Abbreviated Criminal Procedures for Core International Crimes

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The *Gacaca* Courts and Abbreviated Criminal Procedure for Genocide Crimes in Rwanda

Phil Clark*

7.1. Introduction

Following the 1994 genocide in Rwanda, during which approximately 800,000 people were killed, many by their own neighbours and friends, the country embarked on one of the most comprehensive justice programmes attempted anywhere in the world. Whereas most post-conflict societies limit prosecutions to a handful of ringleaders of mass crimes, Rwanda sought to bring hundreds of thousands of everyday genocide suspects to justice. Central to Rwanda's post-genocide justice structure have been the *gacaca* community courts, which between 2002 and 2012 comprised 11,000 jurisdictions across the country, overseen by locally elected lay judges. Over that decade, *gacaca* prosecuted around 400,000 suspects. Because of *gacaca*'s plea-bargaining scheme, the vast majority of those convicted by *gacaca* either had their sentences commuted to community service or, if they were imprisoned, have now been reintegrated into the same communities where they committed crimes during the genocide.

This chapter explores the function and efficacy of the *gacaca* courts, focusing on their attempts to expedite the process of hearing such an enormous caseload of genocide suspects. Based on the author's research into *gacaca*, which covered the entire lifespan of the process and involved more than 600 interviews with participants in *gacaca* and relevant Rwandan and international political and judicial officials, this chapter argues that *gacaca* has produced variable results, especially in terms of justice and truth, but

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overall has generated crucial benefits for the post-genocide society. The chapter proceeds in five sections: a brief background to the Rwandan genocide; the history and modalities of *gacaca*; the virtues of *gacaca*'s use of abbreviated criminal procedure; the problems associated with this approach; and some concluding remarks regarding the relevance of the *gacaca* experience for more general considerations of expedited methods of post-conflict accountability.

7.2. Background to the Rwandan Genocide

Between April and July 1994, Rwanda experienced one of the most devastating waves of mass killing in modern history. In around 100 days, nearly three-quarters of the Tutsi population (which constituted around 11 per cent of the overall population of Rwanda in 1994, while Hutu constituted nearly 84 per cent) were murdered and hundreds of thousands more exiled to neighbouring countries.[1] What distinguishes the Rwandan genocide from other cases of mass murder in the twentieth century, and in particular from the genocide of Jews during the Second World War, is the use of low-technology weaponry, the mass involvement of the Hutu population in the killings, the social and cultural similarities of the perpetrators and victims, and the astonishing speed of the genocide. The majority of murders were carried out brutally with basic instruments such as machetes, spears and spiked clubs and often near victims' homes.[2]

Events in the early 1990s are important for our understanding of the genocide.[3] On 1 October 1990 the Rwandan Patriotic Front ('RPF'), comprising mainly descendants of Tutsi refugees who fled Hutu violence in the 1960s, invaded Rwanda from Uganda.[4] Government forces repelled the RPF and a guerrilla war broke out in the north-east of the country. After

1 Gérard Prunier, *The Rwanda Crisis: History of a Genocide*, Hurst, London, 1998, pp. 264–68.

2 See, for example, Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda,* Human Rights Watch, New York, 1999, pp. 209–12; African Rights, *Rwanda: Death, Despair and Defiance*, rev. ed., African Rights, London, 1995, ch. 9; Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda*, Random House Canada, Toronto, 2003, ch. 11.

3 For a useful account of the flurry of key events in 1990, see Peter Uvin, *Aiding Violence: The Development Enterprise in Rwanda*, Kumarian Press, West Hartford, CT, 1998, pp. 60–65.

4 Prunier, 1998, p. 72 and ch. 3, see *supra* note 1.

nearly three years of fighting, the government and the RPF signed the United Nations ('UN')-brokered Arusha Peace Accords in August 1993.

Important dynamics both within and outside of Rwanda exacerbated ethnic tensions during this period. The assassination on 21 October 1993 of the Burundian President Melchior Ndadaye, a Hutu, by members of the Tutsi-led army, led to mass killings of Burundian Hutu and the exodus of thousands of refugees to Rwanda, sparking fears among Rwandan Hutu that the violence would spill across the border. Many Hutu politicians – aided by extremist media sources such as the Hutu newspaper *Kangura* and the country's largest radio station Radio-Télévision Libre des Mille Collines ('RTLM') – used the violence in Burundi as justification to call for greater suppression of Tutsi in Rwanda.[5] Meanwhile, the Rwandan President Juvénal Habyarimana, supported by the French government,[6] was training Hutu youth militias called *interahamwe* – Kinyarwanda for "those who stand together" or "those who fight together" – to attack Tutsi.[7] As Alison Des Forges explains, before the genocide "[m]assacres of Tutsis and other crimes by the Interahamwe went unpunished, as did some attacks by other groups thus fostering a sense that violence for political ends was 'normal'".[8]

On the night of 6 April 1994, President Habyarimana and the Burundian President Cyprien Ntaryamira were returning from regional talks in Tanzania. At around 20.30, as their plane neared Kayibanda airport in Kigali, two missiles fired from near the airport's perimeter struck the aircraft, which crashed into the garden of the presidential palace, killing everyone on board. Within an hour of the crash, government roadblocks were set up across Kigali and troops and *interahamwe* began stopping vehicles and checking identity papers. Shots rang out across the city as killings began at the roadblocks and Presidential Guards and militiamen went house-to-house, killing Tutsi and Hutu accused of collaborating with Tutsi.[9]

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5 See, for example, African Rights, 1995, pp. 36–45, *supra* note 2; Jean-Pierre Chrétien, "Un génocide africain: de l'idéologie à la propagande", in Raymond Verdier, Emmanuel Décaux, and Jean-Pierre Chrétien (eds.), *Rwanda: un génocide du XXème siècle*, Harmattan, Paris, 1995, pp. 45–55.

