



2007

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Recommended Citation

14 *New Eng. J. Int'l & Compl L.* 41 (2007)

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JUSTICE AND RECONCILIATION ON TRIAL: GACACA PROCEEDINGS IN RWANDA

LINDA E. CARTER*

INTRODUCTION

The Gacaca proceedings in Rwanda are an innovative and unique response to a post-conflict situation. Although loosely based on a traditional dispute resolution process,¹ the current Gacaca is a statutory creation.² The idea of Gacaca tribunals was conceived in the aftermath of the 1994 conflict that resulted in the deaths of at least 800,000 people in a 100 day period. Gacaca is an effort to adjudicate the cases of those who participated in the killing, sexual assaults and other crimes during those disastrous days. The killing began after a plane carrying the President of Rwanda was shot down, resulting in his death. A fragile power-sharing peace accord among several political groups, including ones that were

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1. Historically, Rwandans had a mediation-type process at the local level that was called "Gacaca," which referred to meeting on the grass. Traditionally, Gacaca was a community meeting conducted by elders to find a way to resolve disputes arising within the community. See Maya Goldstein-Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355, 376-77 (2005) (explaining the role of traditional Gacaca in Rwanda); William A. Schabas, *Genocide Trials and Gacaca Courts*, 3 J. INT'L CRIM. JUST. 879, 891 (2005) (discussing the derivation of the term "Gacaca").
2. See Organic Law No. 08/96 of Aug. 30, 1996, amended by Organic Law No. 16/2004 of Jun. 19, 2004, and by Organic Law No. 10/2007 of March 1, 2007, available at www.Inkiko-gacaca.gov.rw/En/EnLaw.htm; see also Nat'l Service of Gacaca Jurisdictions, *Context or Historical Background of Gacaca Courts*, <http://www.inkiko-gacaca.gov.rw/En/Generaties.htm> (last visited Nov. 12, 2007).

predominantly Hutu or Tutsi, fell apart.³ During the fighting that followed, radical Hutu political and military groups mobilized and slaughtered Tutsi and moderate Hutu civilians. Ultimately, a largely Tutsi army, led by returning refugees that included current President Kagame, took control and stabilized the country. Although the United Nations created the International Criminal Tribunal for Rwanda (ICTR) in 1994,⁴ it was never anticipated that the ICTR would try all of the alleged perpetrators. Moreover, the judicial system in Rwanda, devastated by the conflict, could not handle the volume of cases generated by the hostilities. Rwanda found itself with over 100,000 individuals in prison, accused of crimes committed during the conflict. In an effort to achieve justice and reconciliation, and to move the society forward, Gacaca jurisdictions were created.

Preliminarily, it is important to understand how ambitious an undertaking the Gacaca process represents. First, there is the sheer number of courts. Operating at a community level, there are about 12,000 Gacaca jurisdictions, of which 1,545 are designed to conduct most of the trials.⁵ Second, there is a staggering number of defendants. Although Gacaca was originally designed for the 100,000-plus detainees in Rwandan prisons,

3. Rwanda was a Belgian colony from post-World War I until 1962. The Tutsis were a more privileged group than the Hutus under Belgian rule. There is debate whether there is in reality an ethnic difference between Tutsis and Hutus, or whether the difference was largely socio-economic. Nevertheless, the Belgians instituted identity cards that labeled most people either Tutsi or Hutu. Shortly before independence, there were outbreaks of fighting that sent many Tutsis fleeing into Uganda and the Congo. After independence, there was a growing Hutu-rights movement in Rwanda at that same time that there was a burgeoning Tutsi refugee community in Uganda and the Congo that wanted to return to Rwanda. In the early 1990s, the Tutsi refugee army took over part of northern Rwanda. Although a peace accord was reached to share power between the then Hutu-led government and the Tutsi refugee leaders, the accord fell apart and culminated in the genocide in 1994. For a thorough explanation of the history and dynamics of Rwanda, see MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA* (Princeton University Press 2002); see also MICHAEL N. BARNETT, *EYEWITNESS TO A GENOCIDE: THE UNITED NATIONS AND RWANDA* (Cornell University Press 2002).
4. S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8th, 1994).
5. It is also worth noting that there were originally over 254,000 judges in the Gacaca jurisdictions. This number has since been reduced to the still staggering number of 169,000. See *Interview with Augustin Nkusi, the Director of the Legal Support Unit, IRIN, available at <http://www.irinnews.org/PrintReport.aspx?ReportId=59453>* (June 27, 2006). The enormity of the undertaking is even more significant in the context of a country with only a total population of 9.9 million. CIA, *The World Factbook* (2007), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/rw.html>.

there are now estimates of up to one million possible defendants⁶ due to the exhaustive investigative function of the Gacacas at the “cell” level.⁷ Third, the crimes that can be heard in a Gacaca court, genocide and crimes against humanity, rank among the most severe known to the world. Fourth, the goals of the proceedings, combining justice with reconciliation, are complex.

