to deal with the issues of complexity and reconciliation has a greater "potential to foster moral growth and transform society by enabling wider participation in the process of justice." Rwanda's governmental involvement should aid the development of reconciliation theory, as the process is analyzed as a model for other countries.³⁹⁸ Although Rwanda's process seems experimental in the extreme when compared to the Western trial process, the *gacaca* system, in theory, is not so removed from the scenarios described by the Law Commission of Canada.

CATEGORIZATION ISSUES

Some defendants' crimes are difficult to categorize, because both the Rwandan criminal law and the *gacaca* law are incomplete. One relevant example is the Rwandan rape statute, which defines rape using the bare legal conclusion that rape is "unlawful sexual intercourse."³⁹⁹ The Rwandan Penal Code does not define "unlawful sexual intercourse" and, therefore, is, for all practical purposes, silent on the elements of the crime of rape.⁴⁰⁰ Further, the law of rape is incomplete because the Rwandan Penal Code defines rape as requiring penile penetration, but it does not, for example, specifically proscribe crimes related to forced sodomy, oral or digital penetration, or penetration with a foreign object of either a man or a woman.⁴⁰¹ The *gacaca* law on rape is similarly uninformative.⁴⁰² As a result of lack of clarity in the law, even trained prosecutors do not

396. *Id.*

397. Eliadis, *supra* note 343.

398. *Id.*

399. Rwandan Penal Code, Article 360

400. *Id.*

401. *Id.*

402. Organic Law 40/2000, *supra* note 327.

agree on the appropriate categorization for crimes.⁴⁰³ Further, because the *gacaca* judges are lay people, inexperienced at applying the facts to the law and unfamiliar with comparative law systems, vaguely written statutes generate even further confusion.

In addition to legal issues such as vagueness of Rwandan statute, a common problem that has arisen in the process of categorizing defendants' crimes pursuant to *gacaca* law is that often witnesses do not give complete information, because investigators do not ask the right questions or do not have enough training on how to deal with victims appropriately.⁴⁰⁴ These issues may lead to incomplete dossiers and case files and could lead to inaccurate categorization of defendants' crimes.⁴⁰⁵

Another administrative problem regarding categorization of genocide crimes involves the investigators' tracing of *genocidaires'* crimes throughout the country of Rwanda.⁴⁰⁶ According to the *gacaca* statute, a *genocidaire* is to be tried once, for all crimes committed, at the cell where he committed the most serious crime.⁴⁰⁷ However, often, *genocidaires* committed crimes in different cellular jurisdictions under assumed or different names.⁴⁰⁸ *Gacaca* investigators must link the crimes to the proper defendants, and the *gacaca* courts must decide where the most serious crimes occurred and, thus, where defendants should be tried.⁴⁰⁹ The Rwandan government is presently designing a computer program to cross-reference defendants by name, alias, and categorization for different crimes committed to ease the jurisdiction search.⁴¹⁰ Despite the aforementioned issues, the information gathering and categorization phases are nearly complete.

BUY-IN AND ACCEPTANCE

The *gacaca* trial process will involve bringing together the victim, victim's family members, defendant, defendant's family members, and any witnesses, all of whom will publicly testify in front of the *gacaca* judges.⁴¹¹ This part of the *gacaca* process will be highly publicized, and the Rwandan government anticipates a high level of community participation and attendance at the *gacaca* trials.⁴¹² After the trial process is completed, the *gacaca* judges will give their

403. Umugwaneza Interview, *supra* note 269.

404. Umugwaneza Interview, *supra* note 269.

405. *Id.*

406. *Id.*

407. Organic Law 40/2000, *supra* note 327.

408. Umugwaneza Interview, *supra* note 269.

409. *Id.*

410. Umugwaneza Interview, *supra* note 269.

411. Organic Law 40/2000, *supra* note 327, at Art. 69-71.

412. Umugwaneza Interview, *supra* note 269.

decision.⁴¹³ If a guilty verdict is reached, the defendant will be sentenced to participate in reintegration counseling, community service, or another program that the judges deem appropriate, and released.⁴¹⁴ The trial process is dependent upon the parties' agreement to participate in the process, or "buy in" to the process.

