TRYING INTERNATIONAL CRIMES ON LOCAL LAWNS: THE ADJUDICATION OF GENOCIDE SEXUAL VIOLENCE CRIMES IN RWANDA'S GACACA COURTS

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INTRODUCTION

During the Rwandan genocide sexual violence was used as a weapon of war to ravage a people. Women were tortured psychologically, physically and emotionally. For some women the "dark carnival" of the genocide has not ended.[1] Living side by side with the men who committed violence against them, they must confront their past every day. This Article explores how,

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[1] Gérard Prunier wrote:

> In Kigali, the Interahamwe and Impuzamugambi . . . had tended to recruit mostly among the poor. As soon as they went into action, they drew around them a cloud of even poorer people, a lumpen proletariat of street boys, rag-pickers, car-washers and homeless unemployed. For these people, the genocide was the best thing that could have happened to them. They had the blessings of a form of authority to take revenge on socially powerful people as long as these were on the wrong side of the political fence. They could steal, they could kill with minimum justification, they could rape . . . This was wonderful. The political aims pursued by the masters of this dark carnival were quite beyond their scope. They just went along, knowing it would not last.

GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 231–32 (1995).

post-genocide, the country has come to adjudicate these crimes in gacaca.

Gacaca is a unique method of transitional justice, one that calls upon traditional roots, bringing community members together to find the truth of what happened during the genocide and punish those who perpetrated violence. One scholar calls gacaca, "one of the boldest and most original 'legal-social' experiments ever attempted in the field of transitional justice."[2] Others, however, criticize gacaca for the impunity it grants to crimes committed by the current ruling party, the Rwandan Patriotic Front (RPF),[3] and its lack of due process and nonconformance to international fair trial processes.[4] Most authors find that, for cases of sexual violence, gacaca is a wholly unsuitable forum.

When gacaca began in 2001, sexual violence[5] was not within its jurisdiction. Crimes of sexual violence were classified in category one (the highest category of crimes) along with the

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[2] Maya Goldstein Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355, 355–56 (2004).

[3] HUMAN RIGHTS WATCH, WORLD REPORT 2006 123 (2006), *available at* http://www.hrw.org/legacy/wr2k6/. Peter Uvin & Charles Mironko, *Western and Local Approaches to Justice in Rwanda*, 9 GLOBAL GOVERNANCE 219, 227 (2003).

[4] *See* AMNESTY INT'L, RWANDA: GACACA: A QUESTION OF JUSTICE (2002), *available at* http://www.amnesty.org/en/library/info/AFR47/007/2002. *But see* Amaka Megwalu & Neophytos Loizides, *Dilemmas Of Justice And Reconciliation: Rwandans And The Gacaca Courts,* 18 AFR. J. INT'L & COMP. L. 1 (2010) ("Advocates also argue that several problems attributed to Gacaca already existed in the other judicial systems before Gacaca was set up. For example, in the national court system, where most genocide cases would have been tried, there is a great deal of corruption, the personnel are barely qualified, due process rights are not guaranteed, and the government (and affluent private Rwandans) may exert undue influence on the judicial staff.").

[5] In this Article, the term "sexual violence" will be used to include the forms of rape, sexual torture, sexual abuse and sexual mistreatment experienced by victims of the Rwandan genocide. In some cases the word "rape" or "sexual torture" will be used because it more accurately reflects what was used in the cited document. *See generally* WORLD HEALTH ORGANIZATION, *Sexual Violenc*, http://www.who.int/gender/violence/sexual_violence/en/index.html (last visited Mar. 3, 2010).

crimes of planning and supervising the genocide, and were under the jurisdiction of the national courts. Eventually, sexual violence cases were heard in the gacaca courts after a 2008 amendment to the gacaca law.

After the 2008 amendment, 6608 cases of rape or sexual torture were transferred from the national courts to the gacaca jurisdiction to be completed as the gacaca justice system was brought to a close.[6] The Minister of Gender and Women's Development in Rwanda estimated that 250,000 women were raped during the genocide.[7] Human Rights Watch suggests the number is much higher.[8] The question arises: what of the other 243,392 victims? How were their cases adjudicated?

The history of the classification of sexual violence as a category one crime is, in one way, a triumph of the woman's rights movement in Rwanda. Sexual violence was meant to be considered the most serious of crimes. However, this triumph resulted in sexual violence cases being moved to the side as the national courts practiced triage on their judicial system. The short time frame allocated for the adjudication of sexual violence trials in gacaca allowed for perpetrators to escape trial in national courts and sent inconsistent messages to the victims. This Article reveals that many of those who committed crimes of sexual violence received de facto amnesty.

Academics have argued that it would be inappropriate to adjudicate sexual violence in gacaca, a public court. The shame and fear women associated with the sexual nature of the crimes committed against them meant that the adjudication process

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[6] GACACA COURTS PROCESS: IMPLEMENTATION AND ACHIEVEMENT, REPUBLIC OF RWANDA NATIONAL SERVICE OF GACACA COURTS (2008) [hereinafter GACACA COURTS PROCESS] (on file with author).

[7] IMMIGRATION AND REFUGEE BD. OF CAN., RWANDA: UPDATE TO RWA36561.E OF 30 MARCH 2001 REGARDING THE PROTECTION AVAILABLE TO WOMEN WHO ARE VICTIMS OF VIOLENCE (2003), *available at* http://www.unhcr.org/refworld/docid/403dd21810.html [hereinafter PROTECTION AVAILABLE TO WOMEN].

[8] *See* BINAIFER NOWROJEE, HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH, 34 (1996) *available at* http://www.hrw.org/en/reports/1996/Rwanda.htm.

would be a re-victimization. It is easy to conclude that the low number of sexual violence cases adjudicated in Rwanda reflects this social and cultural context. However, this Article will show that personal, cultural and societal forces were not the only drivers of the low caseload. Rather, the structure and process of the judicial mechanism prohibited women's access to justice.

This Article argues that the classification of rape and sexual torture as a category one crime within the jurisdiction of the national courts impeded access to justice for victims. In Part I, I will discuss the history of sexual violence during the genocide, the history of women in Rwanda, the history and mechanics of the gacaca justice system and the criminalization of sexual violence in international law. In Part II, I will examine what determined women's participation in gacaca and the problems women faced in participating in gacaca. I argue that while past scholars have found that the participation of victims of sexual violence was constrained by social mores, women do want to access justice and were inhibited because of legal and procedural features of gacaca. In Part III, I will identify the long-term impact of the manner in which sexual violence crimes from the genocide were adjudicated. By leaving sexual violence out of the gacaca process for the majority of time, women's voices were left out of the community narrative building process and there is a risk that those types of crimes will never be deemed 'wrong.' Lastly, I will conclude with the lessons that can be taken from Rwanda's endeavor to provide justice to victims of sexual violence. I argue that crimes of sexual violence should have initially been included within the jurisdiction of gacaca courts and that improved reporting procedures and training would have engendered greater participation.

Transitional justice is not a singular act; there are many tools to rebuild a country, and no single method can "adequately address and repair the injuries of the past nor chart a fully just future."[9] Recognizing that, this Article is an evaluation of the national adjudication of sexual violence crimes from the Rwandan genocide; a discussion of the reparations offered to victims is outside of its scope.

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[9] Katherine Franke, *Gendered Subjects of Transitional Justice*, 15 COLUM. J. GENDER & L. 813, 813 (2006).