This paper analyzes the efforts of Gacaca to achieve justice and reconciliation, in part by comparing the process to a typical trial in the United States. In this way, the similarities and differences of Gacaca to a judicial court proceeding are explored,⁸ and Gacaca’s strengths and weaknesses are analyzed. In the final section, Gacaca is placed within the context of multiple responses, on international and national levels, in a post-conflict situation. The analysis and comments in this essay are based on firsthand observations of Gacaca trials and interviews with government and nongovernment personnel in Rwanda.⁹

I. CONTRASTING TRIALS: A CRIMINAL TRIAL IN THE UNITED STATES AND A GACACA TRIAL

With its impressive structure and even more impressive goals, what is a Gacaca trial? How does it compare with a typical criminal trial in the United States?

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6. Arthur Asiimwe, *Rwanda Estimates 1 Million Face Genocide Charges*, GLOBAL POLICY FORUM, Jan. 14, 2005, <http://www.globalpolicy.org/intljustice/tribunals/rwanda/2005/0114rwgencharges.htm>.
 7. The collection of information in Gacaca occurs at the cell level. Rwandan political society is composed of four levels, each combining several of the prior level’s units. The levels, from local to national, are cell (or cellule), sector, district and province. The cells, comprised of at least 200 people each, are the investigative level as well as adjudicating less serious crimes. It is at the sector level that most trials occur and appeals are heard.
 8. Judicial trials in the United States are chosen for the comparison because of my expertise in U.S. criminal law and procedure. It should be noted, however, that a comparison with a judicial trial in a legal system based on a civil law, rather than a common law, tradition would have many similarities to an American trial (such as right to defense counsel), but would also have some differences in analysis. For example, it is typical in a civil law-based jurisdiction for the judge to conduct the questioning of witnesses rather than the attorneys as in the American system. As a result, some aspects of the Gacaca trials, while different from the U.S. common law system, bear greater similarity to the Rwandan civil law-based system.
 9. My colleague, Professor Omar Dajani, McGeorge law student Chad Couchot, and I observed proceedings and interviewed people in Rwanda for three weeks in July 2005. Most of the information in this paper comes from firsthand observations by the three of us and our notes from those proceedings.

For both lawyers and the general public, an American criminal trial conjures up images of one judge on a raised bench, articulate attorneys, a jury and the restrained atmosphere of a courtroom inside a large office-style building. For high-profile trials, or even for regular trials, there may be an added element of security, such as screening through the familiar metal detectors and the presence of armed prison or jail transportation officers. The questioning of witnesses and arguments to the court are conducted by attorneys. The defendant sits silently at the counsel table, removed from the general public, occasionally writing notes to the attorney at his or her side. In trials that take place in the United States, judges rarely pose questions to the witnesses and it is unusual for a judge to address the defendant directly during the proceedings until sentencing. In a few cases, the defendant will represent himself and have a greater role in the proceedings, questioning witnesses and posing a closing argument to the jury. The general public sits in the gallery of the courtroom, removed from the attorneys, defendant, and judge by a low wall. A person in the public area does not speak, and indeed, risks admonishment by the judge or removal from the courtroom if he or she speaks out.

Judges are clearly a crucial fulcrum in the American judicial system. Despite various attacks on the judiciary by interest groups, judges are generally revered in the United States. Who are the judges in American courtrooms? Attorneys aspire to become judges, and judges generally come from among the most highly accomplished pool of lawyers. With the exception of some local justices of the peace, judges in the United States must have a law degree and be in good standing with the bar associations. The typical judge has spent many years in practice, gaining experience as a lawyer before assuming a judicial role.

