

## **After Arusha: Gacaca Justice in Post-Genocide Rwanda**

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**Abstract:** The epicentre of post-genocide Rwandan society and politics has been the need for reconciliation to assuage ethnic tensions and end a culture of impunity. The International Criminal Tribunal for Rwanda (ICTR) has yet to meet its goal of reconciliation in Rwanda: The failure of the tribunal goes beyond its institutional shortcomings and can be attributed the norms of international criminal law that render it an inappropriate response to criminalizing mass violence. The Gacaca courts were resurrected in Rwanda as an indigenous form of restorative justice. The principles and process of these courts hope to mitigate the failures of “Arusha Justice” at the tribunal and seeks to punish or reintegrate over one hundred thousands genocide suspects. Its restorative foundations require that suspects will be tried and judged by neighbours in their community. However, the revelation that Gacaca is a reconciliatory justice does not preclude its potential for inciting ethnic tension if it purports to serve as an instrument of Tutsi power. The state-imposed approach of command justice has politicised the identity of the participants in Gacaca -- perpetrators remain Hutus and victims and survivors remain Tutsis. Additionally, the refusal of the Kagame government to allow for the prosecution of RPF crimes to be tried in Gacaca courts empowers the notion that Tutsi survival is preconditioned by Tutsi power and impunity. If Gacaca fails to end the perceptions of impunity in post-genocide Rwanda, it will come at a much higher cost for reconciliation than the failure of the ICTR. The relevance of justice after genocide speaks to the appropriateness of retributive and restorative models of justice in a post-genocide society such as Rwanda. Additionally, the model of justice must be reconciled to the nature of a political regime that imposes unity under an ethnocratic minority.

### INTRODUCTION

It is frequently said that reconciliation in post-genocide societies is not possible without justice. In Rwanda, the form that justice should take is at the heart of the debate. The 1994 genocide in Rwanda left over 800,000 dead and over 130,000 in prison upon suspicion of committing acts of genocide. The recent tenth anniversary of the genocide entailed memorials, burials, and the reawakening of violent memories. Amidst this atmosphere there was also political rhetoric filled with blame, guilt, and disappointment. Despite the obvious desire to bring justice to the victims and hold the perpetrators accountable, impunity persists in Rwanda.

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The international community responded to the atrocities with a call for accountability and an end to impunity. This resulted in the creation of the International Criminal Tribunal for Rwanda (ICTR). This tribunal, plagued by institutional shortcomings, has been an insufficient and inappropriate response to criminalizing mass violence. Rwandans have tired of its inefficiencies and feel its principles are at odds with their views of justice and reconciliation.

With the judicial infrastructure destroyed and most prosecutors and judges killed in 1994, there was no chance that the national court system could prosecute all those responsible for such crimes. Even now, after years of rebuilding, the national courts cannot handle such a high volume of cases. In response to the ineffectiveness of the tribunal and the incapacity of its national court system, the Rwandan government has revived a traditional form of dispute resolution called Gacaca (ga-CHA-cha). 10,000 Gacaca courts will try genocide suspects in the communities where their crimes were committed. They will be tried and judged by their neighbours.

Gacaca represents a model of restorative justice because it focuses on the healing of victims and perpetrators, confessions, plea-bargains, and reintegration.<sup>1</sup> It is these characteristics that render it a radically different approach from the retributive and punitive nature of justice at the ICTR and national courts. Great hope has been placed in the ability of restorative justice to contribute to reconciliation at the individual and community level. Gacaca justice is meant to be as intimate as the genocide itself: If it is unable to provide for reconciliation it will come at a high cost for Rwandan society. This paper will argue that the characterisation of the Rwandan government as a “Tutsi ethnocracy” and its heavy-handed approach to reconciliation has tainted Gacaca as a form of victor’s justice. If the Gacaca process is threatened by an approximation of the same politicised ethnic identities that fuelled the violence then reconciliation will not be attainable.

The next section will proceed with a brief description of post-genocide justice issues and the importance of understanding victim-oppressor group relationships. This will be followed by a review of the two types of justice models available to criminalise mass violence: retributive and restorative justice. It is necessary to describe the ideal features of these models prior to analysing their institutional manifestations (i.e. the ICTR as retributive and Gacaca as restorative). Section three will then turn to Gacaca itself and address two issue areas. First, what is Gacaca in terms of its traditions, processes, and goals? Second, as a form of restorative justice, how might Gacaca’s norms and processes contribute to reconciliation in ways which retributive models, i.e. the ICTR, have not? Section four will address the controversial political and societal dangers associated with Gacaca. These dangers, particularly in the form of renewed ethnic violence, are discussed on several levels. First, what elements in the process of Gacaca trials violate human rights and victim’s expectations of reconciliation? Second, how is this form of justice connected to the criticism that the government represents a Tutsi ethnocracy? Finally, is this ultimately a form of victor’s justice disguised by its indigenous and restorative nature?

