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Sandra F. Joireman

University of Richmond, sjoirema@richmond.edu

Allison Corey

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Retributive Justice: The Gacaca Process in Rwanda

Allison Corey
University of Buffalo
School of Law

Sandra F. Joireman
Department of Politics and International Relations
Wheaton College
Wheaton, IL 60187

Sandra.F.Joireman@wheaton.edu

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After decades of cycling violence between Hutu and Tutsi groups in Rwanda and Burundi violence peaked in 1994 with a genocide of Tutsis in Rwanda. During the Rwandan genocide the Hutu majority slaughtered 800,000 Tutsi and moderate Hutus, leaving the country with 120,000 accused *genocidaires* awaiting trial. Rwanda's gacaca courts were established as a response to the backlog of untried genocide cases. These courts disturbingly distinguish between genocide and war crimes committed during the same era, trying only those accused of genocide crimes. We argue that the gacaca process will contribute to the insecurity of all Rwandan citizens in the future since it pursues inequitable justice, accentuates the ethnic divide and will be interpreted as revenge.

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In a mere 100 days, between April and July of 1994, nearly one million Rwandans were killed by their neighbors, friends, families and fellow citizens in the most devastating act of collective violence in recent history. Without taking action, the world watched as Hutus slaughtered their Tutsi and moderate Hutu neighbors.¹ Also during these three months, tens of thousands of Rwandan women were raped and hundreds of thousands of Rwandans were internally displaced or became refugees. The Rwandan genocide was more than ethnic oppression, exiled refugees, political instability and murder. It was also the most horrific rotation-to-date in the continuing cycles of ethnic violence that have constituted Rwandan history since independence.

In the following paragraphs we will document the cycles of violence that have occurred in Rwandan society and assess the future of Tutsi and Hutu security. We will consider the implications of the new gacaca courts, an indigenous legal procedure that has been adapted to process accused perpetrators of genocide. It is our belief that the gacaca courts will intensify a distorted sense of justice and a desire for vengeance among the Hutu majority in Rwanda, thereby contributing to rather than curtailing the risk of ethnic violence in the long run.

We begin this paper by discussing the historical context leading up to the Rwandan genocide and the way the genocide is viewed by both Hutu and Tutsi populations in Rwanda. This will be followed by a description of the gacaca process and an assessment of the implications for the long-term security of ethnic groups in Rwanda. We conclude with some suggestions for better ensuring the security of all Rwandan citizens.

¹ We use “Hutu”, “Tutsi” and “Twa” instead of the plural forms “Bahutu”, “Batutsi” and “Batwa” to describe the three people groups within Rwanda. Moderate Hutus would be those who were interested in power-sharing with Tutsis and opposed the violence against the Tutsi population.

HISTORICAL ANALYSIS

Recounting history is always a political endeavor as there are many “truths” from which to form a narrative. There are competing interpretations of Rwanda’s historical events. Rene Lemarchand refers to these different versions of history as the “cognitive maps” of Rwandans and it is perhaps not surprising that they are dissimilar for Hutu and Tutsi.² Hutu and Tutsi collective memories of political events in Rwanda diverge in critical areas. This is both important to note from an anthropological and historical perspective as well as relevant politically as these collective memories have been used to justify violence and therefore have life and death consequences.

At the heart of the matter are two prominent and competing narratives regarding the source of ethnic conflict, hatred, and violence. One historical description suggests that the people of Rwanda, often called the Banyarwanda, were peacefully co-existing ethnic groups until they became subject to colonial authorities. German and Belgian conceptions of race and policies of favoritism created an atmosphere of ethnic rivalry in which the Tutsi were elevated above the Hutu. The second account insists that ethnic discord is rooted in pre-colonial history, and that these previously existing divisions were merely exacerbated by changes wrought by colonial domination. For purposes of this article, we will label the former “Tutsi” and the later “Hutu.” These narratives represent polar extremes on the spectrum of Rwandan historical understanding. While it seems simplistic to say that Tutsis adhere to the former historical perspective and Hutus to the later, one can largely do so. Mahmood Mamdani and Gerard Prunier both note that even scholars are labeled pro-Hutu or pro-Tutsi depending on which

² René Lemarchand, “Genocide in the Great Lakes: Which Genocide? Whose Genocide?,” *African Studies Review* 41, no. 1 (April 1998): 5.

historical narrative they accept.³ Our observations of Rwandan-led reconciliation workshops affirm that there is a divide in opinions regarding history that follows ethnic lines.⁴

The account attributing ethnic inequalities to the colonial authorities is the official position of the current government and that associated with the Tutsi population – no surprise given that the government is predominantly Tutsi.⁵ The Rwandan government is trying to create a unifying historical narrative that will contribute, and not inhibit, political reconstruction and ethnic reconciliation. Therefore, the government would like to emphasize the peaceful cohabitation that once existed, and to minimize talk of “natural” or “ancient” antagonisms between ethnic groups.