What are our expectations from a criminal trial in the United States? The most common response is "justice." What do we mean by justice? Certainly a dominant concern is a desire to convict the guilty. A less-publicized purpose, but surely equally compelling, is to find the innocent not guilty. This idea of justice has a punishment rationale, to penalize those who have broken society's rules, and a security rationale, to protect society from those who would harm us. The reasons to punish are predominantly guided by either a retributive or a deterrent theory. A retributive theory posits that the defendant should get his "just deserts" for committing the crime, putting the defendant back into equilibrium with society. A deterrent theory posits that punishing the defendant serves to discourage other would-be offenders from committing the same crime in the future. Rehabilitation of the offender, while fostered by educational and vocational programs in and out of prison, does not garner quite the same vocal support as retribution or deterrence. Reconciliation of the victim and offenders is

ignored for all practical purposes.¹⁰

Now picture a Gacaca trial in Rwanda. Seven judges¹¹ file in, wearing sashes that proclaim them as *Inyangamugayo*, “persons of integrity.” They sit behind a long table in front of a crowd of people from the community and foreign observers. Members of the crowd sit on benches out in the open or in a building that serves on other days as a classroom or meeting place. So far, the setup is similar to a courtroom in the United States, with the exception of the community location and the lack of amenities of a formal “bench.” A number of differences, however, are quite striking. The defendant does not sit at a counsel table; indeed, there is no counsel and no counsel table. These two characteristics cannot be understated for their impact on the proceedings. Moreover, not only does the defendant not sit at a counsel table, but the defendant is actually sitting right in the middle of the community. There is no segregation of a suspected *genocidaire* from the community that he or she victimized. Of course, the defendant’s family and relatives are also likely to be part of the community. It is an unusual sight to our eyes to see the inclusion of the defendant (often times several defendants) in their ironed, pink prison shirts and shorts, sitting side-by-side with people who have survived the genocide. Although there are armed guards present, they generally stand outside the meeting place away from the defendants and community.¹²

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10. There are some nascent efforts in the United States with restorative justice, which has a strong reconciliation component. For example, following an anti-Muslim hate crime in Eugene, Oregon, the prosecutor’s office and victims chose to participate in a neighborhood accountability board where the victims and offenders worked with the community to develop a specific plan to remedy the harm. See Mark S. Umbreit, et al., *Restorative Justice in the 21st Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 300-04 (2005) (advocating the expansion of restorative justice structures and principles beyond its present limited use in the juvenile and criminal justice systems).
 11. At the time of our observations in 2005, there were 9 judges and 5 deputies (alternates) in a Gacaca jurisdiction. Seven of the nine had to be present to hear a case. Organic Law No. 16/2004 of Jun. 19, 2004, ch. I, § II, art. 8, ch. I § IV, art. 23, available at www.Inkiko-gacaca.gov.rw/pdf/newlaw1.pdf. In the 2007 amendment to the Gacaca law, the number of judges was reduced to seven with two alternates and a requirement that five judges have to be present to hear a case. Organic Law No. 10/2007 of March 1, 2007, art. 1 and art. 5, available at www.Inkiko-gacaca.gov.rw/pdf/En.
 12. The contrast in security precautions at a Gacaca proceeding in comparison to security in an American courtroom at first seemed quite striking to us. Then, at one Gacaca, our research assistant, Chad, asked a guard if he had any concern that defendants would escape, given that the guards were not anywhere near the defendants. The response was: “Where would they go?” Because the defendants are known in the community, it would be virtually impossible to conceal oneself for long. What

It is also unusual for us to see a proceeding with no attorneys whatsoever. The judges, who at first blush resemble a jury, question all witnesses and the defendant, which places them more in the role of a prosecutor in an American criminal trial than in the role of a jury. The judges, thus, fulfill the roles of judge, jury, and prosecutor.¹³ There is yet one more role for the judges; acting much like a court reporter in an American trial, one of the judges records the testimony. Another notable difference from an American trial is that this recording is all done by hand. The testimony is painstakingly written down in longhand and, ultimately, signed by the witness to verify the accuracy.

What about the people from the community? What is their role in Gacaca? Unlike the people in the gallery in an American courtroom whose role is the antithesis of participation, persons from the community at Gacaca are invited to ask questions of the witnesses or to give testimony. At one Gacaca trial that we observed, a member of the community questioned the defendant with the skill of a cross-examiner. At other trials, the community participation was more of a commentary. It is not open season, however, as the judges still control the scope of this participation. In one proceeding, for example, the presiding judge stopped a person in the community who was asking that the defendant name others who had participated with him in clearing the bushes of people who were subsequently killed. Much like a relevance ruling in an American trial, the judge indicated that the information about additional perpetrators would have to be brought in a separate proceeding on those issues or defendants.

Yet another aspect of community participation is the declaration of who was lost and what compensation is requested. In one trial that we observed, twelve people solemnly lined up to address the court, stating the name of the person who was killed at a nearby church and indicating some amount of compensation. There is an air of sadness and loss, but also of memory of the person lost. Although this procedure has a counterpart in some civil law legal systems,¹⁴ there is no similar process during an

appeared to us at first as relaxed security was, in fact, quite effective security.