I. Background

A. Sexual violence during the 1994 Genocide of the Tutsis

1. The nature of sexual violence during the Genocide

In the spring of 1994, 500,000 to 800,000 Rwandans[10]

[10] Scholars vary in their estimates of the number of deaths during the genocide. Alison Des Forges estimates that 500,000 Tutsi were murdered. ALISON DES FORGES, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 18 (1999). Gerard Prunier, however, estimates "the least bad possible" number of deaths to be 850,000. *See also* PRUNIER, *supra* note 1, at 265.

were murdered at the hands of the *genocidaires.*[11] Over only a few months, men, women and children were killed by their

[11] The story leading up to the genocide in 1994 is full of complexities—the genocide was the culmination of nearly one-hundred years of socially and politically constructed conflict. The targets were members of the Tutsi minority and moderate Hutus who were seen as helping the Tutsis. The perpetrators included members of the *Interahamwe*, "those who stand (fight, kill) together", and *Impuzamugambi*, "those who have the same (or a single) goal", soldiers of the Rwandan Armed Forces (Forces Armées Rwandaises, FAR), and civilians. Historically, the Hutu and Tutsi share the same language, culture and religion; marriage amongst members of the two groups was common. The two groups share the same tastes in food, music and art, and names are transposable. Since the fifteenth century, despite their minority status, the Tutsis held aristocratic positions in a feudal system with Tutsi monarchs and Hutu serfs. It wasn't until the early twentieth century that Christian missionaries and colonizers institutionalized the ethnic differences. The Hutu demanded control in 1957 and, after independence Rwanda was run by two different military dictatorships. Tens of thousands Tutsis fled to neighboring countries during this period.

In 1993, the government of Rwanda and RPF signed a dysfunctional peace agreement, the Arusha Accords, which provided a veil behind which both sides amped up for war. Habyarimana's government put in place the foundation for the genocide: an effective propaganda machine, supplies of arms and ammunition, and the people who propelled the genocide—gangs of largely unemployed youth normalized to violence, political leaders, military troops and local administrators committed to achieving Hutu Power. Through the written press and then through the RTLM radio, extremists taught that the two ethnic groups were different peoples incapable of living together, setting the stage for genocide. "Slaughtering as a civic duty began in 1991 and 1992." PRUNIER, *supra* note 1, at 231–32.

The perpetrators of the genocide were often ordinary citizens, not specifically organized to kill but following orders and sometimes acting out of fear of reprisal against those who were thought to be Tutsi sympathizers. The genocide ended one-hundred days after it started, with the RPF rebels overthrowing the Hutu regime.

neighbors, friends, strangers and leaders.[12] The violence was perpetrated in a way that not only destroyed human lives, but also institutions, infrastructure, communities, families and social bonds.[13]

Exact figures on the number of cases of sexual violence during the genocide are unknown.[14] Some estimate that between 250,000 to 500,000 women were raped.[15] Others argue that nearly every female adult and adolescent who survived the

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[12] *See generally* DES FORGES, *supra* note 10; JEAN-PIERRE CHRÉTIEN, THE GREAT LAKES OF AFRICA: TWO THOUSAND YEARS OF HISTORY (2003); PRUNIER, *supra* note 1; PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA (1998). *See also* Special Rapporteur on the Situation of Human Rights in Rwanda, U.N. Comm'n on Human Rights, *Report on the situation of human rights in Rwanda, under paragraph 20 of resolution S-3/1 of 25 May 1994*, U.N. Doc. E/CN. 4/1997/61 (Jan. 17, 1995), *available at* http://www.unhcr.org/refworld/docid/3ae6b1060.html [hereinafter *Rep. on Human Rights in Rwanda*]; INT'L PANEL OF EMINENT PERS. TO INVESTIGATE THE 1994 GENOCIDE IN RWANDA AND SURROUNDING EVENTS, ORG. OF AFR.UNITY, RWANDA: THE PREVENTABLE GENOCIDE 160 (2000).

[13] NAHLA VALJI, U.N. DEV. FUND FOR WOMEN *sub nom.* U.N. WOMEN, *Supporting Justice: An Evaluation of UNIFEM's Gender and Transitional Justice Programming in Rwanda (1994–2008)* 6 (2008), *available at* www.unifem.org/attachments/gender_issues/women_war_peace/SupportingJustice_AnEvaluationOfUNIFEMsGenderAndTransitionalJusticeProgrammingInRwanda.pdf.

[14] The international community was slow to officially recognize sexual violence as a key weapon in the arsenal of the *genocidaires*. The 1994 preliminary report of the Commission of Experts, a group mandated by the Security Council to investigate violations of international humanitarian law during the genocide, did not include any reference to sexual violence. *See* U.N. Secretary-General, *Preliminary report of the Independent Commission of Experts Established in accordance with Security Council Resolution 935*, U.N. DOC. S/1994/1125 (Oct. 4, 1994) [hereinafter *Commission of Experts*].

[15] VALJI, *supra* note 13, at 7; Megan Carpenter, *Bare Justice: A Feminist Theory Of Justice And Its Potential Application To Crimes Of Sexual Violence In Post-Genocide Rwanda*, 41 CREIGHTON L. REV. 595, 636 (2008) (claiming that the 250,000 number comes from the Minister of Gender and Women's Development in Rwanda). *See also* Maggie Zraly, Bearing: Resilience Among Genocide-Rape Survivors in Rwanda 22 (January 2008) (unpublished Ph.D. dissertation, Case Western Reserve University), *available at* http://gradworks.umi.com/32/76/3276748.html.

genocide experienced some type of sexual violence;[16] and if not, they were profoundly affected by it.[17] According to one scholar, "rape constitutes the central experience of the genocide period for most female survivors."[18] Hutu women were also victims of sexual violence because of associations with Tutsis—through marriage or protection—or affiliation with the political opposition.[19]

The crimes of sexual violence were extensive, including rape, gang rape, forced slavery, forced incest, intentional HIV infection and sexual torture.[20] Sexual mutilation included the pouring of boiling water into the vagina, the opening of the womb to cut out the unborn child before killing the mother, cutting off breasts, slashing the pelvis area, removal of genital organs, introduction of harmful objects into the vagina and mutilation of the vagina.[21] Women and girls were pierced with spears, in some cases from their vagina to their mouth.[22]

The women were often raped after witnessing the torture and killing of their families, and the destruction and looting of their homes.[23] Many murder victims were raped before they

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[16] NOWROJEE, *supra* note 8, at n.32.

[17] ANNE-MARIE DE BROUWER & SANDRA KA HON CHU, THE MEN WHO KILLED ME 11 (2009).

[18] Sarah L. Wells, *Gender, Sexual Violence and Prospects for Justice at the Gacaca Courts in Rwanda*, 14 S. CAL. REV. L. & WOMEN'S STUD. 167, 183 (2005).

[19] NOWROJEE, *supra* note 8, at 3.

[20] NOWROJEE, *supra* note 8, at 2; *see also* Zraly, *supra* note 15, at 27 (referring to the "weaponization" of HIV); AMNESTY INT'L, RWANDA: "MARKED FOR DEATH", RAPE SURVIVORS LIVING WITH HIV/AIDS IN RWANDA (2004), *available at* http://www.amnesty.org/en/library/info/AFR47/007/2004.

[21] Zraly, *supra* note 15, at 22.

[22] *Id.*

[23] NOWROJEE, *supra* note 8, at 1.

were killed.[24] In some cases, women were forced to kill their own children,[25] or, in extreme cases, rape their own children.[26] Some women, before being killed, were forced to commit incest with a family member, or had their breasts cut off.[27] According to survivors, even the corpses of some women were raped. After murdering a woman, the militia would sometimes leave her naked with her legs spread apart to dehumanize her.[28]

During the genocide, houses were set aside specifically for the purpose of keeping women to rape.[29] Women were pulled aside at checkpoints or roadblocks, and government soldiers would block village exits to prevent people from escaping, allowing the *interhamwe* time to find all of the Tutsi and rape and murder them.[30]

In a January 1996 report, the United Nations Special Rapporteur on Rwanda, Rene Degni-Segui, found that:

> Rape was the rule and its absence the exception . . . According to the statistics, one hundred cases of rape give rise to one pregnancy. If this principle is applied to the lowest figure [the numbers of pregnancies caused by rape are estimated to be between 2,000-5,000], it gives at least 250,000 cases of rape and the highest figure would give 500,000, although this figure also seems excessive. However, the important aspect is not so much the number as the principle and

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[24] *Id.*

[25] *Id.* at 17.

[26] DE BROUWER & CHU, *supra* note 17.