6 Andrew Wallis, *Silent Accomplice: The Untold Story of France's Role in the Rwandan Genocide*, I.B. Tauris, London, 2007, pp. 51–78.

7 Des Forges, 1999, p. 4, see *supra* note 2.

8 *Ibid.*

9 Dallaire, 2003, ch. 10, see *supra* note 2.

The killing spree spread rapidly beyond Kigali into towns and villages across Rwanda. In the following weeks, government leaders fanned out from the capital to incite the entire Hutu population to murder Tutsi, backed by messages of hate on RTLM. By most estimates, around 250,000 Tutsi were killed in the first two weeks of the genocide.[10]

The killing of Tutsi was far from spontaneous or indiscriminate and not, as the government tried to tell foreign diplomats and the international media both at the time and after the genocide, merely a proportional military response to the RPF invasion.[11] The violence was the result of long-term planning and systematic implementation by the Hutu regime. One source of evidence of the planning behind the government's campaign of violence was the extent to which the orchestrators of the genocide targeted key Tutsi and Hutu moderate political leaders in the immediate aftermath of Habyarimana's death. Their aim was to wipe out any semblance of political opposition before launching wider attacks against Tutsi.[12]

On 21 April, the UN Security Council determined that the rapidly deteriorating situation posed a major threat to its personnel on the ground. It passed a resolution to reduce the number of UNAMIR troops from approximately 2,000 to 270.[13] While the UN debated the nature of its intervention in the genocide, the RPF swept through the countryside, capturing Kigali on 4 July. Two weeks later the RPF gained control of the entire country, in the process halting the genocide. Thousands of predominantly Hutu refugees fled into Zaire, among them many of the main organisers of the genocide.[14]

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10 African Rights, 1995, p. 258, see *supra* note 2; Des Forges, 1999, p. 770, see *supra* note 2; Alan J. Kuperman, *The Limits of Humanitarian Intervention: Genocide in Rwanda*, Brookings Institution Press, Washington, DC, 2001, p. 16.

11 Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide*, Zed Books, London, 2000, chs. 11–13; Linda Melvern, *A Conspiracy to Murder: The Rwanda Genocide and the International Community*, Verso, New York, 2004, ch. 10.

12 African Rights, 1995, p. 177, see *supra* note 2.

13 United Nations Security Council, Adjustment of the Mandate of the UN Assistance Mission for Rwanda Due to the Current Situation in Rwanda and Settlement of the Rwandan Conflict, 21 April 1994, UN doc. S/RES/912.

14 Gérard Prunier, "Opération Turquoise: A Humanitarian Escape from a Political Dead End", in Howard Adelman and Astri Suhrke (eds.), *The Path of a Genocide: The Rwanda Crisis from Uganda to Zaire*, Transaction Publishers, New Brunswick, 1999, pp. 294–301.

7.3. History and Modalities of *Gacaca*

In the months following the genocide in Rwanda, around 120,000 genocide suspects, mostly Hutu, were rounded up by the new RPF-led government and transported to jails around the country built to hold only 45,000 inmates.[15] Most detainees were never formally charged with any crime and were forced to live in hellish conditions: underfed, drinking dirty water and crammed into tiny rooms where they were often made to sleep in lattice-work formations for lack of space.[16] During the genocide the Rwandan judicial system – which manifested signs of debilitation before 1994 – was nearly destroyed completely, as the infrastructure of the national courts was decimated, and many judges and lawyers were killed or fled the country.[17] With the existing judicial system incapable of dealing with massive numbers of suspects, the government sought new mechanisms to hear genocide cases. As the then Vice President and now President Paul Kagame said in 1998: "Presently, the maintenance of 120,000 prisoners costs US$20 million per year, for which we receive assistance from the international community. This cannot continue in the long-term: we have to find other solutions".[18]

In response to the social, political, economic and legal problems created by the overcrowded prisons, the Rwandan government in 2001 instituted *gacaca* to hasten the prosecution of lower-level genocide suspects, most of whom had been imprisoned for more than six years. In March 2005 *gacaca* entered its most crucial phase, as it expanded nationwide and in some communities began judging and sentencing the first wave of genocide suspects, some of whom, as a result of their conviction at *gacaca*, have now been sentenced to new prison terms. In the later years of *gacaca* identified and prosecuted many new suspects who were not rounded up during the initial incarceration process.[19]

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15 International Centre for Prison Studies, "Prison Brief for Rwanda", King's College, ICPS, London, 2002.

16 Author's Fieldnotes, Butare Central Prison, 4 February 2003.

17 Amnesty International, "Rwanda: Gacaca: A Question of Justice", AI doc. AFR 47/007/2002, December 2002, pp. 12–13.

18 Paul Kagame, quoted in Stef Vandeginste, "A Truth and Reconciliation Approach to the Genocide and Crimes against Humanity in Rwanda", Working Paper 1998/1, Centre for the Study of the Great Lakes Region of Africa, University of Antwerp, May 1998, p. 45.