13. The role of the Gacaca judges, while quite dissimilar to the role of a judge in an American trial, bears much more resemblance to the role of a judge in a civil law-based legal system. Judges in typical civil law-based systems conduct most, if not all, of the questioning to develop the facts of the case. See generally Renee Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D'Assises*, 2001 U. ILL. L. REV. 791, 801-802, 811-812 (2001) (describing the roles of the investigating judges and the trial judges as questioning the witnesses and controlling the proceedings).
14. See, e.g., Walter Perron & William S. Pizzi, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 54-63 (1996) (discussing the *Nebenklage* procedure of including victims of crime as a party

American criminal trial. In the United States, the idea of damages and restitution is saved for a subsequent sentencing hearing or a completely separate civil proceeding.

Who are the *Inyangamugayo* presiding over the Gacaca proceedings? Unlike the law-trained judges in American courts or in Rwandan national courts, the Gacaca judges are persons who are elected from the community. They are not lawyers, but are to have attributes of respect and integrity. The Gacaca judges receive about a week of training in how to categorize crimes and how to conduct proceedings; they even do mock trial proceedings in the training. There is also periodic supplemental training.¹⁵

What are the expectations for Gacaca? The expectations are high. It is hoped that Gacaca can process the tens of thousands of incarcerated inmates, imposing punitive sentences of up to life imprisonment as warranted.¹⁶ Another goal is the reconciliation with, or at least the reentry of, perpetrators to their communities. There is a great emphasis in Gacaca on confessions. Although, on the surface, the confessions seem similar to a plea bargaining system, this confession process has more attributes of reconciliation than does plea bargaining in the United States. The Gacaca confession process is defined as: “confession, guilt plea, repentance and apology.”¹⁷ Thus, even the definition has aspects of reconciliation.

Gacaca also has characteristics not quite reaching amnesty, but promoting a great motivation to confess because of a reduction in penalty. This gives the process more of an air of a truth-and-reconciliation commission. For example, a possible penalty of thirty years to life imprisonment is reduced if the defendant confesses (twenty-five to twenty-nine years); if he confesses before his name is on the list generated by the investigating Gacaca cell, the penalty is even less (twenty to twenty-four years). Even more importantly to most inmates, half of the reduced sentence can be done in community service rather than incarceration.¹⁸ It

to the proceedings); *see also* Rome Statute of the International Criminal Court, art. 68, ¶ 3, U.N. Doc. A/Conf. 183/9 (July 17, 1998), available at <http://www.un.org/law/icc/statute/rome.htm> (permitting victims to participate in the proceedings).

15. *Interview with Augustin Nkusi, the Director of the Legal Support Unit*, IRIN (June 27, 2006), available at <http://www.irinnews.org/Report.aspx?ReportId=59453>
16. At the time of our observations in 2005, the maximum penalty that could be imposed in Gacaca was 30 years. In the 2007 amendments, the possible penalty in Gacaca was increased to life imprisonment. Organic Law No. 10/2007, *supra* note 2, art. 14.
17. Organic Law No. 16/2004, *supra* note 10, at ch. II, art. 54.
18. Organic Law No. 10/2007, *supra* note 2, at art. 14. The figures in the text are for first, second and third degree category 2 crimes, which include a form of aggravated murder, torture, and engaging in dehumanizing acts on dead bodies. For lesser degrees of category 2 crimes, the maximum penalty and, therefore, the reduction for confessing result in significantly lesser penalties. For example, fourth and fifth

means that many of those in prison can be released immediately if they confess. The consequence is reentry into society relatively quickly. The mixture of purposes is undeniably present. Although the process to achieve reconciliation is less prominent than the justice-oriented trial, and less readily measurable, it is clear that Gacaca is designed to achieve some measure of both justice and reconciliation.