## POST GENOCIDE RWANDA OPTIONS FOR JUSTICE AND RECONCILIATION

### **Rwandan Context**

The genocide produced staggering statistics that indicate the enormity of reconciliation in terms of scope and process. The genocide created an initial population displacement of 1.7 million Hutus fearing reprisals, left 400,000 widows, 500,000 orphans, and 130,000 imprisoned upon

suspicion of committing acts of genocide.<sup>2</sup> The country's fledgling judicial system was all but destroyed in terms of personnel and infrastructure by the spring of 1994. The judiciary was a primary target during the genocide that eliminated all but 244 out of a previous 750 judges, with many of the survivors fleeing into exile.<sup>3</sup> As late as 1997 the courts in Rwanda were left to function with only fifty lawyers and a notable absence of infrastructure and administration, specifically Courts of Appeal, in all twelve counties.<sup>4</sup> The 130,000 prisoners arrested under suspicion of committing crimes during the genocide, required a capable and extensive national court system. As noted by the Rwandan Ambassador to the United States, Richard Sezibera, "even though we had asked the international community to set up a tribunal for Rwanda, we knew that, given the way international bodies work, the bulk of the cases would have to be handled by our own legal system."<sup>5</sup>

Human rights and justice have not enjoyed a viable working relationship in Rwanda. As of August 2003, the Ministry of Justice stated that 6,500 of the 130,000 imprisoned had been sentenced for genocide cases in the national courts, 700 received the death sentence and twenty-three were executed.<sup>6</sup> The incremental rate of prosecution in the Rwandan national courts has meant that prisoners languish in overcrowded prisons suffering from malnutrition and disease, serving sentences without due process.<sup>7</sup> The Rwandan government has responded to the accusations of human rights violations based upon prison conditions by stating they have no alternative and to continue to follow the "western trial process would take far too long and therefore be a violation of human rights in itself."<sup>8</sup>

At the heart of this controversy is determining what form of justice is best suited for dealing with these tens of thousands of cases and providing for reconciliation. It is the nature of post-genocide society in Rwanda, not the form of violence that occurred, that indicates what type of justice is most appropriate. Mark Drumbl has devised a typology of post-genocide societies that describes the relationship between victim and oppressor groups and prescribes an appropriate model of justice. He delineates three types of societies: homogenous, dualist, and pluralist.<sup>9</sup> Drumbl argues that Rwanda constitutes a dualist post-genocide society.

Drumbl's description of a dualist post-genocide society lists a specific set of characteristics. First and foremost, his type of society requires that both groups, victims and oppressors, coexist within the nation-state and territorial division is not possible. Secondary characteristics include: control of political and economic power (and the groups' numerical significance), level of participation in the violence, and geographic distribution of the two groups. Rwanda complies with the characteristics of a dualist post-genocide society on all counts. In Rwanda, Tutsis and Hutus both coexist within an overpopulated nation-state where territorial division between the two groups would be impossible. Additionally, both groups live in the same communities and participate in civil society, sharing culture with social status. In terms of power sharing, the Tutsis who wield the most political power despite being numerically weaker at only ten to fifteen per cent of the population. With regard to the level of participation, documented testimonies indicate that a large number of civilians participated and a large number of victims and survivors remain.<sup>10</sup>

A post-genocide society of this nature raises two prominent concerns with regards to justice and reconciliation. First, a dualist post-genocide society is in danger of genocide occurring again if institutions and civil society are incapable of ensuring that both groups can coexist within the same social and political space. Second, institutions that seek to reconcile the two groups must be conscious of the risk that punishing past violence may incite more violence.<sup>11</sup> Thus, moderation in punitive measures may be necessary. In dualist post-genocide societies, restorative

justice is required over retributive justice in order to moderate punitive measures and maximise the possibility of reintegration through an emphasis on shame over guilt.<sup>12</sup> The remainder of this section will compare the normative components of retributive and restorative models of justice and relate them to the Rwandan context.

### **Retributive vs. Restorative Justice**

The concept of justice, specifically in the context of post-conflict reconciliation, can have many descriptive qualifiers that denote different rules, procedures, and goals. Additionally, justice paradigms assign different parties to the roles of architects and beneficiaries of the judicial process. For both the ICTR and Gacaca courts, the architects of each system have accorded different notions of legitimacy to the process through various institutional and normative components.

The architects of the ICTR, the international community, have constructed a tribunal that follows the rules and procedures of retributive justice in seeking an end a culture of impunity. Retributive justice is punitive, focussing on the defendant and the adversarial relationship between defence and prosecution. Success can be measured by the fairness of the process and the equality and proportionality of the sanctions.<sup>13</sup> Furthermore, crimes are addressed by legal professionals who are not connected to the parties in dispute. This type of justice has been deemed by the international community to be an appropriate response to the Rwandan genocide. It follows as part of an atrocities regime that converges international criminal law with crimes against humanity and human rights abuses. Despite its mandate to promote reconciliation, it is designed to satisfy its architects by exacting punitive measures against the elite criminals of the genocide. Thus, the politicised nature of retributive justice has allowed for the architects of the ICTR to also be its only beneficiaries, leaving Rwandans essentially unaffected by its process.

Restorative justice is the alternative to retributive justice. The goals of restorative justice are to repair the harm, heal the victims and community, and restore offenders to a healthy relationship with the community. Success is measured by the value of the offender to his/her community after reintegration and the level of emotional and financial restitution for the victim(s).<sup>14</sup> The process requires that crimes should be addressed in and by the community. Furthermore, restorative justice can be differentiated from retributive justice with its focus on reintegrative shaming over guilt and its impact on reconciliation: “Reintegrative shaming means that expressions of community disapproval, which may range from mild rebuke to degradation ceremonies are followed by gestures of reacceptance into the community of law-abiding citizens.”<sup>15</sup> It will be shown in the following section that the norms underlying Gacaca closely resemble those of restorative justice.