The essential requirement in any initiation of ADR is an agreement between the parties to participate in the process, commonly known as "buy-in." Ideally, the parties' buy-in should occur before the process begins, although parties may make the decision to begin participation while holding mental reservations. In the case of *gacaca*, the primary parties include defendants and victims. Secondary, but equally important, parties include witnesses, the families of the defendants and victims, and community members. Because the *gacaca* process is beginning with a grassroots investigation process prior to the commencement of the trial process, the government has had the time to conduct an extensive education campaign.⁴¹⁵ Buy-in is beginning to occur, as the government's programs convince more and more citizens that the *gacaca* trials will occur, will be fair, and will not be corrupt.⁴¹⁶ *Genocidaires* are beginning to file the papers, admitting the crimes they have committed and detailing the crimes of others. Geraldine Umugwaneza, a *gacaca* judge/trainer, has found that,

[c]itizens are now realizing that there is no prescription period, or statute of limitations for the genocide crimes. People are coming to realize that, if they do not want to live haunted, they must come forward and confess to their crimes. Some people are choosing to get it over with, and confess to their crimes now. We are continuing to educate people with the phrase that it is "not a favor to speak out, it is an obligation."⁴¹⁷

Because the historic *gacaca* process is locally recognized, even Rwandans who have lived in exile for many years are familiar with the government's system. Rwandans tend to be familiar with *gacaca* or similar processes. Familiarity may also be based on similarity in African customary dispute resolution programs.⁴¹⁸ Thus, now that citizens are buying in to the *gacaca* process, understanding of the process is more accessible than would be a Westernized trial process because the system has some foundation in people's lives.⁴¹⁹

According to Mr. Busingye, over time, the Rwandan people are learning to respect *gacaca*, in that there is increasing honesty among witnesses and victims

413. Organic Law 40/2000, *supra* note 327, at Art. 69-71.

414. Umugwaneza Interview, *supra* note 269.

415. *Id.*

416. *Id.*

417. *Id.*

418. Owasanoye, *supra* note 286.

419. Busingye Interview, *supra* note 294.

who are coming forward to participate in the process.⁴²⁰ Although there is no measurable way to assess the effectiveness and growth in community acceptance of *gacaca*, administrators are finding that there is increased participation in the *gacaca* process, as demonstrated by the following example described by Ms. Umugwaneza:

In October of 2001, Rwandan citizens elected *gacaca* judges. In June of 2002, almost a year after the elections, the same people who helped to elect the *gacaca* judges named some of the judges as *genocidaires* in the *gacaca* information gathering process. As a result, there are allegations that some of the elected judges were genocide perpetrators and were known by the community to have committed these crimes, even at the time that the *gacaca* elections were conducted. *Genocidaires* were elected to be impartial judges, in part because from 1975 onwards, crimes such as genocide were not punished, and therefore had not been commonly thought of as crimes. As a result, people did not believe that the process would come to exist, or was a real process, or would be enforced, and certainly did not think that the *gacaca* process would be fair in prosecuting community leaders. Thus, these same leaders were elected judges.⁴²¹

As evidenced by the participation in the information gathering process by the naming of judges as perpetrators, citizens are beginning to buy in to the process, demonstrating more faith in and commitment to *gacaca* and to the Rwandan government.⁴²² As Rwanda's government seeks buy-in of the *gacaca* process, there have been tangential social benefits, such as the beginning of the healing process, that have occurred because of the publicity and educational programs developed precedent to the commencement of the trial process.⁴²³

MITIGATING FACTORS

Action with impunity became part of the culture in Rwanda, at least in part, because the pre-genocide and genocide-era Rwandan governments promised that there would never be prosecution of *genocidaires*.⁴²⁴ Further, relatively few Rwandans would be considered innocent of genocidal acts because the state took great pains at the community level to systematically involve as many citizens as possible in the genocide.⁴²⁵ Through a well-executed and comprehensive program of enticement and pressure - even up to the killing of citizens' family members - the extremist government ensured that as many citizens as possible participated in the genocide.⁴²⁶ By way of illustration, there is even a Rwandan maxim that, at the time of the genocide, "everyone killed, even if they

420. *Id.*

421. Umugwaneza Interview, *supra* note 269.

422. *Id.*

423. *Id.*; Eliadis, *supra* note 343.