As told from the “Tutsi” perspective, the Twa, Tutsi and Hutu people groups co-existed relatively peacefully before the appearance of European settlers. The pygmoid Twa, now less than one percent of the population, migrated into Rwanda from the forests of modern day Democratic Republic of Congo (DRC) and were the first to settle in the area. The predominantly agricultural Hutus were the next immigrants, followed by cattle-herding Tutsis in the 14th or 15th century. Over time, a system arose in which Tutsi kings employed cattle, land and military chiefs to rule over local groups of the majority Hutu and minority Twa and Tutsi peoples. Though Rwandan oral tradition attests to instances of Tutsi king (*mwami*) brutality towards Hutu subjects, this aggression is mitigated by the cohesion of the pre-colonial population at large. The average Hutu and Tutsi led comparable lifestyles, held common religious beliefs, spoke the same

³ Mahmood Mamdani, When Victims Become Killers (Princeton: Princeton University Press, 2001), 19-39 and Gérard Prunier, The Rwanda Crisis: History of a Genocide (New York: Columbia University Press, 1995), 30. Moreover, there is increasing debate regarding the biased nature of some of the scholarship on Rwandan history published after the genocide. See Johan Pottier, Re-Imagining Rwanda: Conflict, Survival and Disinformation in the Late Twentieth Century, (New York: Cambridge University Press, 2002).

⁴ This is based on observations between August and November 2002 in Kigali, Ruhengeri, and Cyangugu.

⁵ The politicians composing the government are from a variety of ethnic groups, though predominantly Tutsi. The government’s overview of Rwandan history is available at their official web site: [Web site <http://www.rwanda1.com/government/>]. [cited April 19 2003].

language, co-developed music and dance and intermarried. The distinction between Hutu and Tutsi was primarily occupational, and the barrier between the two was flexible and permeable. Ethnic identities were malleable depending on the social status and wealth of the family. For example, those referred to as Tutsis typically owned more cattle. Newbury, in her discussion of contested histories, explains the central importance of clan, lineage, and family ties over ethnic identity for Rwandan social interaction from a Tutsi historical understanding.⁶ From this “Tutsi” perspective, Hutu and Tutsi pre-colonial relations were predominantly peaceful.

The second “Hutu” historical narrative places more emphasis on the nature of pre-colonial Tutsi domination. In this view, the legitimacy of Tutsi authority went largely unquestioned, especially when successful conquests and divine attributes were accorded to the local Tutsi lords. Newbury expounds this position when she writes, “Hutu were conquered in the distant past by clever and wily Tutsi, who imposed an exploitative rule on Hutu and made them the servants of Tutsi.”⁷ The ruling *mwami* oppressed the Hutu and Twa populations through forced labor. For example, as payment for occupying land Hutu were forced to donate their labor to Tutsi chiefs. In an agricultural society where land is critical to subsistence, this arrangement clearly established a caste-like system. Tutsi physical features and social claims to aristocracy advanced their power and prestige among the Hutu and Twa.⁸ The serious social inequalities abounding in pre-colonial Rwanda laid the foundation for future discrimination. From this perspective, Hutu subjugation was well developed by the time of colonization. Whichever historical perspective one accepts, it is clear that firm cleavages between the interests of the two dominant ethnic groups were present during the colonial era.

⁶ Catherine Newbury, “Ethnicity and the Politics of History in Rwanda,” *Africa Today* 45, no. 1 (1998): 7-24.

⁷ Newbury.

⁸ Mamdani disagrees with this point in his *When Victims Become Killers* (2001), contending that claims to Tutsi superiority based upon physical features originated in the colonial (and not the pre-colonial) era.

Rwanda's colonial period began in 1885 when Germany claimed the land of Rwanda and Burundi at the Conference of Berlin (though it did not gain full colonial power until 1910, after many years of negotiations with Britain and Belgium). The Germans indirectly governed their new territory, ruling through the *mwami* and local chiefs who in turn benefited from the support of German administrators.

At the conclusion of World War I, the Germans lost all of their colonial possessions, including Rwanda. Though the Belgians had control of the area since 1916, only after the war did the League of Nations officially grant them colonial authority of Ruanda-Urundi, the land that encompasses modern-day Rwanda and Burundi. Under the colonial development of a cash crop economy, the labor obligations that had began during pre-colonial times were reinforced, and further distanced the ruling elite from peasant classes. In 1935, the Belgians issued ethnic identity cards and registered Banyarwanda as Tutsi, Hutu or Twa. Experiments were conducted in order to "scientifically" determine the physical attributes of each ethnic group. Hutus were seen as shorter and stockier with slightly redder skin and wider noses. Tall, lanky, darker-skinned Banyarwanda were categorized as Tutsi.⁹ These physical stereotypes of Hutu and Tutsi remain ingrained in the population.

As independence loomed, Belgians hastily transferred their allegiance from Tutsi elites to the majority Hutu population – Hutus comprise approximately 85% of the population, Tutsis 15% and Twa less than 1%. With the assistance of the Catholic Church, Belgian officials helped establish the *Parti du Mouvement et d'Emancipation Hutu* (PARMEHUTU) which was intended to free Hutus of Tutsi oppression. Growing Hutu political aspirations prior to independence led to the development of the Hutu manifesto in 1957, a document infamous for its catalytic role in the establishment of racist language employed by both Tutsi and Hutu. In 1959, the Belgians

⁹ Mamdani, 44.

supported a Hutu-led revolution to overthrow the ruling Tutsi powers. The political violence of this year was directed primarily against Tutsi government administrators though it did not take long for the rhetoric of hatred to ignite indiscriminate violence.¹⁰ The PARMEHUTU massacred and displaced thousands of Tutsis, thereby taking on the role of the ruling class. “Hutu used the ideas once prized by the Tutsi...to justify the violence of the revolution and the discriminatory measures of the years afterwards.”¹¹ This revolution began a cycle of ethnic violence that would recur over and over in the post-independence era.