## **THE GACACA COURTS: THE MANIPULATION OF INDIGENOUS JUSTICE FOR RECONCILIATION**

### **What is Gacaca?**

The revival of a traditional model of dispute resolution to deal with the over one hundred thousand genocide suspects awaiting trial has received a mixed response both inside and outside of Rwanda. Gacaca, meaning “judgement on the grass,” offers a pragmatic and community based solution. It is expected to relieve the congestion in Rwandan prisons that are the source of many

human rights violations. Additionally, the reintegration of suspects back into the community and the truth-telling nature of confessions offer hope for reconciliation. Gacaca's positive attributes lie in its characterisation as a model of restorative justice.

In its precolonial form, Gacaca was used to moderate disputes concerning land use and rights, cattle, marriage, inheritance rights, loans, damage to properties caused by one of the parties or animals, and petty theft.<sup>16</sup> Gacaca was intended to "sanction the violation of rules that are shared by the community, with the sole objective of reconciliation" through restoring harmony and social order and reintegration of the person who was the source of the disorder.<sup>17</sup> Additionally, compensation could be awarded to the injured party. Gacaca occurred at a meeting that was convened by elders whenever there was a dispute between individuals or families in a community and was settled only with the agreement of all parties.<sup>18</sup> The Government of Rwanda does not pretend that Gacaca today strictly adheres to its indigenous form. Officials argue that its reinvention takes the form that it does to better accommodate for the severity of the crimes in its mandate and the volume of cases to be tried.

Rwandan Organic Law was conceived in 1996 to facilitate the prosecution of those suspected of committing acts of genocide. It applies both to the Gacaca and national courts. There are two notable aspects of the Organic Law. Gacaca has a much longer temporal jurisdiction than the international tribunal, covering crimes committed between 1990 and 1994. Second, the Organic Law categorises criminal responsibility through four levels indicating the seriousness of the crime committed and the appropriate punishment.

Category one suspects are the most serious and will be prosecuted by the national courts of Rwanda who have the authority to hand out punishments of life imprisonment or the death penalty upon conviction. This category targets the planners, organisers, "notorious" murderers, perpetrators in a position of religious and political authority, and those who committed acts of "sexual torture or violence."<sup>19</sup> The Gacaca courts hold jurisdiction over categories two to four of the Organic Law for which the punishments vary but do not include the death penalty. Category two to four suspects range from the perpetrators, conspirators, or accomplices of intentional homicide, to those who destroyed property.<sup>20</sup> Punishments range from life in prison to community service and reintegration.<sup>21</sup> Plea bargaining is a controversial but key element of the process that allows for the possibility of immediate release if a suspect confesses. Prosecution in Gacaca is communally participatory in that a general assembly acts as the prosecutor to identify perpetrators and victims as well as present evidence.

The approximately 10,000 Gacaca courts are far behind in their scheduled trials. Many courts remain in the pre-trial stages. These stages began with the elections of judges that were completed in 2001. The trials have to be preceded by a seven step pre-trial process that includes identifying suspects and witnesses and establishing the appropriate categories for offences.<sup>22</sup> In June 2002, twelve pilot trials began and were followed several months later by 760 courts beginning their pre-trial phases.<sup>23</sup> The rest of the 10,000 courts have not begun their work and as of June 2003, less than half of the pilot trials had finished their pre-trial phases.<sup>24</sup>

### **Gacaca: Mitigating the Failures of the ICTR through Restorative Justice**

To juxtapose the principles and procedures of Gacaca with the ICTR is to contextualise the normative differences between the two types of courts. The norms underlying Gacaca reflect both cultural traditions and the characteristics of restorative justice. The benefits that Gacaca will bring to the reconciliation process are tied to the integrity of its indigeneity and its adherence to a

restorative model of justice. Table 1 compares the normative differences between the two types of justice.

Local prisoner support for the ICTR is very low. The U.S.-based Internews Network has shown what are known as the “Arusha Tapes” in Rwandan prisons to give genocide suspects a view of what has been happening in the ICTR trials and to encourage debate on Rwanda’s own judicial process.<sup>25</sup> Ironically, while the tapes are meant to generate support for the tribunal, they have had opposite effect on local prisoners. The reactions to the tapes have revealed concerns among the prisoners over the absence of the death penalty at the tribunal and the luxurious living conditions of the tribunal prisoners as compared to those of the Rwandan prisons. The issue of the death penalty is significant because it is used by the national courts in Rwanda but not at the international tribunal. One prisoner replied, “why is it that the tribunal gives them more lenient sentences than us, they are the ones who told us to kill on radio . . . how come we are paying the higher price?”<sup>26</sup>

TABLE 1. NORMS OF JUSTICE

Institutional Component	Restorative Justice Norms: Gacaca	Retributive Justice Norms: ICTR
Goal	Justice for reconciliation; ending impunity is secondary	Justice to end impunity; reconciliation is secondary
Venue	Local Communities	Isolation from participants to avoid victor’s justice
Due Process	Primacy of truth telling	Primacy of rules and procedures; defendant’s rights
Establishing Guilt	Confession; Community Consensus	Judgement
Burden of Proof	Testimony/Accusations	Testimony; investigation
Compensation for Victims	Depends on nature of crime	None
Judiciary	Respected community members	Independent
Punishment	Imprisonment; reintegration	Imprisonment
Process	Trials; negotiations	Trials

The objections and shock registered by the prisoners to the Arusha Tapes were reflected in their support of the Gacaca process as an appropriate and fair judicial process. Awareness and acceptance of the community courts is evidenced by the high and increasing number of confessions among the prisoners, numbering in the tens of thousands, and a willingness to provide testimony and evidence against other genocide suspects.<sup>27</sup> It is acknowledged that some of these prisoners have opted for confession on the basis of a personal cost-benefit analysis whereby they have their sentences reduced and can possibly indict someone with whom they hold a grudge. However, the personal intentions of suspects aside, confessions still provide a function of restorative justice that is the discovery of truth over punishment.