II. THE EVIDENCE: DO THE FACTS DEMONSTRATE JUSTICE AND RECONCILIATION IN GACACA?

Critics of Gacaca raise concerns about procedural fairness. Of primary concern for procedural fairness is the absence of defense counsel. The lack of counsel is significant for both the pleas based on confessions and for the actual trials. A number of outside observers, such as Amnesty International, have expressed concern that the Gacaca proceedings are not in conformity with the provisions of the International Covenant on Civil and Political Rights (ICCPR).¹⁹ Among the criticisms are the lack of access to defense counsel and the failure to provide an impartial tribunal.²⁰ There is also criticism of Gacaca as victor's justice. There are, for example, no prosecutions of the current government's troops in Gacaca.²¹

What is the substance of a typical proceeding? A typical proceeding that we observed before a Gacaca tribunal involved a defendant who was allegedly part of a group that killed. The focus of the questioning by the judges was: "Was the defendant part of a group that killed? Did the defendant have a firearm? Why did the defendant have a firearm?" There was no direct discussion of elements, such as the *mens rea* for genocide.²²

degree category 2 crimes, which include those who kill or attempt to kill, carry a maximum penalty of fifteen to nineteen years. A confession reduces that penalty to twelve to fourteen years (if after the accused's name is on the list) or to eight to eleven years (if before the accused's name is on the list of those to be prosecuted). And, again, half of the reduced sentence can be served in community service. See *id.* at art. 11 for the categorization and descriptions of the degrees of category 2 crimes.

19. See, e.g., Press Release, Amnesty International, Rwanda: Gacaca-Gambling with Justice, (Jun. 19, 2002), available at <http://web.amnesty.org/library/index/ENGAFR470032002> (criticizing the Gacaca courts lack of compliance with ICCPR); see also Goldstein-Bolocan, *supra* note 1, at 385-86 (noting the concerns of human rights observers with the lack of due process in Gacaca proceedings).
20. See Goldstein-Bolocan, *supra* note 1, at 385-89.
21. The current government is the Rwandan Patriotic Front (RPF) party. The largely Tutsi RPF soldiers fought the primarily Hutu government soldiers and Hutu militias during the genocide. Soldiers from the RPF troops, who allegedly committed crimes during the conflict, are being prosecuted in military courts in Rwanda, but little is written about these trials or their results.
22. The crime of genocide requires proof of "intent to destroy, in whole or in part, a

The most common defense was presence, but absence of direct involvement: "I had the weapon, but I didn't kill; I was part of the group, but I didn't kill; I cleared the bushes, but did not kill." The defendants did not seem to understand aiding-and-abetting liability. Another typical defense was a duress-type claim: "I participated because I was afraid for my own life." Although there were no attorneys on either side, the defendant was able to speak on his or her own behalf and the questioning was focused on distilling the facts of what occurred. On the other hand, there was little development of possible defenses for the defendant. In this type of system, the judges take on an even greater role than in an American trial. Although the ability to present a defense was probably shortchanged, the judges that we observed took their role seriously and, despite their lack of formal legal training, were clearly trying to conduct proceedings and deliberations with a sense of fairness. Gacaca is therefore a mixed bag in terms of substantive and procedural fairness.

If Gacaca is somewhat lacking in due process guarantees, is it more successful in promoting reconciliation? It is hard to capture empirically a sense of the legitimacy of the proceedings within the community, but the idea is that there is a greater possibility of reconciliation when there is a high level of community participation. At the Gacaca proceedings, families of victims and defendants sit together on the grass or on benches. Moreover, there is a strong commitment by people to the Gacaca process, both at the national and local levels. Judges are working for free. On the days of the Gacaca proceedings, businesses are closed in that sector so that everyone can attend the proceedings. As one might expect, reactions to Gacaca are mixed within the community. Even with a language barrier, we were able to observe the contrasts. For instance, we saw a defendant and the son of the woman he killed embrace after one Gacaca proceeding. In contrast, after another proceeding, we talked with a woman whose sister had been killed. In response to our questions, she declared through tightly controlled emotions that there was no justice and no truth in Gacaca. Given the enormity of the losses, it is certainly understandable that Gacaca does not have an immediate conciliatory effect on all persons and, perhaps, never will. The evidence of reconciliation, thus, cannot be fully developed for some period of time.

III. THE VERDICT: WILL GACACA ACHIEVE JUSTICE AND RECONCILIATION?

In many respects, Gacaca is an ingenious solution to an overwhelming problem. If justice is desired or believed to be mandatory given the atrocities committed, the community-based approach spreads the

work out among a large number of people with the possibility of justice on a large scale. Further, if admission and repentance are the goal, the confession process, at least in theory, strongly encourages that path. Gacaca is a way to combine some of the positive aspects of a truth commission with the positive aspects of a judicial proceeding.

On the other hand, one might question whether Gacaca will achieve either justice or reconciliation. Critics point to a lack of compliance with procedural guarantees, such as access to defense counsel and the ability to gather evidence and witnesses. In addition, there have been allegations of fear and violence toward prospective witnesses and the accused.²³ At one point, thousands fled Rwanda for Burundi because of the Gacaca proceedings.²⁴ Then, there is the ever-present criticism that Gacaca is simply victor's justice since no member of the current government's side is being prosecuted in Gacaca.