19 There is considerable debate about exactly how many new genocide suspects *gacaca* has identified. The Rwandan government estimates that up to one million genocide suspects

Following the enactment of the Gacaca Law in January 2001,[20] the Rwandan government stated that *gacaca* was designed to expedite justice

have been prosecuted, after *gacaca* has unearthed hundreds of thousands of new cases since 2002. (Author's Government Interviews, Domitilla Mukantaganzwa, Executive Secretary, National Service of Gacaca Jurisdictions, Kigali, 24 April 2009.) There is little evidence so far to suggest that so many new cases – approximately an increase of 800 per cent to the initial number of genocide suspects – have been identified. Interviews at *gacaca* provincial offices and at the community level suggest that the numbers are likely to be considerably lower than the government claims. National Service of Gacaca Jurisdictions officials in the Northern and Southern provinces reported approximately 300 per cent and 400 per cent increases respectively in the number of genocide suspects identified by *gacaca*. At the community level, Alphonse and Cypriet, two detainees who had confessed to committing crimes during the genocide and whom I interviewed on several occasions in 2003 and again in 2006, 2008 and 2009, claimed that in their local jurisdictions, *gacaca* had led to roughly a 100 per cent increase in the number of genocide suspects identified. In Alphonse's community, around 50 individuals had confessed to genocide crimes while in prison after the 1994 round-up of suspects, and *gacaca* had subsequently identified 65 new suspects; in Cypriet's community, 55 new suspects had been identified, alongside the 40 who had initially confessed. (Author's Detainee Follow-up Interviews, Alphonse, Nyamata, Kigali Ngali, 11 June 2006; Cypriet, Nyamata, Kigali Ngali, 11 June 2006.) Based on these findings, it is more likely that *gacaca* has dealt with around one million *cases* rather than *suspects*, as many suspects are accused of committing multiple crimes and many crimes were committed by groups.

20 Republic of Rwanda, Organic Law 40/2000 of 26/01/2001 Setting Up Gacaca Jurisdictions and Organising Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed Between 1 October 1993 and 31 December 1994, in *Official Gazette of the Republic of Rwanda*, October 2000, Article 13 ('Gacaca Law'). The Gacaca Law has been modified five times, as explored in greater detail below. The five documents that comprise these modifications are: Republic of Rwanda, Loi Organique No. 33/2001 du 22/6/2001 Modifiant et Completant Loi Organique No. 40/2000 du 26 Janvier 2001 Portant Creation des "Juridictions Gacaca" et Organisation des Poursuite des Infractions Constitutives du Crime de Genocide ou de Crimes contre l'Humanité, Commises entre le 1 Octobre 1990 et 31 Decembre 1994, in *Official Gazette of the Republic of* Rwanda, 22 June 2001 ('*Gacaca* Law (Modified 2001)'); Republic of Rwanda, Organic Law No. 16/2004 of 19/6/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and other Crimes against Humanity, Committed between 1 October 1990 and 31 December 1994, in *Official Gazette of the Republic of Rwanda*, 19 June 2004 ('Gacaca Law (Modified 2004)'); Republic of Rwanda, Organic Law No. 28/2006 of 27/06/2006 Modifying and Complementing Organic Law No. 16/2004 of 19/06/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes against Humanity, Committed between 1 October 1990 and 31 December 1994, in *Official Gazette of the Republic of Rwanda*, 27 June 2006 ('Gacaca Law (Modified 2006)'); Republic of Rwanda, Organic Law No. 10/2007 of 01/03/2007 Modifying and Complementing Organic Law No. 16/2004 of 19/6/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Gen-

for genocide crimes, while pursuing more subtle social goals such as reconciliation by encouraging direct community participation in genocide prosecutions. *Gacaca* was not intended to replace the national courts in the hearing of genocide cases, but rather to relieve the immense pressure on the national system by addressing the vast numbers of low-level suspects, while leaving more senior accused to the national courts and the UN International Criminal Tribunal for Rwanda ('ICTR').[21]

Two legal documents establish the modalities of *gacaca*: the Organic Law of 1996 and the Gacaca Law of 2001, with the latter modified five times, minimally in June 2001, June 2006 and March 2007, and more substantially in June 2004 and June 2008. The Organic Law is organised to prosecute "the crime of genocide or crimes against humanity" or "offences […] committed in connection with the events surrounding genocide and crimes against humanity".[22] The Organic Law defines "genocide" and "crimes against humanity" in accordance with three international conventions, to which Rwanda is a signatory: the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide, the 1949 Geneva Convention on the Protection of Civilian Persons in Time of War, and the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[23] The Organic Law, and subsequently the Gacaca Law of 2001, divides genocide suspects into four categories of crimes committed between 1 October 1990 and 31 December

ocide and Other Crimes against Humanity, Committed between 1 October 1990 and 31 December 1994, as Modified and Complemented to Date, in *Official Gazette of the Republic of Rwanda*, 3 January 2007 ('Gacaca Law (Modified 2007)'); and Republic of Rwanda, Organic Law No. 13/2008 of 19/05/2008 Modifying and Complementing Organic Law No. 16/2004 of 19/6/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes against Humanity, Committed between 1 October 1990 and 31 December 1994, as Modified and Complemented to Date, in *Official Gazette of the Republic of Rwanda*, 19 May 2008 ('Gacaca Law (Modified 2008)'). Gacaca Law (Modified 2004) and Gacaca Law (Modified 2008) constitute a more significant rewriting of parts of the original Gacaca Law than do the other modified laws. The 2001, 2006 and 2007 revised document are concerned primarily with minor changes to the wording of several sections of the Gacaca Law, while the 2004 and 2008 versions comprise several important reforms of the *gacaca* process, outlined later in this chapter.