424. Busingye Interview, *supra* note 292.

425. *Id.*

426. *Id.*

were living out of the country.”⁴²⁷ Mr. Busingye estimates that perhaps half of the *genocidaires* in prison are those who succumbed to government pressure in committing genocidal acts.⁴²⁸ The *gacaca* process allows for the identification of those who killed easily, as opposed to those who were forced by intense pressure to kill, and allows for mitigation based on the legal climate at the time of the genocide.⁴²⁹ Mr. Busingye argues that at the beginning of the genocide, *genocidaires* acted with greater moral culpability, and in a sense more criminally, because their actions were not only illegal, but also outside the scope of accepted social norms.⁴³⁰ However, as the genocide progressed, it became clear that the government was becoming more and more successful with its program of killing.⁴³¹ Because no one was prosecuted, genocide was normalized, and the program’s success created a culture of impunity.⁴³² The culture of impunity allowed people to have no fear of reprisal for their crimes, and to easily convince themselves that what they were doing did not violate social norms and had no consequences under the law.⁴³³ *Gacaca* allows the judges to take a defendant’s explanation of the institutionalized culture of genocide into consideration when rendering a decision and sentence.⁴³⁴

HUMAN RIGHTS AND DUE PROCESS CONCERNS

Despite the opportunity for defendants to show mitigating factors during *gacaca* trials, and the fact that, if a defendant participates in the pleading procedure, *gacaca* offers immediate release of a *genocidaire* even if convicted, the process has drawn justifiable comment and criticism from human rights activists, lawyers’ groups, and academics over the decrease in the scope of due process and human rights protection.⁴³⁵ For example, Amnesty International remains concerned that the issue of reconciliation could overshadow the question of innocence or guilt of the accused, raising the following human rights considerations:

the accused in the *gacaca* trials will not be allowed representation by a defence lawyer;

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.*

434. *Id.*

435. See, e.g., Werchick, *supra* note 320; Rwanda: *The Troubled Course Of Justice*, *supra* note 325.

those judging these extremely complex and serious cases will have no legal training or may have a personal interest in the verdict, thus potentially undermining the competence, independence and impartiality of these courts;

fundamental aspects of the *gacaca* proposals do not conform to basic international standards for fair trials guaranteed in international treaties which Rwanda has ratified. . . .⁴³⁶

As Amnesty International notes, the *gacaca* process excludes the use of attorneys on either side, raising human rights accountability issues related to the fairness and quality of legal defense.⁴³⁷ Further, *gacaca* judges will be able to avoid difficult defense issues, both factual and legal, because there are no defense attorneys to raise the issues.⁴³⁸ As a result, if root causes of problems are ignored, this will hinder the reconciliation effort. However, although the *gacaca* system is not generally compliant with international criminal law human rights standards, the system strikes a balance between responsiveness to the interests of the Rwandan community, and respect of individual human rights.⁴³⁹ *Gacaca* is a process that is accessible to citizens and the lay judges who are becoming educated to decide often complex equitable matters. As a practical point of comparison, the warehousing of Rwandan accused *genocidaires* in highly substandard conditions for up to ten years is a gross violation of human rights.⁴⁴⁰ Further, the current backlog in the Rwandan justice system and the prison conditions constitute serious violations of numerous internationally protected human rights.⁴⁴¹ *Gacaca* responds to these problems by allowing judges to release prisoners as soon as the verdict is given.⁴⁴² Further, the verdict will be rendered much more quickly than would be given through a Western-style trial.⁴⁴³ The only option for a quicker release of prisoners, a general amnesty and release, was attempted and found to be extremely destabilizing.⁴⁴⁴ Former prisoners often became victims of revenge violence and some even took refuge back in the prisons.⁴⁴⁵ United Nations screening committees that meant to re-

436. *Rwanda: The Troubled Course Of Justice*, *supra* note 325.