Gregoire Kayibanda, leader of the “Hutu Power” movement, went on to win the nation’s first internationally recognized election and the Republic of Rwanda gained independence on July 1st 1962. According to the current Rwandan government, “The First Republic, under President Kayibanda, institutionalized discrimination against Batutsi and periodically used massacres against this targeted population as a means of maintaining the status quo.”¹² In 1963 and 1969, thousands of Tutsis fled or were forcefully displaced in further massacres; throughout the decade Kayibanda’s administration enacted state-led discrimination against the Tutsi minority who were regularly denied equal education and employment.

In 1972, Burundi, itself composed of a population split between Hutu and Tutsi, experienced a genocide in which Tutsis murdered their Hutu neighbors. This fostered an increase in anti-Tutsi sentiments in Rwanda, which contributed to a coup of extremist Hutus in 1973 led by Major General Juvenal Habyarimana. Kayibanda, political leaders from his administration, and many other Tutsis were killed, and successive waves of massacres continued

¹⁰ The current Rwandan government’s perspective is that 1959 was the first year in their nation’s history that leaders preached violence to the population, and that these messages triggered the cycles of genocide. A summary of the Rwandan government’s viewpoint is available at <http://www.rwanda1.com/government/> cited April 19 2003.

¹¹ Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (New York: Human Rights Watch, 1999): 40.

¹² See <http://www.rwanda1.com/government/> cited April 19 2003.

against Tutsi groups throughout the 1970s and 1980s (including especially violent mass killings in 1975).¹³ Also, divisions among Hutus became more marked through these two decades with the Hutu of the north (Habyarimana's birthplace) becoming increasingly estranged from their Hutu neighbors to the south. Nonetheless, membership in Habyarimana's political party, the Mouvement Révolutionnaire National pour le Développement (MRND), remained obligatory for all Rwandans and Habyarimana was successfully re-elected in 1978, 1983 and again in 1988 (in all three cases he was the sole candidate). Habyarimana's regime was aggressively supported by a clique referred to as the little house (*akazu*), of which his wife, Agathe Habyarimana was an especially influential member. What is important to note from this brief history is the recurrent cycling of ethnic violence between Hutu and Tutsi. Thus, though there are other cleavages in the Rwandan population, such as the salient northern/southern division or socioeconomic divisions, we will focus on ethnicity herein because it has been the trait around which political violence has been perpetrated. We do also recognize that ethnicity in the Rwandan case captures issues of socioeconomic position and political privilege.

1990 marked the start of a four-year civil war in Rwanda; on October 1st of that year, Hutu-Tutsi conflicts escalated when the Rwandan Patriotic Front (RPF) - composed of Ugandan-based Tutsi exiles invaded northern Rwanda.¹⁴ RPF soldiers were battle-tested from their participation in Yoweri Museveni's overthrow of the Ugandan government. The Rwandan government felt exceedingly threatened by the RPF's attacks and responded in what was by then a predictable fashion by massacring Tutsis.¹⁵ The government-instituted policy of political

¹³ Des Forges, 44.

¹⁴ In the late 1970s the Rwandese Alliance for National Unity was formed out of exiled Tutsis and in 1987 this group became known as the Rwandan Patriotic Front (RPF).

¹⁵ The government conducted massacres at the following sites: Kibilira (October 1990), Ruhengeri (January 1991), Bugesera (March 1992), Kibuye (August 1992) and Gisenyi (December 1992). This list of massacres can be found in Guy Martin's "Readings of the Rwandan Genocide," *African Studies Review* 45, no. 3 (December 2002): 19.

violence was intended to silence political opposition and attempts to push the government toward negotiations leading to peace. However, it was not sufficient. Habyarimana's authority was already crumbling, and the President further undermined his own legitimacy by displeasing many of his Hutu extremist followers. They despised his consent for a new constitution that would allow for power-sharing with Tutsis and were again enraged when, in August of 1993, Habyarimana signed his name to the Arusha Accord, an agreement that specifically promised power-sharing with the RPF.

From 1990 through 1994, political powerful Hutu extremists organized civilian death squads and radical militia groups that trained men to follow orders, act collectively and engage in mass killings.¹⁶ They also drew up lists of Tutsi leaders and political opponents, so that expeditious killings could be easily directed once mass violence was underway - they began planning a genocide.

On April 6th 1994, Habyarimana's jet was shot down over Kigali, and he, the Burundian President Ntaryamira and several other government officials were killed. For prepared and organized Hutu extremists, this event was all the justification necessary for the death hunt against Tutsi leaders and Hutu moderates. Within hours, many of Habyarimana's moderate cabinet members were killed and the campaign to exterminate Tutsis spread to the public via media and word of mouth. Radio propaganda against the Tutsi population had already been in full-force for one year and almost immediately after Habyarimana's assassination, hate-filled broadcasts from the Hutu Power's Radio-Télévision Libre des Mille Collines encouraged Hutu civilians to take up arms against Tutsi 'cockroaches' (*inyenzi*). Government-sponsored civilian militias, called the *interahamwe* (meaning "those who work together"), the Rwanda Government Forces (FAR), government and local officials, religious leaders and members of the police force

¹⁶ Prunier, 242-24 and Des Forges, 87-95.

hunted all whom they wished to eliminate. Roadblocks were established and militias formed to efficiently exterminate Tutsis and moderate Hutus. Days passed and the violence intensified, sending Tutsis into flight across the borders of the DRC, Uganda, Tanzania and Burundi. Those Tutsi who remained inside the country were slaughtered as they sought safety in schools and churches, begged loved ones for a hiding place, or were killed in their homes and on the streets.