[27] Zraly, *supra* note 15, at 21.

[28] NOWROJEE, *supra* note 8, at 17.

[29] *Id.* Zraly, *supra* note 15, at 22.

[30] Alette Smeulers & Lotte Hoex, *Studying the Microdynamics of the Rwandan Genocide*, 50 BRIT. J. CRIMINOLOGY 435, 443, 450 (2010).

the types of rape.[31]

The National Population Office estimated that the number of pregnancies resulting from the war (also known as "*enfants non-désirés*" (unwanted children) or "*enfants mauvais souvenir*" (children of bad memories) to be between 2000 to 5000.[32] In some cases, these pregnancies resulted in infanticide and self-induced abortions. In other cases, mothers who decided to keep the children have been rejected by their families.[33]

Women who survived the genocide faced innumerable physical, emotional and psychological problems, in addition to a difficult economic situation. Without male relatives to rely on for economic support, some genocide survivors found themselves destitute.[34]

Senator Aloysea Inyumba, former Minister of Family, Gender, and Social Affairs noted that, "what was particular to the Rwandan experience was that the atrocities took place in the most intimate settings—between colleagues, teachers and students, neighbours and, most destructively, within families. . . ."[35] While the rapes were intimate, they were often in public settings. Rapes occured at victims' or perpetrators' houses, however, "more often it [the rape] was committed in plain view of others, at sites such as schools, churches, roadblocks and government buildings."[36] The public nature of the crime was further emphasized "frequently" when a woman's corpse was left "spread-eagle" in public view—as a reminder for all who passed of the *genocidaires* domination and the women's degradation.[37]

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[31] *Rep. on Human Rights in Rwanda*, *supra* note 12.

[32] NOWROJEE, supra note 8, at 3.

[33] *Id.*

[34] *Id.*

[35] VALJI, *supra* note 13, at 6.

[36] DE BROUWER & CHU, *supra* note 17, at 17.

[37] *Id.*

2. Propaganda Vilified Tutsi Women and Was Used to Incite Genocide and Sexual Violence

Propaganda was used to incite genocidal tendencies amongst the people of Rwanda; the government taught its people to use sexual violence as a weapon of war.[38] The propaganda incited sexual violence to accomplish the dual task of dehumanizing and subjugating all Tutsi women[39] and as a means to dominate and undermine Tutsi men.[40] Through this dehumanization and sexualization of Tutsi women, a climate was created in which "the mass rape of Tutsi women appeared to be an appropriate form of retribution for their purported arrogance, immorality, hyper-sexuality, and espionage."[41]

The propaganda distorted Rwanda's history to paint Tutsi women as foreign conquerors who subjugated the majority Hutu through sexual trickery and heartlessness and who were, moreover, bent on resuming control over the Hutu after the 1959

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[38] William Schabas, *Hate Speech in Rwanda: The Road to Genocide*, 46 MCGILL L.J. 141, 146–49 (2000) (noting the influence of propaganda on the incitement to genocide). *See generally* Llezlie Green, *Gender Hate Propaganda And Sexual Violence In The Rwandan Genocide: An Argument For Intersectionality in International Law*, 33 COLUM. HUM. RTS. L. REV. 733 (2002).

[39] Carpenter, *supra* note 15, at 632 ("Sexual violence may also be used as a punishment for women who are perceived as having a certain amount of power, as an instrument of terror, and as a genocidal strategy.").

[40] *See also* Adrien Wing, *Critical Race Feminism and the International Human Rights of Women in Bosnia, Palestine, and South Africa: Issues for LatCrit Theory,* 28 U. MIAMI INTER-AM. L. REV. 337, 34344 (1997); SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975).

[41] Lisa Sarlach, *Gender and Genocide in Rwanda: Women as Agents and Objects of Genocide*, 1 J. GENOCIDE RESEARCH 387, 394 (1999).

revolution.[42] The Kinyarwanda word for a Tutsi woman was *Ibizungerezi,* which means beautiful and sexy.[43] The fact that Tutsi women were considered more beautiful than Hutu women was used to breed hate against them.[44] Cartoons showed Tutsi women seducing UN peacekeepers and moderate politicians in sexual poses.[45]

The focus was often on the role of the Tutsi woman as that of the evil seducer, who looked down on the ugly and inferior Hutu men, thus the propaganda warned Hutu men (and their families) to stay away from the arrogant Tutsi women. One Tutsi woman said, "For example, it is said if she gives you a good child, the child is not really for you—the child is really for her Tutsi brothers. These women are very sexual, and they sleep with their Tutsi brothers. You will be deceived by them."[46] The propaganda sought to characterize Tutsi women as trying to control the Hutu men (and therefore the whole community)

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[42] NOWROJEE, *supra* note 8, at 9 ("In 1959, the Hutu, who made up the majority of the Rwandan population, rose up against the existing order and most aggressively against the Tutsi. The preamble of the 1991 Rwandan Constitution, as well as various other texts, label the events that took place in 1959 as a revolution that ultimately put an end to the monarchy, freed the majority of Rwandans, and led to independence. For some Rwandans, however, 1959 marks the beginning of genocide. The events of 1959 culminated in atrocities against Rwandan Tutsi that ranged from the burning of their homes and eating of their cattle to displacement and murder. The biased press encouraged such conduct."). *See also* Jean Marie Kamatali, *Freedom of Expression and its Limitations: The Case of the Rwandan Genocide*, 38 STAN. J. INT'L L. 57, 61 (2002).

[43] NOWROJEE, *supra* note 8, at 9.

[44] *Id.*

[45] One of the most infamous cartoons showed General Romeo Dallaire, head of the UN peacekeeping force in Rwanda, in an embrace with a nearly naked Tutsi woman. The cartoon was captioned: "General Dallaire and his army have fallen into the trap of fatal women." *See* Carpenter, *supra* note 15, at 631; Green, *supra* note 38, at 748; NOWROJEE, *supra* note 8, at 9

[46] NOWROJEE, *supra* note 8, at 9. This type of hatred was motivated by the press through articles such as one in *Kangura* entitled "A Cockroach Cannot Give Birth to a Butterfly." Carpenter, *supra* note 15, at 630 (noting that ethnicity was traditionally decided along patrilineal lines, meaning that historically, the offspring of a Tutsi woman and a Hutu man would be a Hutu).

through their sexuality.[47]

Four of the infamous *The Ten Commandments of the Hutu*, published in the December 1990 issue of *Kangura*, by Hassan Ngeze discussed women:

> Every Muhutu should know that a Mututsi woman, wherever she is, works for the interest of her Tutsi ethnic group. As a result, we shall consider a traitor any Muhutu who: marries a Tutsi woman; befriends a Tutsi woman; employs a Tutsi woman as a secretary or a concubine.
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> Every Muhutu should know that our Hutu daughters are more suitable and conscientious in their role as woman, wife and mother of the family. Are they not beautiful, good secretaries and more honest?
>
> Bahutu woman, be vigilant and try to bring your husbands, brothers and sons back to reason.
>
> The Rwandese Armed Forces should be exclusively Hutu. The experience of the October [1990] war has taught us a lesson. No member of the military shall marry a Tutsi.[48]

Rape was intended to subjugate the Tutsi women who were seen as controlling the Hutu men.[49] Tutsi women were portrayed as beautiful and desirable women who saw themselves as "too good" for Hutu men.[50] One rapist stated, "You Tutsi women

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[47] NOWROJEE, *supra* note 8, at 2.

[48] *Rep. on Human Rights in Rwanda*, *supra* note 12.

[49] *See* Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 732 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998), *available at* http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/akay001.htm. (discussing particular instances of sexual violence used to control Tutsi populations).