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

In contrast, those on trial at the ICTR were isolated from community life in Rwanda during the genocide. Many of the prisoners held in Rwanda saw for the first time in the Arusha Tapes what the orchestrators and leaders of the genocide looked like.<sup>28</sup> As the tribunal is isolated from Rwanda in terms of its geography and impact, and its defendants equally distanced by their former elite status in the genocide, the indictment of the genocide leaders at the ICTR will have very little effect on reconciliation within Rwandan communities. In line with the restorative paradigm, Gacaca is presented as a shift in power in the community, a sort of "populist response to a populist genocide."<sup>29</sup>

There are additional benefits that Gacaca brings to the reconciliation process that differentiates it from the norms of retributive and international justice. One such benefit is the recognition of a specific demographic, namely women, in the justice and reconciliation process. The demographics of post-genocide Rwanda illustrate that the socio-economic responsibilities of women increased dramatically. As the heads of tens of thousands of households and the producers of up to 70% of the country's agricultural output, they are overwhelmingly responsible for the livelihood and stability of their community.<sup>30</sup>

Rwandan women have a lot invested in the success of the Gacaca courts for several reasons. The importance of women and the crimes committed against them is recognised in the Organic Law where crimes of sexual violence fall under Category One (most serious) and will be tried in the national courts. Some women will be attending the trials of their husbands or family members who have been accused and to whom they have been bringing food and supplies to while in prison. Others want to accuse those on trial of crimes committed against them or their families and to tell their stories as witnesses and victims. Additionally, some women will receive compensation from the government or from reintegrated perpetrators if their property had been destroyed or the breadwinners in their family were killed by the accused.

Most importantly, Rwandan women seek to hear the confessions of the accused and an admission of guilt. As reconciliation for most Rwandans represents an act between two people where one confesses and the other forgives, the confession is a necessary first step for reintegration.<sup>31</sup> Rwandan women will be expected to live in the same communities as those who assaulted them or killed their family members. As judges and witnesses, women will have the responsibility of determining punishment or the desirability of the suspect's reintegration. In sum, the community basis of Gacaca allows women to participate on various levels, recognises their role in the reconciliation process, and brings their identity beyond that of victimisation.

Further to the restorative justice paradigm, decisions rendered by Gacaca courts will allocate compensation to victims. The Rwandan government set up a genocide survivor's fund in 2003 that accounts for eight per cent of the annual budget and assists destitute survivors.<sup>32</sup> The Organic Law provides for the commutation of half of the sentences through Gacaca to community services. Therefore, the Gacaca courts will assist in supplementing the compensation fund from the property constructed and services provided by prisoners.<sup>33</sup> To further aid

reconciliation, the compensation fund hopes to ease the burden of female and child-headed households.

In sum, the Gacaca courts subscribe to the restorative justice paradigm most diligently in the elements that liken it to its indigenous form. The emphasis on reconciliation and reintegration over punishment is evident in the confession and plea bargain procedures stipulated by the Organic Law. Furthermore, the array of participants is widely extended in Gacaca to include all those affected by the crimes and also those who will be affected by the suspect's return to the community. These characteristics of restorative justice are also indicative of the purpose of Gacaca in its traditional form. Gacaca carries enormous potential for reconciliation if it remains true to the principles of restorative justice.

## VICTOR'S JUSTICE: THE TUTSI ETHNOCRACY AND THE POLITICISATION OF GACACA

There is tremendous hope attached to Gacaca for its potential contribution to a reconciled and reintegrated Rwandan society. However, there exist many elements in the principles and practices of the Gacaca trials that render it a dangerous venue which refuels ethnic tensions. The processes of Gacaca are highly politicised and the participants racialised by assumptions of guilt based on ethnic group membership. The nature of 'modernised' Gacaca is most dramatically a departure from its indigenous form as it represents a state-imposed model of justice that threatens the community based principles of restorative justice. The modernised elements of Gacaca serve the interests of a government that can be characterised as a Tutsi ethnocracy. The end result could be the imposition of a victor's justice that is wrought with the ethnic tensions of pre-genocide Rwanda. This section will first address the many critiques made about Gacaca in terms of its process and legitimacy. The primary focus of this section is to explore Gacaca's link to an increasingly "Tutsified" state through notions of victor's justice and ethnic identities.