Many have documented the international community's knowledge of these events and its subsequent silence on the issue.¹⁷ Debates over the use of the term "genocide" paralyzed the international community, and representatives in the United Nations Security Council that pushed for military intervention were silenced (particularly by United States officials determined to smother attention so as to avoid any legal obligation to intervene in the genocide). The genocide continued unabated for 100 days.

As news of the genocide filtered out of the country, the RPF infiltrated Rwanda from the northeast in early April, trying to bring an end to the killings. Though this army saved the lives of many Tutsis and moderate Hutus on their march towards the south and west, Human Rights Watch data on RPF actions at this time indicates that thousands of Hutu civilians and militia-members were killed by the RPF in retaliation for the genocide that continued elsewhere in the country.¹⁸ This point is worth emphasizing: Hutu women and children were killed by the RPF as the troops moved towards Kigali to bring an end to the genocide. These retaliatory killings occurred mainly in the northern areas of the country. In other circumstances, the magnitude of these killings would have been newsworthy. However, in this particular case, the genocide of Tutsis overshadowed RPF non-combatant killings. The RPF captured Kigali on July 19th 1994.

¹⁷ See Prunier's *The Rwanda Crisis* (1995) and Linda Melvern's *A People Betrayed: The Role of the West in Rwanda's Genocide*. (New York: Zed Books, 2000).

¹⁸ Des Forges, 692. Des Forges also records RPF human rights violations committed since 1990 and before the genocide of 1994. See Des Forges, 701-735.

However, violence did not end with the conclusion of the genocide, some 6,000 civilians were killed by the RPF in 1997, three years after the genocide.¹ Most of the victims were Hutus concentrated in the northwest section of the country. After the fall of Kigali, Hutu militia groups swept into the nation in order to massacre remaining Tutsis, spread hate-propaganda, and threaten the new Tutsi government. In this setting, the RPF took violent and indiscriminate measures against the Hutu population, declaring that Hutu aggression justified its actions.¹⁹ The RPF established a government that consisted primarily of Tutsis. Untold numbers of Hutu genocide perpetrators took refuge in countries around Rwanda after the RPF took control of the country.²⁰ Some remain in hiding, and many are suspected to have settled in the DRC, Tanzania and elsewhere. Even after the genocide there was a wave of reprisal killings of Hutu by Tutsi both within and outside of Rwanda. Violence between these two groups has cycled back and forth over time.

¹ Neuffer, 283.

¹⁹ Quoting the U.S. State Department, Elizabeth Neuffer writes, ““The RPA committed hundreds of extrajudicial killings, including individuals and families, in the course of fighting the insurgency in the northwest”” (340). See Neuffer’s The Key to My Neighbor’s House: Seeking Justice in Bosnia and Rwanda (New York: Picador USA, 2001): 283, 339-340.

²⁰ We leave out the violence perpetrated in these refugee camps since they are outside of Rwandan territory and therefore legal jurisdiction. However, these acts do contribute to a full discussion of Rwandan cycles of violence. Lemarchand carefully addresses the “counter-genocide” of mass violence in the camps that received very little international attention. RPF troops claimed the lives of thousands of Hutu civilians in Kibeho in 1995 and in eastern DRC camps. The RPF, however, denies that its troops were ever involved in the widespread civilian killings, and insists that those that they did attack in refugee camps formed part of the *interhamwe* or ex-FAR. RPF officials maintain that the security measures taken to protect Rwanda’s population against such militias entailed addressing any potential threats from the *genocidaires* hiding in refugee camps. In contrast to their claims, research has concluded that only approximately five percent of the refugee population were former *genocidaires* and that the vast majority were innocent women and children. Lemarchand writes, “Nothing is more specious than the argument that after the destruction of the refugee camps in November 1996, and the return perhaps of as many as half a million refugees to Rwanda, the only Hutu left behind were the *genocidaires*, and therefore that it was entirely legitimate for the Rwandan army to kill them in order [to] prevent them from doing further harm. And yet this is precisely the subliminal ‘text’ that underlies the ‘cleansing’ operations of the Rwandan military in eastern Congo” (11).

PURSUING JUSTICE

After the genocide, the international community moved to respond to the events in Rwanda by establishing the International Criminal Tribunal for Rwanda in Arusha, Tanzania. The tribunal was designed to prosecute those responsible for organizing the genocide. Both because of its narrow mandate and its limited success the United Nations war crimes tribunal for Rwanda in Arusha, Tanzania has failed in its attempt to dispense justice to the victims and perpetrators of the genocide. The millions of dollars and months of agonizing deliberation invested in the Tanzania court have resulted in fifteen trials at the time of this writing, nearly 10 years after the genocide. The failures of the UN tribunal for Rwanda far outweigh its benefits. The goal of the war crimes tribunal is only to prosecute the leaders of the genocide, but the process has been so excruciatingly slow that it is obviously an insufficient and inadequate response to the need to try those guilty of genocide.