437. *Rwanda: Country Reports on Human Rights Practices - 2002*, Released by the Bureau of Democracy, Human Rights, and Labor (March 31, 2003), available at <http://www.nationbynation.com/Rwanda/Human.html>.

438. *Id.*

439. Umugwaneza Interview, *supra* note 269.

440. *Rwanda: The Troubled Course of Justice*, *supra* note 325.

441. See generally *Rwanda: The Troubled Course of Justice*, *supra* note 325; see also Human Rights Watch, *The Search for Security and Human Rights Abuses*, vol. 12, no. 1, (Apr. 2000) (discussing silencing the press, extra judicial killings, arbitrary arrests, and torture), available at <http://www.hrw.org/reports/2000/rwanda/> [hereinafter Search for Security]. As purely a practical matter, today many families make weekly journeys, often over great distances, to provide supplemental food and basic necessities for family members in prison awaiting trial. (citation necessary)

442. Busingye Interview, *supra* note 294.

443. Umugwaneza Interview, *supra* note 269.

444. *Rwanda: The Troubled Course of Justice*, *supra* note 325.

445. *Id.*

view files and, ultimately, to release prisoners, were found to be ineffective.⁴⁴⁶ *Gacaca* is meant to allow for the release of prisoners by providing an element of punishment in order to satisfy victims' need for justice, while also fostering a sense of reconciliation.⁴⁴⁷

Again, on a purely a practical note, although human rights criticisms are completely valid, for a country such as Rwanda that has very limited resources to spend on protecting civil rights and political freedoms, these necessities must sometimes bow to other important issues also crying out for attention.⁴⁴⁸ As a result of the lack of resources, civil rights and political freedoms cannot be guaranteed in the same way in Rwanda as these rights may be protected in a wealthy country, despite Rwanda's best intentions, or treaty obligations, or pressure from the international community.⁴⁴⁹ As a result, any analysis of the Rwandan legal system must address the reality that, theory notwithstanding, Rwanda's options for resolving the genocide cases were and remain extremely limited.⁴⁵⁰

SOCIAL COHESION

The *gacaca* system requires the judges and participants to mix the classical Western justice system's goal of punishment with the reconciliation goals of the traditional Rwandan system.⁴⁵¹ Reconciliation is expected to occur, in part, because one of the main functions of historic *gacaca* was to maintain social cohesion.⁴⁵² The flexibility of *gacaca* enabled the judges to fashion decisions that both satisfied the parties and strengthened the social fabric of the community.⁴⁵³ In the same sense, the Rwandan government's modern *gacaca* program is charged with developing social cohesion in Rwanda, in situations such as the following, relayed by Ms. Umugwaneza:

A woman and her first husband have children. In 1994, the woman's first husband commits genocide crimes and is subsequently imprisoned for those crimes. While the woman's first husband is in prison, the woman falls in love with and marries someone from the family of a victim of her first husband's crimes. The woman and her second husband have children. The

446. Amnesty International Report, *Rwanda: A Question of Justice* (December 17, 2002), available at <http://web.amnesty.org/library/index/engaf470072002>.

447. Umugwaneza Interview, *supra* note 269.

448. Shabas, *supra* note 139.

449. *Id.*

450. *Id.*

451. Umugwaneza Interview, *supra* note 269.

452. See generally Owasanoye, *supra* note 286; Nantuyla, *supra* note 20, at 53.

453. VANDEGINSTE, *supra* note 292, at 15.

woman and her second husband have care of their children, as well as the children of the woman and her first husband.⁴⁵⁴

The *gacaca* judges are faced with responsibility for consideration of the unity of the two families, the family of the imprisoned *genocidaire* and the family of the victim, as well as the woman and her mixed family.⁴⁵⁵ Each panel of *gacaca* judges is expected to work together to find creative solutions to difficult problems such as the one described above.⁴⁵⁶ Although the governmental formalization of the process will make the judges more accountable for their decisions, the formalization also eliminates some of the flexibility that was endemic in the traditional *gacaca* process.⁴⁵⁷ However, institutionalization of the creative process, through charging *gacaca* judges with finding creative solutions, is an attempt to duplicate the value of historic process that was successful in maintaining social cohesion.⁴⁵⁸