21 See, for example, Charles Murigande, "Report on Urugwiro Talks from May 1998 to March 1999", in *Report on the National Summit of Unity and Reconciliation*, Kigali, NURC, 18–20 October 2000, pp. 30–33.

22 Republic of Rwanda, Organic Law No. 08/96, 30 August 1996, Article 1 ('Organic Law').

23 *Ibid*.

1994. When the Gacaca Law was modified in 2004, a key change was the merging of the old second and third categories[24] to form a synthesised second category, thus reducing the overall number of categories to three, which by the 2008 version of the Gacaca Law were organised as follows:

First category:

a) any person who committed or was an accomplice in the commission of an offence that puts him or her in the category of planners or organisers of the genocide or crimes against humanity;

b) any person who was at a national leadership level and that of the prefecture level: public administration, political parties, army, gendarmerie, religious denominations or in a militia group, and committed crimes of genocide or crimes against humanity or encouraged others to participate in such crimes, together with his or her accomplice;

c) any person who committed or was an accomplice in the commission of an offence that puts him or her among the category of people who incited, supervised and ringleaders of the genocide or crimes against humanity;

d) any person who was at the leadership level at the sub-prefecture and commune: public administration, political parties, army, gendarmerie, communal police, religious denominations or in a militia, who committed any crimes of genocide or other crimes against humanity or encouraged others to commit similar offences, together with his or her accomplice;

e) any person who committed the offence of rape or sexual torture, together with his or her accomplice.

Second Category:

[24] In the original categorisation of crimes detailed in the Organic Law and the Gacaca Law of 2001, the second category comprised "persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death", while the third category comprised "persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person". (Organic Law, Article 2, see *supra* note 24; Gacaca Law, Article 51, see *supra* note 22) In Gacaca Law (Modified 2004), these two categories are merged to create a new second category, while the old fourth category, which deals with individuals charged with property-related crimes, is now rendered as category 3 (Gacaca Law (Modified 2004), Article 51, see *supra* note 22).

a) a notorious murderer who distinguished himself or herself in his or her location or wherever he or she passed due to the zeal and cruelty employed, together with his or her accomplice;

b) any person who tortured another even though such torture did not result in death, together with his or her accomplice;

c) any person who committed a dehumanising act on a dead body, together with his or her accomplice;

d) any person who committed or is an accomplice in the commission of an offence that puts him or her on the list of people who killed or attacked others resulting into death, together with his or her accomplice;

e) any person who injured or attacked another with the intention to kill but such intention was not fulfilled, together with his or her accomplice;

f) any person who committed or aided another to commit an offence against another without intention to kill, together with his or her accomplice.

Third Category:

A person who only committed an offence related to property. However, when the offender and the victim come to a settlement by themselves, settle the matter before the authorities or before the witnesses before commencement of this law, the offender shall not be prosecuted.[25]

Until 2008 *gacaca* had jurisdiction only over suspects in the second and third categories, while the first category cases were referred to the national court system and the ICTR. The 2008 modifications to the Gacaca Law, however, shifted a range of first category cases to *gacaca*, including those of suspected orchestrators of the genocide at the sub-prefecture and commune levels and suspected perpetrators of rape or sexual torture. The outstanding first category cases concerning national or prefecture-level planners of the genocide remain solely the jurisdiction of the national courts and the ICTR.[26] Although no explicit principles existed for the distribution of suspects between the ICTR and the national courts, an unofficial division

[25] Gacaca Law (Modified 2008), Article 9, see *supra* note 22.

[26] *Ibid*., Articles 5–7.

assumed that the ICTR would hear the cases of suspects considered to be among the most important planners and perpetrators of the genocide.[27]

For those suspects over whom *gacaca* had jurisdiction, the Gacaca Law divided the hearing of their cases, according to category, among the approximately 11,000 jurisdictions at two administrative levels. Each of these levels carried out a different task in the *gacaca* process. The cell was charged with the investigation of crimes committed within the cell during the specified period and with the production of four lists: first, of all those who lived in the cell before 1 October 1990; second, of all those who were killed in the cell during the specified period; third, of the damage to individuals or property inflicted during this time; finally, of suspects and their category of alleged crimes. The cell heard cases only of suspects in the third category. Cases of suspects in the first and second categories were heard at the sector level. The sector also functioned as the jurisdiction for the appeal of all cases heard in gacaca and the point from which certain first category cases were forwarded to the national courts.[28]

A crucial issue for the effective running of *gacaca* was the election of judges. *Gacaca* was unique among post-conflict judicial structures around the world in its mass involvement of the population in the delivery of justice. Over the decade of trials, nearly every Rwandan adult attended *gacaca* at some stage, including hundreds of thousands who provided eyewitness testimony. *Gacaca* judges were required to be Rwandan nationals over the age of 21 years, without any previous criminal convictions or having ever been considered a genocide suspect (except in relation to property crimes), and an honest, trustworthy person, "free from the spirit of sectarianism" but "characterised by a spirit of speech sharing".[29] Judges could not at any time have been an elected official, government or non-governmental organisation employee, trained judge or lawyer, or a member of the police, armed services or clergy. The stated motivation for this exclusion was to ensure

[27] The *ad hoc* division of jurisdiction between the ICTR and the national courts has on occasion created major tensions when the two bodies have sought jurisdiction over the same genocide suspects. See, for example, Philip Gourevitch, "Justice in Exile", in *New York Times*, 24 June 1996, A15; and Frédéric Mutagwera, "Détentions et poursuites judiciaires au Rwanda", in Jean-François Dupaquier (ed.), *La Justice internationale face au drame rwandais*, Karthala, Paris, 1996, pp. 17–36.