Substantively, the Rwandan government has done an impressive job of organizing the crimes into "categories" and dividing the cases between the national courts and the Gacaca jurisdictions. Crimes are divided into three categories. The leaders and those who perpetrated torture, sexual crimes and murders on a large scale are tried in the national courts for what are considered to be Category 1 crimes. The Gacaca courts primarily hear cases involving killings and property offenses committed by lower-level people and most are from a local level. These are Category 2 and 3 offenses.

The sheer number of cases, however, may defeat Gacaca in the end if the goal remains the adjudication of all possible perpetrators. Trials began in March 2005 in a limited number of locations. An impressive number of cases were completed in this beginning phase; as of the end of December 2005, 6,267 judgments and 1,317 appeals had been completed. These judgments included 695 acquittals and penalties ranging from 1 year to 30 years.²⁵ As of July 2006, Gacaca trials began throughout the country. An official of the National Gacaca Service stated in April 2007 that they had

23. *Rwanda Genocide Witnesses Killed*, AFROL NEWS, Jan. 24, 2007, www.afrol.com/articles/23900; see also HUMAN RIGHTS WATCH, *KILLINGS IN EASTERN RWANDA 3* (Jan. 2007), <http://www.hrw.org/background/africa/rwanda0107/rwanda0107web.pdf>.

24. *Over 2000 Rwandan Refugees Again Reported in Northern Burundi*, HIRONDELLE NEWS AGENCY, Aug. 23, 2005, <http://www.hirondele.org/arusha.nsf/LookupUrl%20English/8CE31518340EEE1243257067002DA655?OpenDocument>.

25. Nat'l Service of Gacaca Jurisdictions, *The Achievements in Gacaca Courts*, available at <http://www.inkiko-gacaca.gov.rw/pdf/Achivements%20in%20Gacaca%20Courts.pdf>.

now convicted 64,800 suspects, with 15,219 acquittals.²⁶ However, estimates are that there are over 70,000 cases in Category 1 (for the national courts) and over 700,000 cases for the Gacaca courts.²⁷ This is an overwhelming number of cases for any system of justice, and certainly for the system being reconstructed in Rwanda. Moreover, at the same time that the estimated number of cases has risen so dramatically, there was a plan to complete all Gacaca trials by the end of 2007.²⁸ Complicating the task even more, there is a proposal to move most of the Category 1 cases into Gacaca proceedings. The national courts would keep the “most senior planners of the genocide,” probably first-degree Category 1 defendants. A new level of Gacaca would be created to handle the Category 1 defendants removed to Gacaca and some of the Category 2 defendants. It is also proposed that the new level of Gacaca would have more qualified judges, but the precise details of the qualifications are not yet spelled out.²⁹

Will Gacaca fare better in achieving reconciliation? Here, too, the task is daunting. If part of reconciliation is the idea of creating an accurate historical record, Gacaca may not be a good record of the truth. With punishment looming over them, defendants are less likely to be completely forthcoming. The development of a record is also constrained by the fact it is a trial and not an open-ended discussion. The passage of time additionally diminishes the accuracy of the testimony. Another factor contributing to the difficulty of creating a record is that the testimony at each Gacaca is handwritten and this is the only record of the proceedings.

The creation of a historical record is also dependent, in part, on the confession process. That process, however, may not be working as well as planned to establish the truth of what occurred. For example, we observed proceedings where the defendants had “confessed” enough to get released from prison, but were now back before a Gacaca court on more serious charges that they denied. Consequently, there was no uncontested description of the events from the defendants’ confessions.

What, if anything, could make Gacaca a better solution? Putting aside

26. *The Gacaca Courts Prepare to Finish Their Mandate*, HIRONDELLE NEWS AGENCY, April 24, 2007, <http://www.hirondellenews.com/content/view/402/135/>

27. *Id.* Of the 700,000 cases, 432,597 are in Category 2 and 308,738 in Category 3).

28. Godwin Agaba, *Gacaca Courts to Change Structure*, THE NEW TIMES, Jan. 7, 2007, http://www.rwandagateway.org/article.php3?id_article=3978. Recently, however, the head of the National Gacaca Service indicated that trials would continue into 2008. *Gacaca Mandate to be Extended*, available at http://www.rwandagateway.org/article.php3?id_article=7521&var_recherche=gacaca+trials+200 (December 3, 2007).