LAY PANEL OF NEUTRALS

In contrast to Rwanda's *gacaca* ADR system, in a traditional Westernized dispute resolution process, the parties have the option to select the neutral who will be the decision-maker for the parties' case.⁴⁵⁹ As described above, in *gacaca*, a panel of judges is selected from among members of the community and is elected to handle all *gacaca* cases for that geographical area.⁴⁶⁰ The *gacaca* judges are elected in a process similar to judicial election in Western law.⁴⁶¹

The fact that a panel of judges sits on every *gacaca* matter is a great advantage for the *gacaca* process.⁴⁶² If only one judge were assigned to a matter, the judge would wield a tremendous amount of power over individual defendants, victims and witnesses.⁴⁶³ If only one judge were assigned to a matter, especially in a poor country such as Rwanda, where the judges are not well paid, an individual judge would be more susceptible to bribery or coercion than a group of judges.⁴⁶⁴ The use of multiple *gacaca* judges in each case makes it far less likely that any case will be unfairly or improperly decided.⁴⁶⁵

454. Umugwaneza Interview, *supra* note 269.

455. *Id.*

456. *Id.*

457. *Id.*

458. VANDEGINSTE, *supra* note 292, at 15.

459. Owasanoye, *supra* note 286.

460. Organic Law 40/2000, *supra* note 327, at Art. 13.

461. *Id.* at Art. 10.

462. Busingye Interview, *supra* note 294.

463. *Id.*

464. *Id.*

465. *Id.*

One fundamental human rights principle is the requirement of the impartiality of the neutral and the impartiality of the dispute resolution process.⁴⁶⁶ The *gacaca* plan does not follow this restriction, instead seeking to involve some of the parties, even genocide victims, in the process as both neutrals and investigators.⁴⁶⁷ The *gacaca* process requires every unincarcerated Rwandan citizen to serve on the *gacaca* council at the cellule level, where citizens are tasked with gathering evidence and categorizing cases.⁴⁶⁸ The sheer number of judges in the *gacaca* process, comprising approximately one percent of the population, threatens defendants' right to an impartial neutral.⁴⁶⁹ With such a large percentage of the population elected as judges, it is not surprising that people who have been elected as judges are now being named as defendants in the information gathering process, presenting a fundamental fairness issue.⁴⁷⁰

Further, the selection of lay people as judges requires a good deal of education, because many *gacaca* judges are not familiar with genocide law or genocide because these crime were not proscribed in the Rwandan penal code, and genocidal acts were not punished, nor even outside of social norms for years before the genocide occurred.⁴⁷¹ Although the education of *gacaca* judges is proceeding as demonstrated, there are judges who still do not have a full understanding of what it means to be a victim of genocide.⁴⁷² Even more troubling, often, *gacaca* judges don't know what genocide is. For example, Ms. Umugwaneza encountered the following situation:

A *gacaca* judge telephoned Ms. Umugwaneza and said that her help was needed because of an important problem at a *gacaca* categorization session. Ms. Umugwaneza travelled to the session, and listened as the judge relayed the following scenario that took place at the time of the genocide: a woman died in her home, as a result of hanging. There was no known evidence as to how the hanging had occurred. There was some evidence that known *genocidaires* were present in the vicinity of the woman's home, but no evidence had been collected that linked the *genocidaires* to the crime. When the *gacaca* judges were faced with whether to continue investigation of the woman's death and whether her death was the result of genocide, one of the judges suggested, in the presence of the townspeople, that the woman had "committed genocide on herself." Ms. Umugwaneza did not want to educate the judge in the presence of the assembled townspeople, and so responded by thanking the judges for their caring service and saying that, while she could not give a recommendation as to the categori-

466. The requirement of an "independent and impartial tribunal" is also contained in the International Covenant on Civil and Political Rights (ICCPR) Article 14(1), to which Rwanda acceded on March 23, 1976.