[28] Gacaca Law (Modified 2008), Articles 5–7, see *supra* note 22.

[29] *Ibid*., Article 14. The phrase "speech sharing" appears to entail that judges should be capable of encouraging the community to participate in *gacaca* hearings and of facilitating peaceful, productive discussions in the General Assembly.

that *gacaca* was a popular process, run by citizens at the local level and free from actual or perceived political or legal interference.

Both levels of *gacaca* – cell and sector – consisted of a General Assembly, a bench of judges, a president and a co-ordinating committee. At the cell level, the General Assembly constituted every resident of the cell over the age of 18 years. In October 2001, General Assemblies across the country elected 19 judges to form cell-level benches of *inyangamugayo* (in Kinyarwanda, "a person of integrity" or "wise and respected elder") while also nominating five representatives to form the General Assembly at the sector level. The revised Gacaca Law in 2004 reduced the number of judges at both levels of jurisdiction to nine, with five deputies also nominated who could substitute for any of the nine judges if they were absent.[30] In July 2004, the *gacaca* judges who were elected in 2001 decided among themselves which individuals would stay on as either judges or deputies, thus reducing the number of judges nationwide from approximately 250,000 to around 170,000.[31] Surveys into the make-up of benches of *gacaca* judges across Rwanda show that most judges were middle-aged, professional, educated members of the community, with women constituting around 35 per cent of all *inyangamugayo* at the cell level, and judges with higher education usually nominated to the sector level of *gacaca*.[32]

Gacaca judges were empowered to carry out various tasks, including summoning witnesses to testify at hearings, issuing search warrants and imposing punishments on those found guilty. Judges usually sat once a week before a required quorum of 100 members of the General Assembly. In phase one of a *gacaca* jurisdiction, which ideally comprised six weekly meetings (but invariably took much longer), the Assembly gathered to determine a schedule of hearings and to begin compiling the four lists mentioned above. In phase two, which comprised the seventh meeting, the General Assembly gathered to produce a detailed dossier of evidence on each individual accused of a crime and listed during the sixth meeting of phase one. The accused then had the opportunity to respond to the evidence brought against them during phase three of *gacaca*, after which in phase

30 *Ibid*., Articles 13 and 23.

31 IRIN News, "Rwanda: Plans to Reform Traditional Courts", 16 June 2004 (http://www.irinnews.org/report/50257/rwanda-plans-to-reform-traditional-courts).

32 Penal Reform International, "Interim Report on Research on Gacaca Jurisdictions and its Preparations (July–December 2001)", PRI, Kigali, January 2002, p. 32; African Rights, 1995, "Gacaca Justice", p. 6, see *supra* note 2.

four the judges weighed all of the evidence they had heard and passed judgment on defendants.[33] The president of the judges bench chaired all meetings and was responsible for leading an orderly, directed discussion that encouraged truthful testimony and created a space for victims and survivors to describe their personal pain and loss.

A key role of the president in this scenario was to maintain order within the Assembly, especially as the discussion could become emotionally charged and testimonies may diverge. The Ministry of the Interior was tasked with guaranteeing the security of judges, suspects and the community at large during *gacaca* hearings, usually by providing one or two armed security guards for all sessions.[34] The president also had to encourage those who were reluctant to speak – especially women and the young – to testify. In particularly emotional or complex cases where witnesses were unwilling to testify in front of a large gathering, judges (or in cases involving sexual violence, a single judge) could convene *in camera* with a witness to hear evidence. Lawyers were forbidden from assisting either suspects or witnesses at any stage of a hearing as their involvement was seen as a potential threat to the open, non-adversarial approach of *gacaca*. *Gacaca*'s insistence on delivering justice without lawyers constituted one of the primary reasons legal critics and human rights groups have been so hostile toward the institution.

After hearing evidence against a suspect, judges retired *in camera* to consider the individual's guilt, before which judges were expected to recuse themselves from any cases involving friends or family members to the second degree of relation. The president would attempt to reach a consensus among the judges before deciding on the person's guilt. However, in cases where consensus was impossible, a majority decision by the nine judges sufficed. The bench then announced its decision concerning a suspect's guilt to the General Assembly, either at the same meeting or the next, at which point those convicted of crimes were entitled to appeal the bench's decision first to the *gacaca* jurisdiction that initially heard their case or, if

[33] In very few *gacaca* jurisdictions do the three phases occur as quickly as originally planned. For example, by June 2003 only 16 of the 73 pilot *gacaca* jurisdictions inaugurated in June 2002 had completed both phases one and two of the *gacaca* process and none had yet begun phase three. Republic of Rwanda, "La situation actuelle des juridictions gacaca", Kigali, Supreme Court of Rwanda, 6th Chamber, 25 June 2003, pp. 1–2.