Rwanda's own judicial system was devastated during the genocide when nearly all judges and lawyers fled or were murdered.³³ After the fall of Kigali, survivors from the legal profession were forced to work in impossible conditions with no equipment, staff or resources at their disposal. To date, the nation's courts have tried over 5,500 individuals.²¹ Given the resources available to them, this is, in fact, remarkable. However, at this rate it would take over 200 years for all of the accused genocide perpetrators to stand trial. The insufficiency of the International Tribunal in Arusha and the insurmountable caseload for the national courts in Rwanda have led

³³ Amnesty International (2002) estimates there were ten lawyers left in the country after the genocide.

²¹ Martha Minow describes an event in April 1997 when twenty-two convicted genocide participants were executed in front of a fascinated and vengeful crowd of tens of thousands. These death penalties were the first issued through the national courts and as Minow notes, "International human rights leaders objected that the underlying trials failed to comport with international standards of justice. Some defendants had no legal representation; others had lawyers without time to prepare....Rather than ending the cycles of revenge, the trials themselves were revenge" [Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998): 124.]

the government to embark upon a third method for dealing with accused genocide perpetrators, called gacaca.

GACACA PROCESS

Gacaca, Kinyarwanda for “justice on the grass,” is a judicial process in which the Rwandan public tries and judges those who wish to confess or have been accused of genocide crimes.⁴ In the pre-colonial era, gacaca was a popular indigenous forum for resolving local disputes over family matters, property rights and other local concerns.⁵ Village elders and community members would voluntarily gather together on a patch of grass to discuss civil disputes. Elders would present a resolution to the issue in an effort to salvage social peace and cohesion in the village. The current process differs from the traditional process in three key aspects: in the traditional process participation was voluntary; it was primarily used to deal with conflicts within a given community; and the judges or elders were given leeway to decide any punishment they wished within certain boundaries. The highly regulated, national and involuntary gacaca process currently underway is substantially different from its traditional predecessor.

The Rwandan government officially launched the present-day gacaca court system on June 18th 2002 in response to the overwhelming mass of prisoners whose cases remain untried since the genocide. Estimates suggest that prior to January 2003 between 100,000 and 125,000

⁴ The gacaca courts were established by Rwandan organic law number 40/2000 the 26th of January 2001. The law applies to persons who, between October 1990 and the 31st of December 1994 committed crimes of genocide or crimes against humanity and war crimes as defined by the Genocide Convention of 1948 and the Geneva Convention of 1949 with the Additional Protocols of 1968. Thus the law that created gacaca allows for the prosecution of war crimes in gacaca. However, in practice they have been used solely to prosecute genocide crimes and these are delimited in time to the end of 1994 thereby excluding documented cases of RPF massacres in 1995 (see footnote 20).

⁵ A discussion of the traditional gacaca courts can be found in Filip Reyntjens, “Le gacaca ou la justice du gazon,” *Politique Africaine*, (40), December 1990.

Rwandans awaited trial in overcrowded prisons. In January of 2003 approximately 40,000 prisoners were released. 20,000 of the oldest and most infirm were sent directly back to their villages and another 20,000 prisoners who had confessed and been sentenced went to solidarity camps where they undergo training and re-education before being released back into their communities.⁶ The rest of the prisoners await trial by gacaca and the national courts, or for the rare accused, by the UN Tribunal.

The Rwandan government has always acknowledged that processes of justice, reconciliation and healing require that perpetrators be brought to account for their wrongdoing as quickly as possible. Therefore, there is currently a strategy of pushing forward on three fronts – through the UN tribunal in Arusha, national courts and gacaca sessions – in the hope that the strengths of these approaches might compliment one another. The dominant emphasis will, however, be on gacaca, since these community courts provide an affordable and participatory environment in which to try the backlog of cases of the thousands of foot soldiers of the genocide.²² Rwanda's National Unity and Reconciliation Commission expects the grassroots tribunals to try the accused in categories two through four, meaning those accused of theft, looting, property destruction, and murder (and not those accused of distributing orders to carry out these crimes).²³ The hope is that they will be tried within the next five years since the trials require minimal paperwork.

⁶ "Rwanda: released genocide suspects begin re-education," IRIN, January 31, 2003.

²² For an analysis of the effectiveness of gacaca, see Sandra F. Joireman, "Justice for a Genocide?," The Global Review of Ethnopolitics 2, no. 2 (January 2003): 65-66.

²³ The Rwandan government's site outlines the standards used to categorize Rwandans who are accused of committing crimes between October 1, 1990 and December 31, 1994. Category 1 includes planners, instigators, leaders of the genocide and those who committed acts of sexual torture or violence. Category 2 includes participators and conspirators in intentional murders. Category 3 is designed for those guilty of serious assaults and Category 4 for persons who damaged and stole property. For this outline, see <http://www.rwanda1.com/government/> cited April 19 2003. Provincial gacaca courts hear appeals for Category 2 crimes and district gacaca courts hear appeals for Category 3 crimes.

Gacaca's arrangement is unique and unlike other, more Western legal systems in which there is an emphasis upon the individual. In the communal gacaca system, villagers and neighbors congregate in outside locations in cells throughout Rwanda in order to hear cases brought against accused killers and criminals.²⁴ Sets of judges who have undergone informal legal training are present to oversee the cases, but everyone in attendance is free to speak out. Attendees may voice corrections or additions to the information being presented, and criminals are permitted to either defend themselves or admit guilt. There is no requirement for physical evidence and testimony alone is enough to decide a verdict.