29. *See also Stunned by Growing Numbers of Genocide Suspects, Rwanda Revisits Categorisation*, HIRONDELLE NEWS AGENCY, Oct. 7, 2005, <http://tj-forum.org/archives/Gacaca%20numbers,%20Oct%2005.html>.

the overwhelming number of cases for a moment, there is one procedural change that would alleviate many of the due process concerns. If Gacaca itself was part of a plea process, rather than a trial against an unwilling defendant, the due process concerns would be minimal. In the American system, for example, defendants routinely give up their rights to counsel, a trial, confronting witnesses and putting on evidence in defense in exchange for a plea bargain on the charges or sentence. Similarly, Gacaca could be designed to be a voluntary process.³⁰ If a defendant chose to go through Gacaca, he or she would be waiving any procedural rights at a usual trial. Of course, this would mean that there would have to be the option of trying the defendants in a regular court if the defendant chose not to take advantage of Gacaca. Gacaca is, however, already quite appealing to defendants since a sentence is greatly reduced if the defendant confesses. Thus, the national courts might not be overwhelmed with cases. The alternatives of a plea in Gacaca or a trial in a Rwandan court would be a system rather similar to the concept of plea bargaining in the United States.

All in all, only time will tell if Gacaca has succeeded in its overriding mission to move Rwandan society past the genocide and into a time of increasing economic, political and social prosperity. Studying Gacaca at this time is important, however, not only to assess the benefits to Rwandan society, but also for lessons that can be gleaned for approaches in other post-conflict situations. Questions to consider include: Is it important to have a comprehensive effort at justice through a criminal process? Or, is it enough to prosecute the leaders of the atrocities and have a truth commission process for the large numbers of lower-level perpetrators? How important is it to the people affected by the conflict to have an international prosecution? How important is it to have prosecutions at a local level? Is there a greater sense of justice or reconciliation through local prosecutions? Ultimately, the verdict on Gacaca's success in achieving justice and reconciliation will not only be important in Rwanda, but will also be useful evidence for developing post-conflict responses in other regions.

IV. GACACA PROCEEDINGS AS PART OF MULTI-LEVEL TRANSITIONAL JUSTICE

It is also essential to place Gacaca in the context of the wider circle of transitional justice efforts for Rwanda. There are multi-level components to providing justice in Rwanda: international, foreign, national, and local. Gacaca, of course, is the effort at the local level. Rwandan courts are also adjudicating the cases of *genocidaires* who were the most serious

30. See also Goldstein-Bolocan, *supra* note 1, at 394 (suggesting that a defendant's consent be required for trial in Gacaca as an alternative to providing defense counsel).

perpetrators. Foreign national courts have also prosecuted or are undertaking to prosecute perpetrators of the Rwandan genocide under universal jurisdiction principles. These have occurred or are occurring in countries such as Belgium and Canada.³¹ And, as mentioned earlier, the United Nation's ad hoc international tribunal, the ICTR, is adjudicating cases in Arusha, Tanzania.

What is or should be the relationship among the four approaches to justice? In the case of Rwanda, there was no plan at the outset to coordinate the various component courts. Each new component, however, had to take into account the work of the other forums. As a result, Rwanda is a laboratory for future transitional justice efforts. In other contexts, there are parallel proceedings of judicial trials and truth commissions. This was true in South Africa after apartheid and in Sierra Leone. In both of those contexts, the two proceedings had different purposes. The judicial proceedings focused on punishment and the truth commissions on creating a historical record and fostering reconciliation. The combination of court proceedings and Gacaca in Rwanda, however, is fundamentally different from the dual proceedings in South Africa and Sierra Leone. Gacaca is adjudicating guilt and innocence the same as the judicial courts while also striving to achieve a reconciliation purpose.

Is there likely to be a problem with coordinating the proceedings of Gacaca and the various courts? Certain problems can arise if there are overlapping jurisdictions. For instance, in Sierra Leone, the truth commission wanted access to persons detained by the Special Court for Sierra Leone (SCSL). The SCSL ultimately found that the truth commission could have access to the detainees, but that there could be no public testimony by a detainee as there were concerns with prejudicing subsequent trials and with security.³² Gacaca will not have the same problems as encountered in Sierra Leone with the SCSL and the parallel truth commission. Gacaca does not have overlapping jurisdiction with the national courts. There is one prison system that is holding people for trial in the national courts and Gacaca. The cases before Gacaca are not within the

31. See, e.g., ROYAL CANADIAN MOUNTED POLICE, WAR CRIMES AND SPECIAL INVESTIGATIONS ENFORCEMENT PROGRAM, (July 20, 2006), http://www.rcmp.ca/warcrime/index_e.htm.