[34] Republic of Rwanda, "Les parténaires du processus gacaca", Official Rwandan Government website (http://www.inkiko-gacaca.gov.rw/Fr/Partenaires.htm).

they remained dissatisfied with this judgment, to the sector level of *gacaca* and upward.[35]

The Gacaca Law dictated that punishment should be meted out in various ways. Individuals who refused to testify at *gacaca* or were found to have provided false testimony were subject to a prison term of three to six months.[36] The centrepiece of the *gacaca* judicial structure was a pre-determined matrix of sentences that incorporated a system of confession and plea bargaining that is foreign to the European judicial system but finds a place in some jurisdictions in the United States. According to this matrix, suspects could decrease their sentences by at least half if they confessed their crimes. Another important feature of the *gacaca* sentencing mechanism was the combination of prison terms and community service. Most community service was carried out in *travaux d'intérêt général* ('TIG') camps, administered by Rwanda Correctional Services, and involved convicted perpetrators in community work programmes such as road building, clearing ground, making bricks and rebuilding houses for genocide survivors. The sentencing structure, as established by the Gacaca Law, operates as shown in Table 1 in the annex to this chapter.[37]

7.4. Virtues of *Gacaca*'s Abbreviated Criminal Procedure for Genocide Crimes

This chapter turns now to analyse the efficacy and impact of *gacaca*'s use of abbreviated criminal procedure for genocide crimes. This section highlights two principal virtues of this aspect of *gacaca*, namely its capacity to deliver accountability for everyday genocide perpetrators while also reintegrating them into their home communities, and the important forms of post-genocide truth that have emerged through *gacaca*'s emphasis on plea-bargaining and popular participation during hearings.

First, *gacaca* has proven remarkably successful at expediting the post-genocide justice process, delivering accountability for hundreds of thousands of genocide perpetrators. It has also commuted many convicted perpetrators' sentences to overcome the problem of overcrowded prisons and facilitated the reintegration of most detainees into everyday society. By mid-2012, *gacaca* had completed the backlog of genocide cases, including

35 Gacaca Law (Modified 2008), Articles 7, 23 and 24, see *supra* note 22.

36 Gacaca Law (Modified 2004), Article 29, see *supra* note 22.

37 *Ibid.*, Articles 72–81; Gacaca Law (Modified 2008), Articles 17–22, see *supra* note 22.

the multitude of new suspects that the population identified since *gacaca* began and the hundreds of first category cases transferred from the national courts to *gacaca* since 2008. Thus, the Rwandan government delivered on its promise of comprehensive prosecutions of those responsible for committing genocide crimes, but without recreating the problem of overcrowded jails that necessitated *gacaca* in the first place. It also completed the genocide caseload in the relatively short period of 10 years at a cost of only USD 40 million.[38] *Gacaca* therefore proved substantially cheaper to run than more conventional justice institutions, especially when compared to the immense costs involved with the running of the ICTR, which cost more than USD 1 billion.[39]

By clearing the backlog of genocide cases, *gacaca* also improved living conditions in Rwandan prisons and saved government resources necessary to sustain such a large prison population. *Gacaca*'s ability to release detainees more rapidly created more living space for the detainees who remain. In October 2008, the International Centre for Prison Studies stated that 59,311 prisoners remained in Rwanda's jails, which had a capacity of 46,700, although this figure has not been updated since 2002 and does not account for the construction of new prisons around Rwanda.[40] These statistics indicate the significant decrease in the overall prison population, which stood at around 120,000 at the beginning of *gacaca*. The problem of overcrowded prisons in Rwanda has therefore generally been overcome.

Second, empirical research shows that *gacaca*'s emphasis on popular participation during hearings – a key feature of its abbreviated procedure – has yielded significant dividends in terms of truth. In particular, much of the Rwandan population argues that *gacaca* has been important for recovering truth in the form of legal facts regarding the genocide and therapeutic truth in terms of allowing individuals to tell and hear personal narratives of the genocide that may allow them to deal emotionally and psychologically with the past. Regarding legal truth, many survivors argue that they partici-

38 Republic of Rwanda, "Ministry of Finance and Economic Planning Budgets, 2002–2009", Ministry of Finance and Economic Planning. It should be noted, however, that this figure does not include *gacaca*-related expenditure by other government bodies such as the National Unity and Reconciliation Commission, the Ministry of Justice and the Rwanda Correctional Services.

39 Hirondelle News Agency, "Cost of the ICTR to Reach $1 Billion by the End of 2007", 12 May 2006 (http://allafrica.com/stories/200605120745.html).

40 International Centre for Prison Studies, 2002, see *supra* note 17.

pated readily in legal truth-telling at *gacaca*, for example by giving eyewitness testimony concerning genocide crimes and by helping construct the four lists of evidence discussed above. Patrice, a 62-year-old survivor in Ruhengeri, whose wife, two sons and one daughter were killed during the genocide, said:

> I hope that we [survivors] will be allowed to speak freely at gacaca. I have much to tell about what I saw during the genocide. […] I saw many crimes with my own eyes and I want to tell what I know at *gacaca*.[41]

Gacaca's compilation of testimony from 11,000 communities today provides a rich, diverse reservoir of historical material regarding genocide crimes.