### **The International Community's Response: The Human Rights and International Law Critique**

Much of the criticism directed towards Gacaca, voiced primarily by international and local human rights groups, centers on the practical limitations to Gacaca. Specifically, these critiques point to the incapacity of the government and the community to safeguard against the consequences of community trials. Their strongest critique arises from Organic Law's lack of adherence to the principles of international criminal law.<sup>34</sup> The architects of Gacaca have had to respond to critiques of human rights violations, capacity problems, and legal procedures. The government of Rwanda has sensibly pointed out that many of these problems are unavoidable if Gacaca is to serve its pragmatic purpose of putting tens of thousands of prisoners on trial. Additionally, they rightly point out that it is those very principles of Gacaca which do not adhere to standards of international criminal law that make justice and reconciliation possible.

One of the primary concerns centers on the lack of services available to deal with the level of psychological and social trauma that witnesses or survivors will experience with the trials. Tensions could ensue from trials that will "reawaken memories of the genocide and its profound consequences and to renew feelings of grief, pain, fear, rage, outrage and hatred among the people of Rwanda."<sup>35</sup> While many in Rwanda seek peace in their communities, it is undeniable that there is a desire for vengeance and retribution among many who will attend the Gacaca

trials. Human rights organizations have warned of the violations of due process, the lack of training for judges, and the inconsistencies expected with judgments after plea bargains. The absence of these safeguards is thought to increase the chance of “vigilante’s justice” as the flipside to community empowerment.<sup>36</sup>

Many who support the Gacaca process have questioned the relevance of international criminal law in a post-genocide society where there are so many perpetrators and victims. Peter Uvin has identified many of the practical and theoretical falsehoods of applying international legal standards to the Gacaca courts. His first response is one of practicality: “criminal law standards were not designed to deal with the challenges faced when massive numbers of people—victims and perpetrators of crimes—have to live together again, side by side, in extremely poor and divided countries.”<sup>37</sup> A corollary to this, and what the Rwandan government argues as well, is that the current national court system (as designed to adhere to all the aforementioned standards of international law) has failed both in terms of upholding civil and political rights and guaranteeing due process. As the government has repeated time and again, prosecuting genocide suspects through the national court system is a violation of human rights in itself. The number of prisoners is not comparable to the capacity of the courts to provide proper counsel and expeditious trials.

Finally, Uvin identifies the cultural inappropriateness of the international law critiques of the Gacaca courts: “the practice of Gacaca may well be able to respect key conditions of fair trial and due process, but in an original, locally appropriate form, and not in the usual western-style form.”<sup>38</sup> Formalized notions of witnesses, prosecutors and defendants were not relevant to Gacaca in its indigenous form. The interplay of argument and counter-argument between community members and the emphasis on consensus does not adhere to the individualisation of roles in western trial processes. Uvin concludes with the importance of indigeneity when evaluating “modernised” Gacaca and the important role of the international community in ensuring that the “spirit of Gacaca” is respected.<sup>39</sup>

### **Victor’s Justice**

The dangers of victor’s justice are very much dependent on the context of the conflict and composition of the post-conflict society. In Rwanda, both parties to the conflict remain in the same communities together after the genocide. The perpetrators of the genocide are individualised in the legal process and the proceedings extend far beyond the “elite” criminals. Individuals who are victims must coexist in the same social and political space with those who were perpetrators. Therefore, the tension between these two groups becomes much more acute and localised if punitive actions are perceived as victor’s justice.

The events preceding the Rwandan genocide have been characterised by the Rwandan government as a “civil war” and so too are the events that followed it. According to the government and the international community, it is the RPF that ended the civil war, of which genocide was a component, and thus their claim to political power is legitimate. Mahmood Mamdani notes the consequences of an RPF victory are that they must constantly be on guard as to protect the spoils of war, to protect their hold on power and ensure their survival: “the price of victor’s justice is either a continuing civil war or a permanent divorce.”<sup>40</sup> Despite the government’s insistence that ethnic divisions are a thing of the past, there is nothing to indicate that local communities accept this policy as anything more than naïve political rhetoric.

## The Tutsi Ethnocracy

Since coming to power after the genocide under the continuing leadership of Paul Kagame, the RPF has been characterised inside and outside of Rwanda as a militarised ethnocracy that propagates the survival of Tutsis over the well-being of Hutus. Characterising the government in such a way runs contrary to the appearance that Rwanda has successfully democratised its political institutions and is committed to the idea of “Rwandaness”. The Rwandan government has been adhering to the pre-genocide Arusha accords that require an equitable division of power and representation. Indeed, a number of Hutus have retained key positions in the cabinet, which is evenly divided between ethnic groups. Additionally, “issues of good governance and the development and implementation of checks and balances have emerged as part of government policy.”<sup>41</sup> The government is confident enough in its democratisation process that it recently volunteered to have its policies reviewed by the NEPAD’s African Peer-Review Mechanism under the auspices of the African Union.<sup>42</sup> This issue remains controversial. While many laud Rwanda’s progress and see it as a star among democratising states in Africa, both academics and human rights groups have argued for higher standards.