[50] NOWROJEE, *supra* note 8, at 10.

think that you are too good for us;" another said, "You Tutsi girls are too proud."[51] Tutsi women who were married to Hutu men were not spared from a fate of rape and murder, despite the local custom that a woman took on her husband's lineage after marriage.[52]

3. Sexual Violence Was Used as a Weapon of War During the Rwandan Genocide

The Special Rapporteur for Rwanda concluded in a 1996 report that "rape was systematic and was used as a 'weapon' by the perpetrators of the massacres . . . rape was the rule and its absence was the exception."[53] According to Human Rights Watch, "[a]dministrative, military and political leaders at the national and local levels, as well as heads of militia, directed or encouraged both the killings and sexual violence to further their political goal: the destruction of the Tutsi as a group."[54] Sexual violence was encouraged by military and political leaders at all levels of government to achieve the goal of destruction of the Tutsis as a group.[55] One survivor said, "While they were raping me, they were saying that they wanted to kill all Tutsi so that in the future all that would be left would be drawings to show that there were once a people called the Tutsi."[56] It is estimated that nearly seventy percent of rape victims were infected with HIV—a deliberate strategy of the *genocidaires*.[57] Some survivors say their attackers told them it was so that they would "die of

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[51] *Id.*; Carpenter, *supra* note 15, at 631; Green, *supra* note 38, at 749.

[52] NOWROJEE, *supra* note 8, at 10.

[53] *Rep. on Human Rights in Rwanda*, *supra* note 12.

[54] *Id.*

[55] NOWROJEE, *supra* note 8, at 1.

[56] *Id.*

[57] VALIJI, *supra* note 13, at 8 (noting that in an interview President Kagame stated that "[w]e knew that the government was bringing AIDS patients out of the hospitals specifically to form battalions of rapists.").

sadness."[58]

Rape was used as a weapon to terrorize and degrade the Tutsi ethnic group in order to achieve a political end. The humiliation, pain and terror were not just meant for the victim but also to strip humanity from the perceived politically powerful group of which she was part.[59] Rape was intended to cause not only private pain, but public pain as well. It was intended to degrade the community as a whole. Maggie Zraly wrote, "[w]hile rape is a violation of the social body as well as a violation of the self, massive rape provokes maximum terror by damaging and destroying multiple targets: social bonds, cultural practices, bodies, and psyches."[60]

Mass rape is a systematic policy and an act of genocide.[61] It is sexualized violence that seeks to humiliate, terrorize and destroy a woman based on her group identity.[62] Rape is also social degradation; it is intended to humiliate the family of the victim by tapping into a cultural protection of women's "sexual virtue."[63] The strategy was successful in ensuring the genocide lasted longer than the hundred days.

B. Women's Status in Rwandan Society

1. Before the Genocide

Historically, Rwandan women were discriminated against

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[58] NOWROJEE, *supra* note 8, at 1.

[59] AVEGA-AGAHOZO, SURVEY ON VIOLENCE AGAINST WOMEN IN RWANDA 21 (1999).

[60] Zraly, *supra* note 15, at 25.

[61] S.C. Res. 798, U.N. DOC. S/RES/798 (Dec. 18,1992), *available at* http://www.unhcr.org/refworld/docid/

3b00f16163.html.

[62] Darren Nebesar, *Gender-Based Violence as a Weapon of War,* 4 U.C. DAVIS J. INT'L L. & POL'Y 147 (1998).

[63] NOWROJEE, *supra* note 8, at 2.

culturally, socially and economically. Women were traditionally viewed as dependents of their male relatives—fathers, husbands and children. A Kigali legal aid organization describes this traditional upbringing as a history of oppression:

> From a young age, the education that girls receive from their mothers initiates them into their future lives as wives and mothers. A woman will take care of the house as well as working in the fields. She will learn certain kinds of behavior, such as keeping a reserved attitude, or submission . . . . The strength of a family is measured in the number of its boys.
>
> Women's ability to seek opportunities beyond the home have been greatly limited by the idealized image of women as child-bearers. Women are most valued for the number of children they can produce, and prior to the genocide, the average number of children per woman (6.2) was one of the highest rates in the world.[64]

Women's traditional status was compounded by a lack of legal rights and access to education, as well as high levels of poverty. Before the genocide, Rwanda was classified as one of the twenty-five poorest nations in the world, with the vast majority of its residents living on subsistence agriculture. According to Binaifer Norwojee, sixty-five to seventy percent of agricultural work was done by women.[65] Prior to the genocide, women's representation in the halls of schools and governments was minimal. Levels of illiteracy among women were extremely high; women constituted only about ten percent of secondary school pupils, and in universities, women were outnumbered by

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[64] *Id.* at 10.

[65] *Id.* at n.25.

men fifteen to one.[66] Women's participation in voting was often governed by their husbands' views; and very few women served in the government.[67]

The Rwandan legal system codified much of this systemic subordination by denying women ownership rights. Although the 1991 Rwandan Constitution guaranteed equality for women,[68] the Family Code of 1992 officially designated husbands as heads of households.[69] To obtain credit, open a bank account or enter any legal agreement, women needed their husband's authorization. According to the Commercial Code, a woman needed her husband's express authorization to participate in commercial activity or be employed.[70] The feminization of poverty and "structure of enforced vulnerability"[71] in Rwanda was driven by the lack of education, high rates of illiteracy, and limited access to the public sphere and formal employment.[72]

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[66] *Id.* at 11 (citing GOVERNMENT OF RWANDA, RAPPORT NATIONAL DU RWANDA POUR LA QUATRIÈME CONFERENCE MONDIALE SUR LES FEMMES (BEIJING) [NATIONAL REPORT FOR THE FOURTH WORLD CONFERENCE ON WOMEN] 19 (1995)).

[67] *Id.* It should be noted that one woman, Agathe Uwilingiyimana, took office as the Prime Minister in July 1993. As a moderate who opposed the genocide, she was one of the first national leaders killed in 1994.

[68] RWANDA CONST. art. 16. *See also* ELIZABETH PEARSON, HUNT ALTERNATIVES FUND, THE INITIATIVE FOR INCLUSIVE SECURITY, DEMONSTRATING LEGISLATIVE LEADERSHIP: THE INTRODUCTION OF RWANDA'S GENDER-BASED VIOLENCE BILL (2008), *available at* http://www.huntalternatives.org/download/1078_demonstrating_legislative_leadership.pdf.

[69] *See* VALJI, *supra* note 13.

[70] NOWROJEE, *supra* note 8, at 11.

[71] Valji writes that enforced vulnerability is "vulnerability or dependency that is forced upon target populations through an unjust and unequal social system which hampers agency and the power they are able to exercise over their own situation." VALJI, *supra* note 13, at n.6.

[72] *Id.* at n.7 ("There is little gender disaggregated research on poverty levels available prior to 1994, however the patriarchal cultural and legislative framework of the country placed women in a vulnerable position economically.").

In the early 1990s, a few women's organizations and the Ministry of the Family and Promotion of Women were established.[73] Despite these advances, there was strong resistance to changes in women's status, and those organizations advocating for women's rights and the people who worked for them were threatened.[74]

2. After the Genocide

In post-genocide Rwanda, women made up seventy percent of the population.[75] Due to their majority position within Rwandan society post-genocide, women "took on new roles as community leaders and heads of household."[76] Women joined AVEGA, the Rwandan organization for genocide widows, and "[d]espite the risk of social exclusion from the stigma of rape in Rwandan society," victims also joined smaller groups, publicly known as organizations for sexual violence survivors.[77]

The lasting effects of the sexual violence have been exacerbated by the extreme poverty many of the victims lived in post-genocide.[78] Survivors were, in some cases, in the same or worse position than before the genocide. Moreover, female survivors were five times more likely to be living without a spouse than male survivors,[79] and more likely to have "significantly fewer material resources than their male

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[73] VALJI, *supra* note 13, at 5; *see also* Zraly, *supra* note 15, at 30.

[74] VALJI, *supra* note 13, at 5.

[75] NOWROJEE, *supra* note 8, at 10; *see also* Zraly, *supra* note 15, at 28.

[76] Zraly, *supra* note 15, at 28.

[77] *Id.*

[78] "A decade later, many or most female survivors continue to suffer the consequences of wartime rape and sexual violence." Wells, *supra* note 18, at 183.