The pilot phase of the gacaca process was completed in 2002 and now the process has begun throughout the country. Gacaca judges and community members compile lists of the names of those who were killed in the locality during the genocide, those who moved out of the area during that time (who perhaps relocated, fled or were killed elsewhere), and those accused of perpetrating genocide crimes. The early stages of the gacaca process provide opportunity for criminals who have been imprisoned or who live freely in villages to come forward and confess so that they might receive a less severe sentence.

With a verdict of guilt, the criminal faces a scope of possible sentences ranging from obligations of community service to life imprisonment, but the guilty may not be sentenced to death (unlike in the national courts). Officials estimate that thousands will be freed and will return to their villages and homes as gacaca trials proceed either because they are declared innocent or because they are sentenced to community service.

²⁴ Rwanda is divided up into provinces, prefectures, communes, secteurs and cellules. Gacaca officials oversee activity at each of these levels. Gacaca judges may try cases within Category 4 at the cellule level, Category 3 at the secteur level, category 2 at the commune level, and may hear appeals at the prefecture level. See <http://www.rwanda1.com/government/> for a break-down of gacaca court levels of authority.

In October 2001 elections were held in urban and rural cells to select approximately 255,000 men and women of integrity to serve as gacaca judges.²⁵ The gacaca judges are endowed with significant responsibilities in order to arbitrate cases of collective violence. Many are illiterate peasants and lack legal experience, but all have submitted themselves to local elections and brief legal training to prepare them for the work ahead.

Villagers attending gacaca sessions are much more than mere spectators to the proceedings. Their interactions, accounts and testimonies play integral roles in the procedures since their descriptions and reports regarding the defendant directly affect the sentencing administered by the presiding judges. In theory, their active participation contributes to political and personal reconciliation within the Rwandan population since people are given the opportunity to confront their attackers, tell their stories and express pent-up emotions all in a secure environment.²⁶

The government has embarked on a widespread campaign (by way of radio, television, word of mouth and visual advertisements) to inform and persuade its citizens to involve themselves in gacaca hearings. The messages are also directed towards criminals who are eligible for reduced sentences if they confess their crimes. In 2002, the Rwandan television station aired a well-advertised Kinyarwanda film that was intended to educate the public on gacaca. This short movie told the fictional story of a young female victim living in post-genocide Rwanda. The teenage girl began attending secondary school where she instantly recognized one of her schoolteachers as her father's killer. After much deliberation, the young woman and her widowed mother approach gacaca officials. The schoolteacher and his family

²⁵ Erin Daly, "Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda," New York University Journal of International Law & Politics 35, no. 2 (2002): 356.

²⁶ This is the official government position. We doubt the psychological and social benefits of the process due to the re-traumatization that can occur through testimony and the stigma that might accrue to some such as women giving testimony in rape cases.

discover that the truth of his participation in the genocide will soon be public knowledge, and so his wife encourages him to confess so that he might receive a lesser sentence. The schoolteacher does, in fact, come forward to confess, and the film ends with a scene depicting the schoolteacher's wife and the widow working together in the fields, thus illustrating the possibilities for reconciliation through gacaca. This film represents the view of the government for the gacaca process. We believe this view of the gacaca process to be naïve at best. While gacaca in its traditional manifestation - elders solving conflicts brought to it by willing participants in the process - brought reconciliation to communities; the assumptions and the regulations of the contemporary gacaca process create an entirely different setting which will have different results.

ASSESSING GACACA

Some legal scholars have already voiced concern about the procedural issues in the gacaca courts, including deprivation of due process rights²⁷ and evidentiary rules.²⁸ From a purely legal standpoint, the gacaca process is flawed. Judges unfamiliar with methods of legal interpretation will face difficulties in adjudicating extremely complicated cases and administering just penalties.

Hutus and Tutsis alike are considerably apprehensive regarding the independence and impartiality of gacaca judges since nearly all of the elected individuals were involved in the events of the genocide to some degree.⁷ Rumors circulate regarding judges who partook in

²⁷ Daly, 356, Amnesty International 2002.

²⁸ Joireman, 65-66.

⁷ African Rights, "Gacaca Justice: A Shared Responsibility," Kigali, Rwanda, report January 2003. A report by CAGEP-Consult assessing the judicial sector in Rwanda for USAID surveyed people's fears regarding the gacaca process. The main fears were that the truth would not be discovered, that the judges would not be impartial, that people would be retraumatized and that the gacaca process would be used to settle scores (70).

criminal activity or who have pent up anger and could potentially manipulate sentences to enact their own personal vengeance. It is very likely that some judges will face *genocidaires* who killed or injured their own loved ones. But these types of problems are not isolated to judges; even witnesses are likely to have some interest in the process alone and beyond ascertaining guilt or innocence.⁸

Defendants in the gacaca process are brought to the community in which they allegedly committed the crime to stand before the judges and crowd. The accused has no legal representation but is afforded the opportunity to speak out in self-defense if he/she so desires. Judges must perceptively distinguish the guilty from the innocent, even as they listen to complex stories involving circumstances of bribery, extortion, threats to “kill or be killed,” drug and alcohol induced states of mind, revenge, hatred, fear and ignorance. In the enormous absence of evidentiary support, defendants will have little protection against the misrepresentation of facts and the effects of a personalized confrontation between victim and criminal.