Despite significant progress in terms of power sharing, it shall be argued that the government has been masking the increasing Tutsification of state institutions. This accusation has been articulated both by academics and human rights groups with regard to the democratisation process, including faulty elections, restrictions on civil society, and the militarisation of the state. The presence of Hutus in positions of power is nominal. Rene Lemarchand wrote in 1997 that the “appointed parliament is a fig leaf . . . the civil service, the judiciary, the economy, the schools and university are all under Tutsi control.”<sup>43</sup>

Many who cite the importance of eliminating ethnicity in Rwanda also caution that this policy has been used as a political tool to legitimate Tutsi authority. Filip Reyntjens argued in a recent publication that the “political discourse opposed to ethnism attempts to hide the domination of society by the self-proclaimed representatives of the Tutsi community.”<sup>44</sup> Furthermore, he argues that the Tutsification of the state began in 1996 and encompasses the Supreme Court judges, mayors, “university students and teachers, and almost the entire army command structure and intelligence services.”<sup>45</sup> As will be shown in the forthcoming examples, the Tutsification of the state in Rwanda is well under way and is evident in a variety of policies ranging from democratisation to social agendas and militarisation. Each of these issue areas will be dealt with in turn, drawing on controversial examples of domestic and regional policies.

Tutsi power and survival are inextricably linked in the government’s political agenda. Citing complaints from moderate Hutu parties opposed to the RPF, Mamdani states that “not only are the structures of power in Rwanda being Tutsified, civil organization-- from the media to nongovernmental organizations -- are being cleansed of any but a nominal Hutu presence.”<sup>46</sup> He identifies the founding ideology of the government as the “conviction that Tutsi power is the precondition for Tutsi survival.”<sup>47</sup> Mark Drumbl cites examples of limits on civil society, state influence on church leaders, resistance to power sharing, and an aggressive foreign policy as indicative of the “authoritarian behaviour of the RPF.”<sup>48</sup> He argues that as Tutsis can only count on Tutsis for support, ethnicity is still a significant factor in Rwanda. Given this, he warns that “among the factors most closely related to the (re)occurrence of genocide is a “ruling elite whose ethnicity is politically significant but not representative of the entire population.”<sup>49</sup>

The notion that Tutsi Power preconditions Tutsi survival has been aptly illustrated by the elimination of Hutu-based opposition parties and expansion of Tutsi influence in politics. As the

military victor after the genocide, the RPF was the dominant political party. However, there was initially a great deal of power sharing with the MDR (Mouvement démocratique républicain) and two smaller groups.<sup>50</sup> While there was a great deal of parity among posts allocated to the RPF and MDR after the genocide, over the years the RPF has gradually appropriated more posts for itself.

The recent elections have highlighted the dangers associated with transitions to democracy in a post-genocide society. Many see that continuing stability is unlikely as opposition parties have been banned, leadership control is being tightened, and restrictions are still in place for party and civil organizations. According to the Arusha Accords, elections were supposed to be held after five years in 1999. The Rwandan government pushed that date back four years to 2003 in the interests of “unity.” There has been little pressure from the international community to make democratisation a big part of the development agenda. According to Peter Uvin, the concept of democracy and multiparty elections in a post-genocide society can be unrealistic and inappropriate if attempted too early and thus democracy has been traded for stability.<sup>51</sup>

In an attempt to forge unity under the RPF agenda, the Rwandan government has expanded its rhetoric into a social and educational context. The Rwandan government and its National Unity and Reconciliation Committee has organized what are unpopularly known as “solidarity camps,” now known by their Kinyarwanda name *ingando*. These camps are meant to assist in the reintegration process for refugees and those released from prison (who were incarcerated after the genocide), educate youth, and provide military training. While there has been little reported on these camps, they have been characterised as a negative combination of militarisation and one-sided political propaganda in favour of the RPF. Human Rights Watch has reported that the “camps were meant to promote ideas of nationalism, to erase the ethnically charged lessons taught by the previous government, and to spur loyalty to the RPF.”<sup>52</sup>

The correlation of Tutsi power and Tutsi survival has also been evident in the militarisation of the state, as “even the most cursory glance at the pattern of reconstruction in Rwanda cannot fail to notice the characteristic traits of a military ethnocracy.”<sup>53</sup> Elizabeth Sidiropoulos argues, “despite the strong trend toward democratisation and openness in civil matters, the military establishment continues to be regarded as critical for the survival and protection of the state and is not subject to the same levels of accountability.”<sup>54</sup> However, the militarisation of the RPF has served the interests of the Tutsi ethnocracy by justifying the elimination of Hutus in the name of unity. It is widely recognized that the Kagame government has been supporting militias in the DRC under the pretext of capturing Hutus who are said to be propagating violent reprisals against Tutsis in the DRC and Rwanda. However, his military rationale is inconsistent with the domestic political rhetoric of unity through a “Rwandaness” that is blind to ethnicity. The RPF’s justifications reveal the “extent to which its notions of political obligation and political community are ethnic, transnational, and diasporic. Can the RPF act both as the protector of all Tutsi everywhere and as the national government of the Rwandan people?”<sup>55</sup>

### **Gacaca and Recontextualising Identity**

One of the dangers that a Tutsi ethnocracy poses to the success of Gacaca is that it assigns collective guilt to Hutus. Identity in post-genocide Rwanda is not as ethnically dichotomised as it was prior to the genocide. Identities have now been recontextualised to conform to the unity and reconciliation agenda that attempts to take the emphasis off of ethnicity. However, the result has been that Rwandan identities, as tied to their participatory role in the genocide, still correlate to

ethnicity. Identity can be recontextualised in post-genocide Rwanda in a way that divides the population into categories of victims, victors, survivors and perpetrators.<sup>56</sup> However, these categorisations may not be mutually exclusive. Despite the government's agenda of forging a single political identity of Rwandans, the identity of participants in the justice process deploys a dangerous link to ethnicity.