[79] *Id.* In 1995 the Ministry of Family and Promotion of Women in collaboration with UNICEF surveyed 304 rape survivors and found that thirty-two percent were living alone without any surviving family. NOWROJEE, *supra* note 8, at 12.

counterparts."[80] Some women had little education,[81] no employment,[82] lived in poverty,[83] and were denied access to their husband's or father's property.[84] Scholar Sarah Wells commented, "[t]his vulnerability may impact their participation in gacaca because women that are in need of such support are, at least in part, more susceptible to community pressures not to disclose shameful violations and publicly identify themselves as sexual assault victims."[85]

AVEGA reported that gender inequalities hindered women's participation in gacaca: "In pure Rwandese tradition the woman lives as the man's shadow. She is expected to be reserved and discrete. She doesn't have the right to give her opinion on questions concerning family life [and she] does not like to talk about anything concerning her modesty."[86] However, in the late 90s women in Rwanda began to take on new roles in the public and private spheres.

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[80] Wells, *supra* note 18, at 183.

[81] *Id.* (noting that 61.8% had completed primary school, 25.7% had completed secondary school, and ten percent had never attended school).

[82] *Id.* (further noting that forty-one percent of the women were working in subsistence farming, thirty-four percent were students and nineteen percent were state or private sector employees).

[83] Nearly one-third (32.1%) of Rwandan households are headed by women. Sixty-two percent of women-headed households lie below the poverty line compared to fifty-four percent of male-headed households." *Poverty Reduction*, U.N. DEV. PROGRAMME RWANDA, *available at* http://www.undp.org.rw/Poverty_Reduction.html.

[84] NOWROJEE, *supra* note 8, at 12.

[85] Wells, *supra* note 18, at 183; *see also* VALJI, supra note 13, at 9 ("Living on less than US $0.70 a day, most women are hungry and have insecure housing. If widowed, they are often without any family income. If sick, they are unable to work. Multiple family members frequently are infected with HIV, causing households to become poorer and poorer with no way to reverse the trend in future generations.").

[86] Wells, *supra* note 18, at 193.

Internationally, the ICTR's decision in Akayesu[87] and Security Council Resolution 1325[88] emphasized the importance of judicially addressing crimes of sexual violence. Nationally, the government's institution of women's councils guaranteed women's representation in government,[89] as did the creation of the Ministry for Gender and Women in Development and gender posts in government bodies and ministerial positions.[90] Moreover, laws were amended to empower and protect women; changes were made in laws regarding land rights, marriage, child rape and violence against women.[91] Maggie Zraly wrote that increased gender sensitivity in policy making at the national and international levels promoted women's participation in "social reconstruction" and offered opportunities for women to enter politics.[92]

Women in post-genocide Rwanda changed their roles and challenged traditional stereotypes. While structural vulnerability may have impacted women's participation in gacaca, their status was not static during this period.

C. The Gacaca courts

1. History

While there is little information on gacaca before 1919,

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[87] *See infra* text accompanying note 291.

[88] Zraly, *supra* note 15, at 29 ("This resolution provided the impetus to formulate concrete strategies, actions and program to advance the role of women in peace and security areas that would in measurable improvement in the United Nations contributions to the empowerment of women in conflict areas. This review of the resolution encouraged Member States to: 1. recognize contributions by women as peacemakers and peace builders, 2. maintain regular contacts with local women's networks, and 3. ensure their involvement in reconstruction processes.").

[89] Zraly, *supra* note 15, at 29 (noting that Rwanda currently has the greatest percentage of female parliamentarians in the world (48.8%)).

[90] *Id.* at 30.

[91] AMNESTY INT'L, *supra* note 20, at 4.

[92] Zraly, *supra* note 15, at 29.

when the Belgian colonial era began, historians report that during that era gacaca was not a permanent judicial institution, but rather "was based on unwritten law and functioned as a body assembled whenever conflict arose within or between families, particularly in rural Rwanda."[93] *Gacaca* literally means "the lawn" or "grass" and refers to the meeting of neighbors in front of a house.[94] Historically, gacaca was overseen by men,[95] and women's participation was limited.[96]

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[93]Phil Clark, *Hybridity, Holism, and "Traditional" Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda*, 39 GEO. WASH. INT'L L. REV. 765, 777 (2007).

[94] Jaques Fierens, *Gacaca Courts: Between Fantasy and Reality*, J. INT'L CRIM. JUST. 3, 6 (2005); *see also* Ian Fisher, *Massacres of '94: Rwanda Seeks Justice in Villages*, N.Y. TIMES, Apr. 21, 1999 (stating that Gacaca "refers to the grass that village elders once sat on as they mediated the disputes of rural life in Rwanda.").

[95] Scholars vary in their interpretation of how leaders were chosen. The varied interpretations may result from heterogeneous practices. Phil Clark writes that gacaca was overseen by "male heads of households." Clark, *supra* note 93, at 778. Fierens writes that the men were chosen by the parties participating in the gacaca hearing. Fierens, *supra* note 94, at 18.

[96] According to Donnah Kamashazi, women were consulted during gacaca, however their views were not represented as independent from the views of the man who represented them (most likely a husband or father). Kamashazi Donnah, Dealing with Rape as a Human Rights Violation Under Gacaca Justice System 28 (Oct. 2003) (unpublished L.L.M. thesis, University of Pretoria), *available at* www.up.ac.za/dspace/bitstream/2263/1034/1/kamashazi_d_1.pdf.; Lars Waldorf writes that, "[o]lder men dominated gacaca as women were not permitted to speak." Lars Waldorf, *Mass Justice For Mass Atrocity: Rethinking Local Justice As Transitional Justice*, 79 TEMP. L. REV. 1, 48 (2006). According to Phil Clark, women participated in gacaca only as claimants or defendants. Clark, *supra* note 93, at 778. Likewise, Sarah Wells writes that traditional gacaca "prohibited the direct participation of women in any capacity. Historically, men introduced complaints for the women with whom they had relationships: brothers or father in the case of single or separated women, husbands for their wives, and brothers or in-laws for widows. Previously, a woman could not represent herself as an accuser in gacaca or in any other judicial or administrative jurisdictions." Wells, *supra* note 18, at 192. Wells also wrote that a report from a Rwandan women's rights organization (Kkagaruka) states that women of high political stature—Abatware (Chiefs) or Ibisonga (Deputy-Chiefs)—were allowed to participate in gacaca. Wells, *supra* note 18, at n.147. Another scholar reports a different tradition: "In Rwanda, unlike in some African countries, girls and women participated in the gacaca system, even after marriage." Jessica Raper, *The Gacaca Experiment: Rwanda's Restorative Dispute Resolution Response to the 1994 Genocide*, 5 PEPP. DISP. RESOL. L.J. 1, 30 (2005).

Traditionally, according to African scholar Abbe Smaragde Mbonyintege, gacaca aimed to "sanction the violation of rules that [were] shared by the community, with the sole objective of reconciliation."[97] Scholar Phil Clark argues that this analysis is drawn from the "traditional Rwandan worldview"[98] that the family and community units are the most important. The goal of sentencing was not purely punitive;[99] rather the goal was to "re-establish social cohesion."[100] Gacaca dealt with cases involving "livestock, damage to property, marriage, or inheritance."[101] The system was not monolithic;. it varied in its ideological underpinnings and was influenced by the evolving norms of the community in which it was imbedded. Some evidence shows that gacaca was also used to adjudicate minor offenses such as theft.[102] As the Belgians began to institute their system of Tutsi administrators,[103] those administrators began to appoint the elders in charge of hearings. Gacaca was fundamentally altered from a community outgrowth to a judicial system led by political appointees.[104]

Gacaca was officially recognized as a legitimate judicial mechanism by the Belgian administration in 1943.[105] Citizens

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[97] Clark, *supra* note 93, at 778.

[98] *Id.*

[99] *Id.* (noting that Gacaca judges did not impose prison terms, however they did banish some guilty parties from the community, "but always with the option for them to return eventually.").