Many witnesses fear their central role in the gacaca process. Friends of the killers have threatened the lives of unprotected and vulnerable orphans who might testify against their parents’ killers in the gacaca courts. Rape victims fear personal encounters with those who raped them; the many people who were tortured during the genocide must face the creators of their scars. The concerns of the witnesses also extend beyond the scope of what may happen during the hearings. Many participants have expressed anxiety about their physical security once the gacaca process gets underway. There is little-to-no protection for those who speak out against the accused, and cases of disappearance, murder, bribery and intimidation have already been

⁸ These issues are all articulated as fears that people hold regarding the gacaca process and the impartiality of judges in the CAGEP-Consult ‘Assessment of the Judicial Sector in Rwanda.’

documented.²⁹ A growing number of individuals involved in reconciliation, humanitarian and healing work in Rwanda are now voicing unease regarding the potential for trauma as victims and witnesses recount and relive the horrors that they experienced.³⁰

GACACA AND LONG-TERM SECURITY IN RWANDA

The most serious security issue stemming from the gacaca process has not yet been raised in either the journalistic or the academic literature. The gacaca process specifically excludes Tutsis involved in the massacre of civilians as the RPF gained control over the country. In the rhetoric of the government, these “war crimes” are considered separate from the genocide and will not be tried by gacaca. The gacaca tribunals have jurisdiction over individuals who have committed the crime of genocide or crimes against humanity under the previous government.⁹ The text of the law establishing the gacaca courts allows for the inclusion of war crimes, but in practice the government has excluded war crimes from the gacaca process.¹⁰ Moreover, the jurisdiction of the gacaca courts is limited to crimes committed between October 1, 1990 and Dec 31, 1994, which eliminates many of the Tutsi killings of Hutu civilians. The exclusion of these crimes in the gacaca process establishes an ethnic divide and amounts to an unequal application of the law.³¹ We believe this politicized application of justice will ultimately undermine the security of both Hutus and Tutsis within Rwanda. By referring to the crimes of

²⁹ Integrated Regional Information Network, IRIN@irinnews.org “Rwanda: Special Report on Hopes for Reconciliation under Gacaca Court System,” 4 December 2002, Listserv message (4 December 2002).

³⁰ Despite all this, many survivors fully support the gacaca process claiming that it is Rwanda’s only hope for a reconciled citizenry and a peaceful future.

⁹ Amnesty International, 37.

¹⁰ Organic Law Number 40/2000 of 26 January 2001, “Portant Creation des “Juridictions Gacaca” et Organisation des poursuites des infractions constitutives du crime de genocide ou de crimes contre l’humanite, commises entre le 1st Octobre 1990 et le 31 Decembre 1994.”

³¹ The government does not consider this an ethnic policy since they declare that the gacaca process is for *all* crimes committed during the genocide. It is simply that they make a distinction between the genocide and the war. The actual law allows for the trying of war crimes in gacaca.

the Tutsi as “crimes of war” and the crimes of the Hutu as “crimes of genocide” the government has established a moral high ground for all Tutsis. This position is difficult to challenge given the extreme depravity of the genocide and the sufferings of the Tutsi people, yet we contest it because we believe that all individuals should be held accountable for their actions. Indeed national reconciliation demands that individual Tutsis must bear the responsibility for crimes committed against civilians during and after the genocide just as individual Hutus are held accountable for their crimes. Without the equal application of the gacaca process to both Hutu and Tutsi, it will be interpreted more as revenge than as reconciliation.¹¹

In light of the evidence given by Human Rights Watch and other investigative agencies, “the greatest disservice that the international community could render to the cause of peace... would be to impute genocide only to the Hutu, as if the ‘good guy-bad guy’ dichotomy were largely synonymous with the Hutu-Tutsi split.”³² The Rwandan government essentially establishes this dichotomy as it takes on the challenge of administering justice in a nation where “victim” and “perpetrator” are two identities loaded with ethnic and historical connotation. For example, at present the term *genocidaire* – one who commits genocide – implies Hutu ethnicity. Perpetuation of such oversimplified identifications will lead to future self-fulfilling prophecies of collective ethnic violence.

Presently, the Hutu community has been pressured into silence regarding the Tutsi government and the gacaca process. Personal communications with Hutus who are afraid to confront Tutsis in everyday settings exemplify the unspoken fears involved in speaking out against Tutsi leaders in post-genocide Rwanda. Hutu will not cry out for a reform of the gacaca

¹¹ Again, we would like to emphasize that in terms of numbers, the vast majority of perpetrators of crimes against innocents were in fact Hutu. Yet if the goal is national reconciliation justice must be seen as being impartial and impartiality means equally applied.

³² Lemarchand, 8.

process that would include the prosecution of Tutsi criminals since they fear being perceived as either power-hungry or sympathetic to the *genocidaires*. Former RPF leader and current President Paul Kagame claims to speak for both Hutu and Tutsi when he publicly declares that gacaca will be dedicated solely to crimes committed during the genocide. Though the administration of Paul Kagame has tried to address the broader setting of violence within which the genocide took place, for example through the establishment of a yearly open forum called the National Unity and Reconciliation Commission, its actions in the application of justice are insufficient. The right of the military victors to create a new set of rules and institutions with which to adjudicate past wrongs is unchallenged, yet in this case those institutions are so politicized that they appear destined to exacerbate the reoccurring cycles of violence in Rwandan history.