467. Werchick, *supra* note 320.

468. Organic Law 40/2000, *supra* note 327, at Art. 33.

469. Werchick, *supra* note 320.

470. Umugwaneza Interview, *supra* note 269.

471. *Id.*

472. *Id.*

zation, she was sure that the judges would make the right decision. After the assembly had been dismissed, in order to educate the judge, Ms. Umugwaneza asked whether the woman would be a victim of genocide under the following hypotheticals, asking, "is this genocide:"

- suppose the woman hanged herself to avoid rape and torture by *genocidaires*
- suppose the woman is listed as not having been a victim of genocide, and then later a *genocidaire* confesses to her murder
- suppose the woman is killed in an accident, as a *genocidaire* chases her or someone else down the road
- suppose the woman hid in the cold to avoid detection by *genocidaires*, and died because she could not come inside for fear of retribution or death
- suppose the woman became sick, but could not present herself for treatment for fear of retribution, and therefore died⁴⁷³

As a result of the hypotheticals that Ms. Umugwaneza relayed to the judges, the judges determined that the hanged woman may have been a victim of genocide, and that the investigation should remain open. With education about genocide law, the judges and communities are becoming more educated about human rights and Rwanda's history. This education is the first step toward reconciliation. In fact, though, the groups are still learning to live together, and are far from reaching a state of reconciliation.⁴⁷⁴

PUBLIC EDUCATION

The gacaca process, beginning with charging, and continuing through investigation, trial, and post-trial follow-up with defendants, is designed to assist in the creation of an environment conducive to addressing the psychological needs of individuals, communities, and the society as a whole.⁴⁷⁵ However, the issues raised through the education process are often too difficult or traumatizing for individuals to resolve alone. To assist individuals in dealing with the results of trauma, the government has founded the National Unity and Reconciliation Commission (NURC).⁴⁷⁶ The NURC is a public education agency that was established purely to reunite communities and assist citizens dealing with post-genocide trauma.⁴⁷⁷ This and other organizations have provided the government

473. *Id.*

474. Ruth Wedgwood and Harold K. Jacobson, Foreword, Symposium: State Reconstruction After Civil Conflict, *American Journal of International Law*, v. 95 (January 2001), published online at <http://www.asil.org/ajil/recon1.htm>.

475. *Rwanda: The Gacaca System and the International Criminal Tribunal for Rwanda*, *supra* note 325, at 21.

476. *Id.* at 14.

477. *Id.*; Eliadis, *supra* note 343.

with another avenue to indirectly support the *gacaca* and formal justice processes while working for social change.⁴⁷⁸

PROTECTION OF VICTIMS AND WITNESSES

Protection of victims and witnesses is a concern in Rwanda because, as of yet, there is no statute in the Rwandan Penal Code that proscribes bribing, threatening, intimidating or coercing witnesses or victims of crime.⁴⁷⁹ Although the Rwandan government is currently working to enact such legislation in light of the increased need to protect victims and witnesses who participate in the *gacaca* process, victim and witness security remains a concern.⁴⁸⁰ The Rwandan government has had the benefit of a trial run at dealing with potential *gacaca* security issues, due to problems surrounding victim and witness testimony at the ICTR.⁴⁸¹ Security of victims and witnesses is an issue that is currently being addressed in both Rwanda and Arusha, Tanzania, where the ICTR trials are currently being conducted.⁴⁸² Although victims and witnesses may receive protection when they appear and testify before the ICTR in Arusha (and some testify anonymously), given the closeness of Rwandan communities, it is virtually impossible for a citizen to leave Rwanda and travel unnoticed to Tanzania.⁴⁸³ Thus, a citizen's absence and presumed testimony may become the subject of often-inaccurate gossip, which many victims and witnesses rightly fear could lead to violent retribution.⁴⁸⁴ Because Rwandan citizens generally cannot afford trips to Tanzania to view the proceedings firsthand, the gossip often has little foundation in truth.⁴⁸⁵