[100] *Id.*

[101] *Id.*

[102] Kamashazi, *supra* note 96, at 27.

[103] *See* Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 388 (1999) (describing implementation of the "race science" of the Germans and later Belgians).

[104] Clark, *supra* note 93, at 779.

[105] *Id.*

were allowed to choose where they had their cases heard.[106] Post-independence, gacaca took an even greater administrative role. When defendants sought to appeal a gacaca's decision, higher officials such as mayors, sector prefects or judges in the official courts would judge the cases. Administrators began to call parties to gacaca without a request from a community member.[107] Gacaca shifted from the family-based effort to reconstruct social harmony to a judicial forum in which elected judges could collect evidence and proclaim judgments.[108]

In 1994, Rwandan law was not prepared to facilitate the prosecution of crimes of genocide. The Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948, was ratified by Rwanda in 1975;[109] however, it was not implemented in domestic law and there was no national law prohibiting genocide or crimes against humanity in 1994.[110] Post-genocide, some commentators report an increase in gacaca in rural areas, possibly a reaction to the collapse of the national court system.[111] The need to find a solution to the problem facing the nation was strong; the jails were overflowing,[112] while reparation and rehabilitation programs

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[106] Clark, *supra* note 93, at 779 (noting that forum shopping was driven by the nature of the citizen's case and degree of comfort with the systems).

[107] *Id.* at 780.

[108] *Id.*

[109] Organic Law No. 08/1975, Feb. 12, 1975. (ratifying various international treaties on human rights, disarmament, prevention and repression of acts likely to endanger peace among human beings and nations).

[110] Organic Law No. 33/2003, Sept. 9, 2003 (targeting genocide, crimes against humanity, and war crimes).

[111] Clark, *supra* note 93, at 781.

[112] The Rwandan jails, built to hold about 45,000 inmates, burst at the seams with 120,000 suspects after the genocide. Phil Clark, *When the Killers Go Home*, 52 DISSENT 14, 14 (2005) (describing the situation in prisons). The State spent 2,000,000,000 Frw in 1998 (two thirds of the budget of the Ministry of Justice) on purchasing food for the detainees alone. This amount was supplemented by a substantial contribution from the ICRC. In 1999, 1,500,000,000 Frw was spent on food, half the Ministry's budget. Fierens, *supra* note 94, at n.13.

were nearly non-existent.[113] In the jails, the inmates lived in "hellish conditions," without sufficient food and water, and lacked space to sleep.[114] The Rwandan legal system did not have the institutional capacity to support trials; most members of the legal profession—judges and lawyers—had been killed or had fled the country, and the judicial infrastructure was decimated.[115]

Many scholars find that post-genocide Rwanda faced an unparalleled task.[116] The nearly complete destruction of the judicial infrastructure[117] combined with the high level of civilian participation in crimes of the highest degree left some scholars to see gacaca as a "last hope for justice and reconciliation."[118] A Swedish radio journalist commented:

> I think I understood something of the magnitude of that problem when I talked to Kibuye Chief Prosecutor Rafael Ngarumbe, who led the pre-gacaca proceedings in Bisesero. He has got 250,000 murders and 7000 suspects to investigate. His staff consists

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[113] Fierens, *supra* note 94, at 5.

[114] Clark, *supra* note 93, at 776.

[115] NAT'L SERV. OF GACACA JURISDICTIONS, GACACA JURISDICTIONS: ACHIEVEMENTS, PROBLEMS AND FUTURE PROSPECTS 4, *available at* http://www.inkiko-gacaca.gov.rw/En/EnIntroduction.htm (reporting that before 1994 there were 758 judges, 70 prosecutors, and 631 other support staff [registrars and secretaries], but by November 1994 there were only 244 judges, 12 prosecutors, and 137 support staff); *cf.* Bolocan, *supra* note 2, at 372 ("According to post-genocide statistics, over 80 percent of the country's legal personnel—including judges, prosecutors and magistrates—had either been killed or fled the country following the outbreak of the violence in April 1994," noting, however, that there are different statistics claiming to be correct on this subject matter.).

[116] Carpenter, *supra* note 15, at 656 (noting the government could not continue to pay costs of keeping citizens in prison); *see also* PENAL REFORM INT'L, GACACA JURISDICTIONS AND ITS PREPARATIONS 9 (2002), *available at* http://www.penalreform.org/publications/gacaca-research-report-no1-gacaca-juristictions-and-its-preparations-0 (calling the prison situation "an exceptional case where theory must bow to reality).

[117] *See* sources cited *supra* note 115.

[118] Wells, *supra* note 18, at 182.

> of 12 persons and they have got one vehicle, unfortunately without petrol.[119]

The practical need was to develop a system that would allow for reconciliation in a country where perpetrators and victims lived side by side.[120] The idea of looking for inspiration in a traditional participatory justice mechanism was first discussed (and rejected) in a colloquium on "The Struggle Against Impunity: A Dialogue for National Reconciliation" in Kigali from October 31 to November 3, 1995.[121]

A Truth and Reconciliation Commission (TRC) based on the type employed in South Africa was rejected because it allowed impunity.[122] Leaders wanted to stop what they considered the cycle of violence driven by the "culture of impunity."[123] In particular, the impunity for the events leading

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[119] Carpenter, *supra* note 15, at 646 (citations omitted).

[120] Fierens, *supra* note 94, at 5.

[121] Fierens reports the idea was deemed "inopportune" at the time. Fierens, *supra* note 94, at 6. Clark writes that gacaca was rejected because it "violated existing Rwandan law regarding the need to formally prosecute serious crimes, particularly murder." Clark, *supra* note 93, at 781.

[122] *See* Martin Ngoga, *The Institutionalisation of Impunity: A Judicial Perspective on the Rwandan Genocide*, in AFTER GENOCIDE: TRANSITIONAL JUSTICE, POST-CONFLICT RECONSTRUCTION AND RECONCILIATION IN RWANDA AND BEYOND, 321–32 (Phil Clark & Zachary D. Kaufman eds., 2009). *See also* PETER UVIN, THE INTRODUCTION OF A MODERNIZED GACACA FOR JUDGING SUSPECTS OF PARTICIPATION IN THE GENOCIDE AND THE MASSACRES OF 1994 IN RWANDA, Discussion Paper for Belgian Secretary of State for Development Cooperation, 2 (2000), *available at* http://fletcher.tufts.edu/faculty/uvin/pdfs/reports/Boutmans.pdf. This decision was impacted by the unique political situation in Rwanda post-genocide, a country run by the minority, victimized group.

[123] UVIN, *supra* note 122, at 2. Neil Kritz observed that gacaca replaces the 'culture of impunity' with a 'culture of accountability.' Neil Kritz, *Progress and Humility: The Ongoing Search for Post-Conflict Justice*, POST CONFLICT JUSTICE 55, 58 (Cherief M. Bassiouni ed., 2002). *See also* STEPHANIE WOLTERS, INSTITUTE FOR SECURITY STUDIES, THE GACACA PROCESS: ERADICATING THE CULTURE OF IMPUNITY IN RWANDA? 12 (2005), *available at* http://www.reliefweb.int/library/documents/2005/iss-rwa-05aug.pdf.

up to 1994 was seen as a factor leading to the genocide,[124] as very few people were punished for the 1959 massacres.[125] The 1995 Conference attendees were also concerned that amnesties would anger genocide survivors, and believed that a blanket amnesty might incite vengeance.[126] They did not believe that a TRC would allow the two groups (guilty and non-guilty) to establish a future together; punishment was a necessary component.[127] Though the conference attendees decided not to implement a TRC, the influence of that post-conflict justice mechanism can be seen in modern gacaca with its emphasis on revealing the truth and reconciliation.[128]

In 1996, the government passed the first law to adjudicate crimes from the genocide. The law created a specialized chamber within the national and military courts to hear genocide cases.[129] It also established a four-tier system for the classification of crimes committed during the genocide[130] and a

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[124] Fierens, *supra* note 94, at 3. *See also* Maya Sosnov, *The Adjudication of Genocide: Gacaca and the Road to Reconciliation in Rwanda*, 36 DENV. J. INT'L L. & POL'Y 125, 142 (2008).