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

To identify the *victors* of the genocide requires putting Rwandan history in the context of civil war in which the victors are undoubtedly the RPF. While the Rwandan government denies the continuing distinction of Rwandans as either Hutus or Tutsi, its use of national and local judicial processes to label participants as survivors and perpetrators further entrenches their ethnic identities. The Organic Law and its division of labour between the national court system and Gacaca purport to promote reconciliation through a survivor's justice. Thus, survivors are by way of their Tutsi identity also the victors. This, combined with the state-imposed Organic Law, leaves Rwandan justice as nothing more than victor's justice and closely associates justice with Tutsi power. Mamdani presents the dilemma to which the process of Gacaca must respond and from which the international community must determine its level of support: "the form of justice flows from the form of power. If victor's justice requires victor's power, then is not victor's justice simply revenge masquerading as justice?"<sup>57</sup>

For Gacaca to overcome these limited and ethnically charged characterisations, the notion of a survivor and perpetrator must include both Hutus and Tutsis. Additionally, the idea that Hutu survival during the genocide depended solely on their participation or complicity serves to generalise blame among Hutus and explains their characterisation as perpetrators. Characterisations that only Tutsis can be survivors and only Hutus can be perpetrators ignore many of the individual specific circumstances of the genocide. Many Hutus survived, not because they were in agreement with extremists, but because they chose to hide, or simply keep from publicly denouncing the crimes. Furthermore, many Hutus were targeted and survived such as those who were mistaken as Tutsis, those who survived their injuries, and women who suffered from sexual violence.

This critique of the ascribed ethnic identities of participants in Gacaca also speaks to the importance of individualising the circumstances surrounding the crimes committed. One of the components of reconstructing a new narrative on the genocide is the attempt to individualise mass violence. While this finds utility in assessing the individual motivations and incentives to commit the crimes, the actual act of committing the crime is much more difficult to individualise. One of the benefits ascribed to Gacaca is that its trials prosecute individuals and differentiate between members of a group and thus individualizes responsibility. This deters the accusing member from exacting undifferentiated vengeance on Hutu individuals based on their ethnic membership.<sup>58</sup> However, the criminal acts of genocide perpetrators in Rwanda are unlike those of conventional homicide cases in that individualizing guilt is very difficult. There are

circumstances in which a family was killed by a group of the militia, each of whom maybe have contributed in one way or another to the death of an individual. This need for consensus in Gacaca and the difficulty of individualizing responsibility will further entrench the ethnic identity of perpetrators as Hutus and the victims/survivors as Tutsis.

The Government of Rwanda's agenda of reducing identity to that of "Rwandan" has only been successful in the public sphere of government rhetoric and bureaucracy. The social conditions of post-genocide Rwanda remain constructed in terms of ethnic identity and relegation to the private sphere renders them more destructive. As a Hutu woman stated, "If you ban these terms...they take a different form that's even more exclusive." Rwandans now ask each other 'is he one of us?'.<sup>59</sup> After the expected release of many prisoners into the community as a result of their confessions in the Gacaca pre-trials, it would be unreasonable to expect a sudden social reconstruction of ethnic identity that no longer adheres to the exclusivity of Tutsi and Hutu. The government's agenda of eliminating ethnicity is a fallacy in Rwandan society. This fallacy will be exacerbated by the prosecution of genocide suspects based on their group membership and by the release of such suspects into the community.

### **Gacaca and the Violations of Restorative Justice**

The control over the processes of justice by the government is also evident in the top-down, state-imposed nature of the Gacaca process. Many criticisms of Gacaca in terms of its relationship to the state point to a history of communal action under state compulsion. Under the precolonial Tutsi king, there was a form of regular communal work called *umuganda*. The Belgian colonizers and the post-colonial Habyarimana regime exploited this practice to conscript forced labourers for public works projects.<sup>60</sup> Gacaca presents a similar tone in its call to justice and reconciliation that bears on every Rwandan the responsibility of bringing perpetrators to justice and to participate in the post-genocide society. Kagame's rhetoric in the preamble to Gacaca law "gives a strong whiff of command justice declaring that the 'duty to testify is a moral obligation, nobody having the right to get out of it for whatever reason it may be.'"<sup>61</sup> There is irony in the relationship between populist and grassroots participation that is state-imposed.

Victor's justice is most clearly problematic and volatile in the government's decision not to allow crimes committed by the Rwandan Patriotic Army (RPA), the military arm of the RPF during the genocide, to be tried in Gacaca. While the genocide targeted the Tutsis, Tutsi refugees and the RPF committed extensive war crimes prior to the genocide that also positions them as perpetrators of violence. Prior to the signing of the Arusha Accords to end hostilities between the RPF and Rwandan government forces, the RPF had forcibly removed Hutus and committed violations paramount to war crimes. According to Human Rights Watch, they destroyed property, recruited child soldiers against their will, and displaced thousands in order to create free-fire zones.<sup>62</sup> Additionally, mass human rights violations, also tantamount to war crimes, occurred with the eventual RPF advancement and its desire to remove Hutus from positions of social and political power.<sup>63</sup> The Gersony Report, which was to be issued by UNHCR (but prevented by the UN Secretary General out of sympathy to the newly formed government under RPF control) stated that the RPF "organized massacres of tens of thousands civilians as its soldiers advanced in Rwanda" with an estimated death toll of 25,000 to 45,000 from April through August of 1994.<sup>64</sup>