Holding Tutsi citizens, including all RPF soldiers, accountable for murders, theft, rape and torture committed during and after the genocide is the only way to ensure equal justice. Any attempts to hold an ethnic group (in this case, Hutus) collectively responsible for all crimes will only lead to future acts of collective retaliatory violence. Individuals need to see themselves as personally responsible for their behavior. Martha Minow aptly summarizes this issue in her warning,

“To prevent lingering assignments of collective guilt, blame and punishment must be restricted to specific individuals and based on specific proof, itself tested through the adversary process. The emphasis on individual responsibility offers an avenue away from the cycles of blame that lead to revenge, recrimination, and ethnic and national conflicts.”³³

³³ Minow, 40.

If gacaca continues to deal only with acts committed against Tutsis, then Hutus who have been victims at the hands of Tutsi Rwandans will be denied justice.¹² In essence, this denial of justice is a failure to even acknowledge that such crimes were committed. This will continue to alienate the Hutu masses and foster pent-up anger and frustration that could fuel another cycle of violence. Leaving Tutsi accused out of the gacaca process endangers any effort at true reconciliation since reconciliation requires accountability.

Just as in the Truth and Reconciliation Commission (TRC) hearings in South Africa led to a unified narrative of the apartheid years, so Rwanda's gacaca courts have the potential to help form a unified narrative of the events that occurred from 1994 to 1996 in Rwanda. There is, however, a critical difference in the two cases. The African National Congress submitted itself to the authority of the TRC and thus was held accountable to the same standards as all other parties during apartheid.¹³ The relative success of the TRC and the peaceful transition of power in South Africa were due largely to the equality with which all victims and perpetrators were viewed.¹⁴ The Rwanda scenario, however, is not as hopeful since all truths cannot be told. In the case of gacaca, a significant and crucial piece of the story is missing when Hutu victims are silenced and Tutsi perpetrators are not held accountable for their wrongdoings. Even more disturbing, there is no broad acknowledgment to Rwandan society that Tutsi RPF soldiers and others even committed human rights violations.

A just rendering of gacaca would lead to the revelation of truth and the punishment of the guilty. A reconstructed gacaca would acknowledge all war crimes, and thus bring an end to the

¹² There are, of course, other ways in which the government could address this inequality, for example through establishing equally public war tribunals, which would try individuals for war crimes.

¹³ Though some might argue it was less a focus and less rigorously treated than other organizations before the Truth and Reconciliation Commission.

¹⁴ There is also a difference in the degree of reconciliation felt by different groups within the society according to Gibson, James L. and Amanda Gouws, Overcoming Intolerance in South Africa, (New York: Cambridge University Press, 2003).

moral distinction between human rights violations committed during the war and those perpetrated during the genocide. The Rwandan government however is unlikely to take this step. They are predominantly Tutsi and feel that the terrible crimes committed against the Tutsi deserve punishment. In this they are correct. But retribution for Tutsis is not sufficient. To move towards long-term security for all ethnic groups, the Rwandan government needs to also be concerned about reconciliation. The Rwandan government has engaged in political rhetoric and numerous initiatives targeted at reconciliation, however, the reconciliation that they envision is politically constructed on Tutsi terms, which is insufficient for ensuring the long term security of Rwanda.

CONCLUSIONS

The gacaca process is underway. The limits of the courts have been set and it is unlikely at this point that they will be changed. That said, observers of the Rwandan court system and the international community should pressure the Rwandan government to expand the mandate of the courts to include those accused of crimes committed in “the war” thus intentionally including Tutsis among the accused. This action has the potential of bringing about a more just gacaca process than what currently exists.

It is important that the post-genocide state in Rwanda be secure for Rwandan citizens of all ethnicities. At the present time, people hold strong identifications with their ethnic groups. This influences the way they view history in general, their perceptions of the genocide, and the way that they are treated by the judicial system. We believe this to be a fundamental problem. Institutions of government, of which the gacaca process is one, need to be blind to ethnic identification.

The evil done against the Tutsi in the genocide stands out as one of the horrors of the twentieth century. In no way would we like this paper to be seen as minimizing the suffering of Tutsi genocide survivors who understandably wish to see the *genocidaires* punished. Tutsi genocide survivors *must have* a formal recognition and adjudication of their grievances. Crimes were committed against the Tutsi during the genocide by individuals and those individuals need to be tried. Crimes were also committed against Hutus during the war and those individuals must also be tried. Crimes in both cases need to be attributed to individuals, not ethnic groups. The gacaca process should not be interrupted but rather expanded.

The gacaca process may ultimately undermine the security of all Rwandans because it will aggravate ethnic fault lines in society. It will serve a retributive function primarily for Tutsis and enforce longstanding grievances between ethnic groups. Rwandan history demonstrates a cycling of violence between the Hutus and the Tutsis. Nothing in the gacaca process, as currently implemented, leads us to expect that the cycles of violence will be interrupted and true reconciliation achieved. Mahmood Mamdani has suggested that, “Rwanda’s key dilemma is how to build a democracy that can incorporate a *guilty majority* alongside an aggrieved and *fearful minority* in a single political community.”³⁴ Judicial rules that apply equally to all are critical to establishing a political community in Rwanda that upholds the security of Hutu, Tutsi, Twa and all other citizens.

³⁴ Mamdani, 266.

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