32. Prosecutor v. Norman, Case No. SCSL-2003-08-PT, Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone and Chief Samuel Hinga Norman JP Against the Decision of his Lordship, Mr. Justice Bankole Thompson, available at <http://www.sc-sl.org/Documents/SCSL-03-08-PT-122-II.pdf>. see William A. Schabas, *Truth Commissions and Courts Working in Parallel: The Sierra Leone Experience*, 98 AM. SOC'Y INT'L L. PROC. 189 (2004) (explaining that the detainees nonetheless chose not to grant interviews to the TRC, apparently because they had wanted a public forum to express their positions).

jurisdiction of the courts.

There also appears to be very little interaction between Gacaca and the ICTR. Prosecutors at the ICTR indicated to us that they do not intend to transfer any cases back to Gacaca, only to Rwandan national courts. There could, however, be evidentiary issues for the ICTR, such as the use of confessions obtained through Gacaca without the usual due process protections or the introduction of statements of other witnesses from the Gacaca trials in written or oral testimony. For the most part, though, it appears that the ICTR, the Rwandan national courts and Gacaca may be a good division of labor. The ICTR brings in the international community to handle the most serious cases at the highest levels. Rwandan courts handle a similar group, but expanded to include other offenders. Gacaca provides a forum for all the other perpetrators. Further complementary efforts are underway as of December 2007 in the requests made by the ICTR Prosecutor to transfer five cases from the ICTR to the national courts of Rwanda.³³

Prosecutions in foreign courts are still rather a novel part of the transitional justice network and are meeting with a mixed review. While the ICTR prosecutor's office is working diligently to find countries to take cases, Rwandan officials were critical of the initial attempts to transfer a case to Norway. One of the Rwandan objections was a perceived disparity in justice between a defendant tried and sentenced in Norway and one tried and sentenced in Rwanda.³⁴ In the end, the ICTR Trial Chamber denied the prosecutor's motion to transfer the case on the grounds that Norway did not have jurisdiction over the same crime of genocide. Norwegian law would only have permitted a prosecution for murder. On the other hand, prosecutions in foreign countries of individuals who are apprehended in that country seem to be met with greater acceptance and approval.³⁵

33. *Former Mayor Gatete, Fifth Candidate for Transfer to Rwanda*, HIRONDELLE NEWS AGENCY, December 5, 2007, <http://www.hirondellenews.com/content/view/11310/333/>.

34. One concern was that there is no crime of genocide or complicity in genocide under Norwegian law. More generally, there was a concern that Rwanda is being treated with less trust and respect than other nations to whom the ICTR is willing to transfer cases. See *Prosecutors Request to Transfer Bagaragaza to Norway Angers Government*, HIRONDELLE NEWS AGENCY, Feb. 17, 2006, <http://allafrica.com/stories/200602170009.html> (discussing the difference in treatment between the ICTR and the ICTY); see also *ICTR Transfer of Suspect to Norway Irks Rwanda*, THE NEW TIMES, Feb. 19, 2006, <http://allafrica.com/stories/200602210374.html> (pointing out the differences in Norwegian and Rwandan law).

35. Damien Vandermeersch, *Prosecuting International Crimes in Belgium*, 3 J. INT'L CRIM. JUST. 400, 403-06 (2005) (discussing the prosecution of Rwandans who fled to Belgium); see also Lee Carter, *Rwanda Genocide Charges in Canada*, BBC NEWS,

CONCLUSION

The multi-level efforts for Rwanda were designed in a piecemeal process after the conflict. In many respects, it is extraordinary that there are so many different avenues for justice and reconciliation in place that function with relatively little conflict. International and national communities can learn, however, from both the successes and the problems of the post-conflict experience of Rwanda. The lessons of Rwanda should frame the development of models for future transitional justice and the choices to be made. There is no one right or wrong response to a post-conflict situation. Responses are and should be tailored to the particular situation and interests of people involved. However, once the goals are identified, a cooperative and complementary structure of international and national forums can be developed that can provide justice and reconciliation in the way that best meets the needs of the particular region. Gacaca is an important trial of a novel approach to combine justice and reconciliation on a national level. Evaluations of Gacaca will be an important base of knowledge for future efforts in post-conflict areas that coordinate responses on international and national levels to achieve both justice and reconciliation.