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

behaviour with the genocide.”<sup>65</sup> A few individual soldiers in the RPF’s army have been tried and convicted in Rwanda’s national courts. However, these remain token sacrifices in comparison to the widespread violations that have been reported. Kagame continues to insist that these crimes will be tried in regular military tribunals and that the priority of the Government is to deal with the genocide cases first and foremost. Additionally, an African Rights report on Gacaca supports the distinction between genocide crimes and the human rights violations committed by the RPF. It states that the “confusion and tension” over why RPF crimes would not be prosecuted by Gacaca “reflects the lack of public awareness and acceptance of the distinctive aspects of the genocide...”<sup>66</sup>

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

The government does not delineate between RPA killings as a result of the civil war prior to 1994 and revenge killings during and immediately after the genocide. Additionally, there is considerable suspicion that many Hutus were eliminated by the RPA as “planned exterminations of political opponents” and as such can be considered acts of genocide.<sup>67</sup> As the RPF is the party in power its armed forces are considered military personnel retroactively, whereas the armed forces and militia of the Habyarimana regimes are considered *genocidaires*. This furthers the notion of victor’s justice as those in the RPF, as Tutsis, will not stand trial against accusations from primarily Hutu communities. Furthermore, it reveals the truth that one’s view on justice is dependent on one’s view of the genocide. Kagame espouses that the genocide was a crime of the previous state, while RPF killings were individualized crimes of excess.<sup>68</sup>

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

## CONCLUSION: LESSONS FROM RWANDAN RECONCILIATION

This paper has presented the justice and reconciliation dynamics of Rwanda as a reflection of both a state-led political agenda and the need for reconciliation in local communities. The introductory and second sections described the enormity of the justice task and the options of two different justice models. While Rwanda follows a retributive model at the national and international level, it has the restorative model of Gacaca at the local level. Section three presented the relationship between Gacaca and the benefits of restorative justice in a society where victims and oppressors coexist in the same communities. It was argued that the more

strictly Gacaca adhered to its indigenous origins and restorative nature, the more it will foster reconciliation.

However, the puzzle of Gacaca is complicated by its characterisation as both restorative justice and victor's justice. This puzzle was resolved in section four by articulating the political intentions of those responsible for reinventing and orchestrating Gacaca. The perception that justice will be done rest with the politics of the state that resurrected this tradition. If the suspects feel as if they are being tried as Hutus by Tutsis then the characterisation of victor's justice is fitting. If the victims and participants in the trial feel as if justice is not being served by the release and reintegration of those that have been accused, then there will be no reconciliation. For Gacaca to meet its goals, its architects must be perceived as neutral and not vengeful.

Whether genocide suspects are reintegrated or remain in prison, it must be questioned if justice is a necessary or only a significant component for reconciliation. The genocidal violence in Rwanda was partly attributed to a culture of impunity that has become so integral to the justice rhetoric. However, differing notions of what justice entails, be it punitive, truth telling, or reintegrative, means that there will always be some who perceive a certain level of impunity. In the Rwandan context, the danger lies in impunity being associated with a particular ethnic group. The remaining question is whether it is safer to have impunity lie with those who hold power or those who are subordinate to it.

The most important lesson from Rwanda's reconciliation process is that the path from justice to reconciliation is not necessarily linear. In reality, this path is conditioned by two important factors: the relationship between victims and aggressors as well as the form of power that justice flows from. In Rwanda's case, these factors leave us with grave concerns for the ability of any kind of justice to contribute to reconciliation. However, lest we end on a note of pessimism, there are lessons to be learned from both the progress and mistakes of retributive/restorative types of justice. First, the international community should encourage alternative and local forms of justice to exist in cooperation, not competition, with international retributive processes. Second, local forms of justice should not be held to culturally inappropriate standards of criminal law and their indigeneity should be respected. Third, caution must be exercised with regard to the relationship between justice and power. The rhetoric placing "unity" and "security" above all else can mask divisions within society that threaten a resurgence of violence. Finally, we must discard the notion that reconciliation can only occur if preceded by punitive justice. What we have learned from Rwanda is that reconciliation has many meanings with both individual and collective consequences. Mitigating impunity must be an assurance for the future and not a way to avenge the past.

## NOTES

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7. Kagame readily admits to this denial of basic rights for prisoners in his aforementioned speech to the Rwandan Bar Association in 2002.
8. Norwegian Helsinki Committee for Human Rights, p. 13.
9. Homogenous Society: oppressor group has "eliminated" the victim group (i.e. Nazi Holocaust, Kosovo, Aboriginal communities in Canada and Australia). Dualist Society: both groups coexist within same nation-state with no possibility of a territorial division (i.e. Rwanda). Pluralist: Oppressor group coexists with victim group and third group; or, several oppressor or victim groups (i.e. Iraq, Bosnia, South Africa).
10. Ibid., p. 1239-1253.
11. Ibid., p. 1239.
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25. The Arusha Tapes highlight the guilty plea of Kambanda, Rwanda's prime minister during the genocide, the trial of George Rutaganda, former vice-president of the Interahamwe militia, Clement Kayishema, a former provincial governor of Kibuye and many other genocide leaders including district mayors and businessmen. Kimani, Mary. "Arusha Tapes Amaze

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31. *Ibid.*

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45. *Ibid.*, p 188.

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