[125] Fierens, *supra* note 94, at 3 (noting that of the 1242 individual prosecuted, 94 were acquitted, 244 were convicted and sentenced to a year or less of prison, 773 received one-to-five years imprisonment, 90 received five-to-ten years, 39 received over 10 years, and 2 persons were sentenced to death; Belgian authorities also granted amnesty for individuals who committed certain crimes between 1959-1961).

[126] Clark, *supra* note 93, at 781.

[127] UVIN, *supra* note 122, at 2.

[128] "Undoubtedly, the model of the South African Truth and Reconciliation Commission (TRC), which operated from 1995–1998, shaped the outcome, although the government rejects the comparison and insists that gacaca comes from traditional Rwandan notions of social cohesion." Christine Stansell, *'I Was Sick During the Genocide': Remembering to Forget in Contemporary Rwanda*, 54 DISSENT 11, 13 (2007), *available at* http://www.dissentmagazine.org/article/?article=766.

[129] Genocide Law of 1996, arts. 19–21 (establishing specialized chambers), *amending* Organic Law No. 40/2000 art. 96, Jan. 26, 2001 (abolishing the specialized chambers).

[130] Genocide Law of 1996, art. 2.

confession procedure so that perpetrators could receive reduced sentences.[131]

The first genocide trial occurred in December 1996.[132] Then, in a series of meetings at Urugwiro Village held from May 1998 to May 1999, the President of the Republic, Pasteur Bizimungu, and main administrative and political authorities decided to institute a judicial system drawn from Rwanda's customary gacaca system, but adapted to the specific needs of the situation facing the country at the time.[133] Protais Musoni, then Prefect of Kibungo, said that during the discussion on how to restructure gacaca the lawyers kept saying: "How can we let the people judge their own cases so soon after the genocide?"[134] He said that the prefects believed that gacaca "should emphasize truth and reconciliation. Gacaca should be more than judgments."[135] A February 1999 report from the U.N. Special Rapporteur stated, "gacaca is not competent to hear crimes against humanity, but it could be utilized for purposes of testifying in connection with reconciliation."[136]

At the same time, two unofficial forms of gacaca developed.[137] Between 1998 and 2001, "prison gacaca" developed, in which the detainees would separate themselves into groups and elected judges (known as *urumuri*, Kinyarwanda

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[131] *Id.* arts. 4–16. *See generally* Nancy Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1 (2002).

[132] Waldorf, *supra* note 96, at 44.

[133] Fierens, *supra* note 94, at 6. *See also* Clark, *supra* note 93, at 782. For more information on these meetings, *see* C. MURIGANDE, REPORT ON URUGWIRO TALKS FROM MAY 1998 TO MARCH 1999, *in* REPORT ON THE NATIONAL SUMMIT OF UNITY AND RECONCILIATION 22-34 (2000).

[134] Clark, *supra* note 93, at 782.

[135] *Id.*

[136] U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Report on the Situation of Human Rights in Rwanda*, ¶ 51, U.N. DOC. E/CN.4/1999/33 (Feb. 8, 1999).

[137] Clark, *supra* note 93, at 784.

for "the light"). The *urumuri* would record confessions and evidence provided by other prisoners to be used at official gacaca proceedings outside the prison. "Christian gacaca" developed in the rural catholic communities. Based on the Christian process of confession, parishioners were encouraged to confess their sins to the congregation. The judges, instead of being local community members, were priests or church officials. After confession, the parishioners had to ask for forgiveness from the victims and the community. Phil Clark wrote, "The assumption underlying this duty to forgive is that because God has forgiven his children of the sins they have confessed to him, believers are therefore obliged to forgive those who have transgressed them in daily life."[138]

Phil Clark wrote that the "only resemblance" between historical and present-day gacaca is that they both involve "local and non-professional judges."[139] Modern gacaca is based on a complex written law, with systematic and organized administrative divisions, women are included as judges and members of the general assembly, prison sentences can be imposed on the guilty, family is not privileged,[140] confessions are favored,[141] and references to religion are not included.[142] Traditional gacaca was vastly different, one leading expert on customary law, Charles Ntampaka, observed:

> [T]he traditional system of conflict resolution did not include any written rules; remained wary of legal prescriptions that adjudicate and convict; was closely related to the family unit; favoured the role of 'head of the family'; involved forms of collective responsibility; did

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[138] Clark, *supra* note 93, at 785.

[139] *Id.* at 766.

[140] Organic Law No. 16/2004 art. 10, June 19, 2004 (establishing that members of gacaca courts cannot sit in hearings or participate in decision on cases concerning a family relative).

[141] Organic Law No. 40/2000 ch. 2 (establishing that confession, as an integral part of gacaca model, results in shorter sentences).

[142] Clark, *supra* note 93, at 766.

> not promote equality; gave priority to community interests over individual rights; often deemed confessions to be a form of provocation; and drew on the sacred and the religious.[143]

These changes, while lauded by the international community and necessary for practical success, "undermine the argument that gacaca in the post-genocide context is little more than a return to a well-established, widely understood indigenous form of conflict resolution that will receive automatic acceptance by the Rwandan population."[144]

Gacaca aims to address both pragmatic and social needs. First, it was a method for decreasing the prison population and proceeding through cases faster than could be achieved in the national courts.[145] Secondly, gacaca was supposed to facilitate community rebirth—revealing truth was intended to spur reconciliation and the reconstruction of Rwandan society.[146] Scholar Sarah Wells wrote, "The Rwandan government contends that the gacaca courts will establish the truth and bring about reconciliation more effectively than the state-led Courts of First Instance or geographically distant ICTR."[147] The decision to pursue gacaca meant other goals were left to the wayside. Jacques Firens said that gacaca endeavors "to legitimize a hereto unheard-of attempt at people's justice, which aims to deal as rapidly as is feasible with an avalanche of cases, rather than to draw upon cultural specificities."[148] In the end, the decision to implement gacaca was a "crucial political compromise."[149]

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[143] Fierens, *supra* note 94, at 18 (citations omitted).

[144] Clark, *supra* note 93, at 788.

[145] Fierens, *supra* note 94, at 5.

[146] Clark, *supra* note 93, at 777.

[147] Wells, *supra* note 18, at 177.

[148] Fierens, *supra* note 94, at 18.

[149] Clark, *supra* note 93, at 776.

Gacaca is a hybrid judicial system that aims to look beyond the judge's gavel to achieve social reconstruction. Clark stated that "a holistic approach to transitional justice provides that multiple political, social, and legal institutions, operating concurrently in a system maximizing the capabilities of each, can contribute more effectively to the reconstruction of the entire society than a single institution."[150] The legitimacy of gacaca is drawn, in part, from its status as a traditional justice mechanism. In 2004, United Nations Secretary-General Kofi Annan stated that, in the context of transitional societies, "due regard must be given to indigenous and informal traditions for administering justice or settling disputes to help them to continue their often vital role and to do so in conformity with both international standards and local tradition."[151]

The estimation that gacaca embodies an innate cultural understanding is considered dubious by some scholars because the connection between the gacaca of 2009 and that of history is tenuous.[152] However, as discussed *supra*, one of the major reasons why the architects of the modern gacaca system believed it would work was because of its derivation from a historically Rwandan institution.[153] This tension is further complicated by the fact that Rwandan people have historical reasons to be suspicious of the state, and therefore a transitional justice model organized and driven by the national government might limit full

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[150] *Id.* at 765.

[151] U.N. Secretary-General, *Rep. of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶12, U.N. DOC. S/2004/616 (Aug. 23, 2004).

[152] Clark, *supra* note 93, at 775 (calling Gacaca a "constantly evolving phenomenon," before moving on to note how much it differs from its historical counterpart); *see also* Fierens, *supra* note 94, at 57–58.