At the same time, many suspects were very aware that their truth-telling at *gacaca*, particularly as it incorporated public confession and apology, would lead to their exoneration if they were innocent of crimes or allow them to benefit from *gacaca*'s plea-bargaining system if they were guilty. Richard, a suspect in Butare, who argued that he had been unjustly accused of complicity in murder during the genocide, said: "The community will definitely accept what I say at *gacaca*. I will stand up and tell them everything I saw when these killings occurred and they will agree that I am telling the truth".[42] More than half of the approximately 300 individuals interviewed in the general community between 2003 and 2012, who themselves were neither survivors nor suspects but had relatives who were accused of genocide crimes, described the primary function of *gacaca* as the potential for truth-telling to exonerate their loved ones, whose innocence they maintained. All of these individuals said that they would testify or had already testified at *gacaca* to clear their loved ones' names.[43] "*Gacaca* is a source of light that brings the truth", said Agathe, a 46-year-old widow in Nyamata, whose parents and three siblings were accused of genocide crimes and were still in prison. "It will allow us to see who is guilty and who is innocent".[44]

41 Author's Survivor Interviews, Patrice, Ruhengeri (author's translation).

42 Author's Solidarity Camp Interviews, Butare (no. 15) (author's translation).

43 Author's Fieldnotes, 2003–2009.

44 Author's General Population Interviews, Agathe, Kigali Ngali, Nyamata, 19 May 2003 (author's translation).

Many popular sources also argued that truth-telling at *gacaca* served an important therapeutic function. Both suspects and survivors argued that the opportunity to speak openly at *gacaca* about events and emotions concerning the genocide contributed to their personal healing. Many guilty suspects claimed to have gained a sense of release from feelings of shame and dislocation by confessing to, and apologising for, their crimes in front of their victims and the General Assembly at *gacaca*. Many survivors meanwhile claimed to have overcome feelings of loneliness by publicly describing the personal impact of genocide crimes and receiving communal acknowledgement of their pain. As Paul, a survivor whose father, two brothers and one sister were killed during the genocide, said after a gacaca hearing in Ruhengeri:

> *Gacaca* is important for us survivors because it helps us live and work in the community again. […] All the survivors come together and talk about what has happened. We realise that we are in the same situation, that we have all had family who were killed. We understand each other and we realise that we are not alone.[45]

7.5. Challenges of *Gacaca*'s Abbreviated Criminal Procedure for Genocide Crimes

While the previous section highlighted important virtues of *gacaca* in terms of accountability and truth recovery, this section argues that *gacaca*'s use of abbreviated criminal procedure also produced significant problems on these same two fronts. Regarding justice through *gacaca*, many survivors increasingly criticised the lenient sentences handed down to many convicted *génocidaires*. In particular, many survivors perceived community service as insufficient punishment, given the gravity of crimes committed during the genocide. Chantal, a survivor in Bugesera, recognised that many detainees had already spent years in jail and that there were understandable pragmatic reasons for not returning perpetrators to prison *en masse*. She argued, however, that the community service demanded of some perpetrators – "you kill six or seven people and you spend only six or seven months doing TIG" – was inadequate.[46] Many survivors argued that convicted perpetrators have in the main benefited from the government's need to rapidly empty the

[45] Author's Gacaca Interviews, Paul, Ruhengeri, Buhoma, 4 May 2003 (author's translation).

[46] Author's Survivor Interviews, Chantal, Kigali Ngali, Bugesera, 9 September 2008.

prisons and thus *gacaca*'s tendency toward lenient sentencing. It appears that some perpetrators and their families share this view. Alphonse, a convicted *génocidaire* in Bugesera, said: "*Gacaca* has been good here because most of the detainees are now back with their families. Some have gone back to jail but most are here now and working on their farms again".[47]

Second, while the degree and types of truth that have emerged through *gacaca* have provided the benefits discussed in the previous section, significant truth-related problems also developed. *Gacaca*'s attempt to deal with the massive backlog of genocide cases involved weekly hearings over 10 years in many communities. For many Rwandans, this meant hearing repeatedly highly emotive testimony concerning genocide crimes, with the result that *gacaca* increased levels of trauma among many of its participants. The retraumatisation of many individuals who are still dealing with the emotional and psychological legacies of the genocide is one of the major costs of *gacaca*'s truth process.

Furthermore, the truth component of *gacaca* itself suffered from many participants' instrumental calculations based on the plea-bargaining scheme. In particular, many genocide suspects had a major incentive to confess falsely to crimes in order to benefit from *gacaca*'s predetermined system of sentencing. A case in Bugesera district of Kigali Ngali province amply illustrates this point. At a *gacaca* hearing by a small banana frond-encircled lake in June 2006, a suspect came from a nearby prison to confess to his genocide crimes. Standing in front of around 200 people in the General Assembly, he admitted to looting some property from a house on the edge of the community, near the main road leading to Nyamata. When the suspect finished speaking, the judges highlighted for the audience's benefit that he had admitted to committing third category crimes involving property and that, if found guilty, he would need to give the same amount of goods or the financial equivalent to the victims of his crimes and perhaps perform some community service. The judges asked if anyone in the General Assembly wished to respond to the suspect's confession. After a lengthy silence, an elderly lady stood at the back of the gathering and asked permission to speak. When this was granted, she launched into a searing tirade: "This man is lying and you judges are not doing your job because you should know that he is lying". The judges were visibly shocked and

[47] Author's Detainee Follow-Up Interviews, Alphonse, Kigali Ngali, Bugesera, 9 September 2008 (author's translation).

asked the woman to explain herself. She said that she knew the suspect was lying because the house from which he claimed to have looted property was her house, and the judges should have known this because, six months earlier, they had convicted a different man for these same crimes.