Although there are secret organizations that ensure that people are protected after they have testified before the ICTR, these groups cannot be presumed to protect the vast number of citizens who will be offering simultaneous testimony when the *gacaca* trials begin.⁴⁸⁶ The fear of retribution is exacerbated by the fact that, as commonly heard in Rwanda, the Hutus and the Tutsis are "barely getting along."⁴⁸⁷

478. Eliadis, *supra* note 343.

479. Kritz Speech, *supra* note 267.

480. *Id.*

481. *Id.*

482. International Criminal Tribunal for Rwanda website, General Information, available at <http://www.ictr.org/default.htm>.

483. Kritz Speech, *supra* note 265.

484. *Id.*

485. Umugwaneza Interview, *supra* note 269.

486. *Id.*

487. Busingye Interview, *supra* note 294.

In contrast to the ICTR, the *gacaca* process will be conducted in the villages and towns where the victims and witnesses live, drawing strength from being a public process that is organized to socialize the whole community, and benefiting those who testify truthfully.⁴⁸⁸ As a result, harmful gossip that may follow a citizen's *gacaca* testimony will, at least, be tinged with the truth of those who witnessed the *gacaca* proceedings.⁴⁸⁹

CULTURAL ISSUES

Although the *gacaca* system of holding trials at the grassroots level may encourage people to testify truthfully about events they witnessed personally during the genocide, this testimony also may be inhibited when sensitive issues, such as incidents involving rape or sexual torture, or the torture and murder of a close family member are concerned.⁴⁹⁰ Thus, the benefit of truthful testimony is balanced by the fact that much of the testimony will be about very difficult subjects that the victims and witnesses do not necessarily want to share with the members of an entire community.⁴⁹¹ Given the Rwandan cultural trait of privacy about personal issues, *gacaca* trials will often be the first time that many Rwandan citizens have spoken of the genocide.⁴⁹² Through educational programs conducted by the NURC and other organizations, citizens are learning the psychological benefit of more open discussion.⁴⁹³ Because customary dispute resolution evolved with a community focus, the process has not historically been used in cases in which the parties have cultural differences or come from diverse cultural backgrounds.⁴⁹⁴ This issue is important in Rwanda given the large number of exiled citizens who have returned to Rwanda since the end of the genocide.⁴⁹⁵ These people, who often lived outside Rwanda for their entire adult lives, or were even born outside Rwanda, bring cultural diversity issues that must be considered in the process.⁴⁹⁶ Basic issues such as language must also be considered, as Rwandans living outside Rwanda often speak a different dialect

488. Author's Note: By contrast, generally, one of the most touted benefits of Western dispute resolution proceedings and decisions is that they are private in nature. However, it is interesting to note that dispute resolution processes involving broad based social issues such as land use or environmental concerns also draw strength from their transparency as public processes.

489. Umugwaneza Interview, *supra* note 269.

490. *Id.*

491. *Id.*

492. *Id.*

493. *Rwanda: The Troubled Course of Justice*, *supra* note 325, at 14.

494. Owasanoye, *supra* note 286.

495. *Gacaca Jurisdictions: Transitional Justice in Rwanda*, Observations from June 10-August 8, 2002 (Interim Report), Harvard University, p. 37, available at http://66.102.7.104/search?q=cache:QSS5F-jXsY-hIJ.www.convenor.com/madison/PDF_Gacaca_Report.pdf+gacaca+jurisdictions+transitional+justice+rwanda+harvard&hl=en.

496. *Id.*

of the local language, Kinyarwanda, and speak English rather than French as a secondary language.⁴⁹⁷ These citizens are equally important in the process to become a unified Rwanda, but their cultural mores are often different than those existing for Rwandans who never left the country.