The woman sat down and the judges conferred. After they had deliberated, they asked several questions of others sitting in the General Assembly, then announced that the woman was correct that this case had already been completed at an earlier hearing. After asking several questions of the suspect, they stated that he had clearly provided a false confession. The suspect initially protested but soon admitted that this was true. It emerged that he was in fact innocent of all genocide crimes. After spending many years in prison, however, he had deemed it preferable to fabricate a confession to a low category of genocide crime, which would bring a minimal sentence, rather than spend further years in jail, with no immediate prospect of release. On this basis, the *gacaca* judges found the detainee guilty of perjury and sentenced him to two years in jail. In short, the suspect had gambled on *gacaca*'s plea-bargaining system and lost.[48] Such cases confirm the fears expressed by many genocide survivors that *gacaca*'s use of plea bargaining to extract confessions from suspects and thus expedite the judicial process would lead to a spate of false confessions.

7.6. Conclusion: General Lessons from the *Gacaca* Experience

Rwanda has attempted to deliver justice on a scale unimaginable in most countries, seeking to involve such large swathes of the population in the prosecution of hundreds of thousands of genocide suspects. The use of the community-based *gacaca* jurisdictions to abbreviate the criminal procedure for the prosecution of genocide crimes stemmed from drastic resource constraints, as well as the belief that only face-to-face engagement among suspects, survivors and the general population during hearings could facilitate reconciliation and other important social goals. The experience of *gacaca* shows that it is possible to deliver accountability to rank-and-file perpetrators of mass crimes such as genocide and to do so in a way that involves the population most directly affected by conflict, thus maximising the societal impact of justice. For many Rwandans, that impact has been the rapid reintegration of their loved ones into the community after their trials and/or time spent in prison. In interviews, many Rwandans state that the country

[48] Author's Gacaca Observations, Kigali Ngali, Bugesera, 12 June 2006.

will benefit from having delivered accountability and thus sanctioning the crimes of even low-level perpetrators, but without strict punitive measures, including lengthy prison terms. For others, however, *gacaca* has been too lenient in decreasing prison terms and employing community service as punishment for individuals found guilty of crimes as grave as murder. Such disagreements point less to fundamental flaws in the *gacaca* process than to the impossible balancing act required in the post-genocide society – namely, the need for acknowledgement of crimes and for justice alongside the need to reintegrate perpetrators into their towns and villages to help rebuild the social and economic foundations of the country.

7.7. Annex

Table 1: *Gacaca* sentencing scheme.

Judgment / Category	Guilty with no confession	Guilty with confession during trial	Guilty with confession before trial	Minors (14 to 18 years old) when offence committed*
1	Life imprisonment with special provisions	25–30-year prison term; possibility of commuting half to community service	20–24-year prison term; possibility of commuting half to community service	10–20-year prison term if guilty without confession; 8–9-year prison term following confession during trial or 6.5–7.5-year prison term following confession before trial
2 (a–e) (judged at sector level; appeals to sector level)	10–15-year prison term	6.5–7.5-year prison term; possibility of commuting half to community service and having one-third suspended	6–7-year prison term; possibility of commuting half to community service and having one-third suspended	10–15-year prison term if guilty without confession; otherwise, half of adult sentence; possibility of commuting half to community service and having one-third suspended, except when no confession is made
2 (f) (judged at sector level; appeals to sector level)	5–7-year prison term; possibility of commuting half to community service	3–5-year prison term; possibility of commuting half to community service and having one-third suspended	1–3-year prison term; possibility of commuting half to community service and having one-third suspended	Half of adult sentence; possibility of commuting half to community service
3 (judged at cell level; appeals to sector level)	Reparations for damage caused or equivalent community service			

* Minors who were less than 14 years old at the time of the offence cannot be prosecuted at *gacaca* but instead are placed in special solidarity camps (Gacaca Law (Modified 2008), Article 20).

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Abbreviated Criminal Procedures for Core International Crimes

Morten Bergsmo (editor)

This book is about jurisdictions that open more war crimes case files than they can process by trial. Such situations are characterised by a backlog of opened case files. The book discusses the legal policy question whether new forms of abbreviated criminal procedures should be created for such situations, to process high numbers of less serious core international crimes on the basis of criminal law and procedure. The volume is not about countries that have suffered many war crimes but without opening more case files than they can handle. Nor is it about the mapping of backlogs of cases, prioritisation of cases, non-criminal justice responses to core international crimes, or reducing the length of standard proceedings.

In his Chapter 1, the editor Morten Bergsmo suggests that, upon reflection, this would seem to be one of the main areas of international criminal procedure that remains under-researched. He argues that ideas should be found in national abbreviated criminal procedures, in particular in Italian law – as analysed in Chapter 3 by Kai Ambos and Alexander Heinze – rather than primarily in the limited transitional justice practice on the question. The book presupposes that abbreviated criminal procedures for core international crimes are in accordance with international human rights standards and consensual in nature.

The volume has further contributions by Jan Braathu, Meddžida Kreso, Milorad Novković, Mark Drumbl, Ilia Utmelidze, Gorana Žagovec Kustura, Maria Paula Saffon, Phil Clark, Gilbert Bitti, Marieke Wierda and Hanne Sophie Greve.

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