ENFORCEMENT OF GACACA DECISIONS

The final requirement of an ADR process is that there is a mechanism for enforcement of the decision. Historically, *gacaca* provided the norm for dispute resolution in Rwandan communities, because communities accepted the customary law of *gacaca* as binding.⁴⁹⁸ *Gacaca* was organized to socialize the whole community, because the whole society was witness to the decision and provided enforcement.⁴⁹⁹ Social exclusion or ostracism provided a potent sanction if a party did not comply with the decision.⁵⁰⁰ In Rwanda, there have never been, and there are no ghettos, no state-sponsored living divisions, and no expectations that Hutus or Tutsis will live in certain areas.⁵⁰¹ In fact, in there is a Kinyarwandan saying that “neighbours give birth to children who look like each other.”⁵⁰² Accordingly, the historic *gacaca* system was always pan-ethnic, in that both Hutus and Tutsis are subject to the same community mores and governed by the same elders. The historic enforceability of decisions is a strength that lends itself to the government’s process today.

As in the past, today’s *gacaca* program provides a public resolution with community sanction.⁵⁰³ Further, the full weight of the Rwandan government is behind the enforcement of *gacaca* decisions.⁵⁰⁴ Government organizations similar to probation departments and trauma centers will be working together to reintegrate accused *genocidaires* into the community and assist genocide vic-

497. *Id.*

498. Nantulya, *supra* note 20, at 53; *see generally* Owasanoye, *supra* note 286.

499. Owasanoye, *supra* note 286.

500. *Id.*

501. Busingye Interview, *supra* note 294. According to Mr. Busingye: “There now are certain areas that are predominantly Hutu or Tutsi, due to practical reasons of population movement, not because of a group’s need to settle with others of their group. For example, those who were exiled in 1959 often left Rwanda and settled just outside the Rwandan border. Upon returning to Rwanda, these former exiles often settled just inside the Rwandan border, either because the location allowed for easy flight if necessary, or because the location is not far from where the exiles lived outside the Rwandan border, or because the location was the first found and easiest to settle. Further, there are some areas which, today, are majority or all Hutu, because all of the Tutsis living in that area were killed in the 1994 genocide.” Busingye Interview, *supra* note 296; *see also* Nantulya, *supra* note 20.

502. Nantulya, *supra* note 20.

503. Umugwaneza Interview, *supra* note 269.

504. *Id.*

tims.⁵⁰⁵ The NURC is also dedicated to working toward community reintegration.⁵⁰⁶ Further, there is the threat of police enforcement if the *gacaca* decisions are not respected.⁵⁰⁷ However, the government is faced with a greater task than merely enforcing a punishment regime - *gacaca* enforcement also includes stopping the cycle of revenge.⁵⁰⁸ *Gacaca* is meant to address the issue of defendants, many of whom have been imprisoned for almost ten years, becoming slowly reintegrated into the Rwandan community - getting reaccustomed to the village, meeting people, and interacting with villagers who are, in turn, learning to live with the defendants.⁵⁰⁹

CONCLUSION

Gacaca is one of the processes that Rwanda is utilizing to respond to the immediate need to move forward with genocide prosecutions, as well as deal with the long-term psychosocial need for national reconciliation and unity. *Gacaca* reinforces, but is not intended to replace, the formal justice system. As a system rooted in Rwanda's traditions, *gacaca* takes advantage of Rwandan cultural characteristics and capitalizes on a historical unity of the collective Rwandan experience. *Gacaca* also gives the Rwandan people an opportunity to take part in shaping their own country, and is restorative in facilitating community reintegration - a process that is seen as necessary in addressing the fundamental causes of the genocide. Although there are many benefits and costs to this uniquely creative judicial experiment, *gacaca* is an important contribution to the field of ADR. *Gacaca* is also an experiment in utilizing traditional or customary justice processes to address vast peace and reconciliation issues, and to determine whether customary dispute resolution systems may be adapted by governments. *Gacaca* is an important experiment in the field of human rights, as Rwandan citizens make a proactive attempt to build a better future for the country through healing the conflict that became one of the largest human rights catastrophes in world history.

505. Umugwaneza Interview, *supra* note 269; Busingye Interview, *supra* note 294.

506. Eliadis, *supra* note 343.

507. Busingye Interview, *supra* note 294.

508. *Id.*

509. Busingye Interview, *supra* note 294.