[153] Mark Drumbl, *Punishment, Postgenocide: From Guilt to Shame to* Civis *in Rwanda*, 75 N.Y.U. L. REV. 1221, 1265 (2000) (noting that there is evidence that murder was considered within gacaca traditionally. When a murder had taken place "the family of the victim would be allowed to symbolically end the killer's life by taking him in front of the community and pretending to kill him. However, the killer would walk away.")

confidence from members of the public.[154]

The legitimacy of referring to gacaca as 'indigenous' or 'traditional' is called into question because of the thin resemblance between new and old.[155] Clark suggests that rather than considering gacaca as an indigenous, 'naturally' occurring legal result of the genocide, it should be considered an endogenous legal structure—one developed within Rwandan society but viewed by the population as a distinct entity because it differs so much from its traditional form.[156]

Some of the published critiques cited in this Part come from Western observers who view 'justice' as the measuring stick with which gacaca should be evaluated. Phil Clark wrote, "With respect to the formal nature of this version of justice the dominant discourse on gacaca draws on a long-standing Western philosophical tradition that views justice as a neutrally determined, universal virtue, free from all value-laden claims

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[154] Peter Uvin said:

> Rwanda's people have for decades been told to participate in all kinds of schemes devised by the state. Yet, from the colonial period, over the previous regimes, to the present, these schemes have been top-down, left little more than the smallest space for any form of true participation, and have often been used to mask policies that actively harm the people . . . Rwandans have learned to distrust the state when it speaks the language of participation and lofty principles. Even if the intentions of the current government are perfectly pure; even if significant segments of the population are interested in the gacaca process—distrust reigns, and people are wary.

Wells, *supra* note 18, at 178 (*quoting* PETER UVIN, THE INTRODUCTION OF A MODERNIZED GACACA FOR JUDGING SUSPECTS OF PARTICIPATION IN THE GENOCIDE AND THE MASSACRES OF 1994 IN RWANDA, Discussion Paper for Belgian Secretary of State for Development Cooperation, 2 (2000), *available at* http://fletcher.tufts.edu/faculty/uvin/pdfs/reports/Boutmans.pdf. *See also* Sosnov, *supra* note 124, at 144 (establishing that "many Hutus do not accept the reconciliation process because it is government controlled, which has resulted in a failure to address Tutsi crimes."). *See also* Bolocan, *supra* note 2, at 390.

[155] Clark, *supra* note 93, at 766.

[156] *Id.* at 776.

made by specific individuals or groups."[157] Moreover, as legal scholars, these critics are drawn to pointing out flaws in gacaca as a judicial system because of its deviation from typical legal form. More than just an institution for retribution or deterrence, gacaca must be examined as both a judicial and a social institution that aims to both achieve legal ends while also building community and healing wounds. The indigenous history of gacaca roots the practice within Rwandan culture, providing the platform for a communal discussion with a language the community members already know. Two years after the genocide, the parliament passed legislation implementing gacaca.

2. Implementation

The mechanics of modern gacaca were established by two documents: the Organic Law No. 08/96 (Genocide Law of 1996) and Organic Law No. 40/2000 which was implemented in January 2001 (Gacaca Law of 2001), the latter was modified five times, in June 2001,[158] June 2004,[159] June 2006,[160] March 2007[161] and May 2008.[162]

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[157] For a more complex analysis of how scholars view of what the philosophical objectives of gacaca should be, impacts that scholars' estimation of how well gacaca is doing, *See id.* at 802 ("The paradigmatic example of this view comes from John Rawls in his model of distributive justice . . . .").

[158] Organic Law No. 33/2001, June 22, 2001 (modifying Organic Law No. 40/2000, Jan. 26, 2001 (creating "gacaca jurisdictions" and organizing prosecutions for offences constituting the crime of genocide or crimes against humanity, committed between Oct. 1, 1990 and Dec. 31, 1994).

[159] Organic Law No. 16/2004, June 19, 2004 (establishing the organization, 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 Oct. 1, 1990 and Dec. 31, 1994).

[160] Organic Law No. 28/2006, June 27, 2006 (modifying Organic Law No. 16/2004).

[161] Organic Law No. 10/2007, Mar. 1, 2007 (modifying Organic Law No. 16/2004).

[162] Organic Law No. 13/2008, May 19, 2007 (modifying and complementing Organic Law No. 16/2004)

The implementation of the 1996 Genocide Law was slow[163] and prison populations grew.[164] As discussed *supra,* in 2001 the government established gacaca as the means for adjudicating crimes from the genocide in lieu of the specialized genocide chambers established in the 1996 law. After the 2000 gacaca law was passed, the Government ran a nationwide media campaign educating the population on the new law.[165] The official gacaca court system operated in three stages:[166] information gathering,[167] categorization of crimes[168] and judgment.[169]

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[163] *See* AMNESTY INT'L, *supra* note 4, at 16 ("By the end of 2001, the specialized-genocide chambers had tried less than six percent of those detained for genocide and crimes against humanity."). *See also* NAT'L SERV. OF GACACA JURISDICTIONS, *supra* note 115, at 8 ("The classic justice didn't meet expectations because after approximately a five years period only 6000 files out of 120,000 detenees were tried. At this working speed, it would take more than a century (+ 100 years) to try these detenees.").

[164] Jennifer G Riddell, Addressing Crimes Against International Law: Rwanda's Gacaca in Practice 65 (2005) (unpublished L.L.M. thesis, University of Aberdeen) *available at* http://www.restorativejustice.org/10fulltext/ridelljennifer/view. During the implementation of Organic Law No. 08/96, 346 accused were tried in 1997, 928 in 1998, 1318 in 1999, 2458 in 2000, 1416 in 2001 and 727 in 2002, or a total of 7181 in six years. Fierens, *supra* note 94, at 4. On April 24, 1998, 22 perpetrators who were convicted and received the death sentence were executed. Fierens, *supra* note 94, at 5.

[165] Fergis Kerrigan, *Some Issues of Truth, Justice and Reconciliation in Genocide Trials before Gacaca Tribunals in Rwanda,* (Apr. 23, 2002), *available at* http://www.humanrights.gov.se/stockholmforum/2002/page1713.html.

[166] For an in-depth explanation of the stages of gacaca, *see* ARTHUR MOLENAAR, AFR. STUDIES CTR., GACACA: GRASSROOTS JUSTICE AFTER GENOCIDE 93–103 (2005).

[167] *See* discussion *infra* Part I.D.5.

[168] In stage two, an offense of sexual torture would be categorized as a category 1 offense, and the file would be sent to the conventional court system for prosecution. Organic Law No. 16/2004 art. 34.

[169] *See also id.* at 2-1-5.

The pilot phase of gacaca began on June 18, 2002.[170] The pilot phase of seventy-five cells[171] was expanded to 623 cells on November 25, 2002.[172] A cell is an area where the population is no more than 200 people age eighteen or older.[173] While the government intended to expand gacaca to over 8,000 more cells in March 2003,[174] this was delayed due to the lack of progress in the acting gacaca courts and other political and social events.[175] The modified 2004 gacaca law was intended to address some of the perceived problems, and its implementation coincided with the expansion of gacaca from 751 cell and sector jurisdictions to 9000 jurisdictions. Those jurisdictions began information gathering on January 15, 2005;[176] the 623 pilot cells began the

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[170] Clark, *supra* note 93, at 786. For more information, *see* AMNESTY INT'L, *supra* note 4, at 12–13. *See also* PENAL REFORM INT'L, *supra* note 116, at 20–26.

[171] There are four administrative levels of gacaca: cell, sector, district and province. Lars Waldorf writes, "Rwanda's administration was reorganized into the following hierarchy: 11 provinces (formerly prefectures), plus the city of Kigali, 106 districts (formerly communes), 1545 sectors, and 9201 cells. The cell, the smallest administrative unit, averages 830 people, though there are considerable variations . . . . In early 2006, the Rwandan government engaged in a sweeping administrative reorganization of the country that reduced the number of provinces (from 11 to 4), districts (from 106 to 30), and sectors (from 1545 to 416)." Waldorf, *supra* note 96, at n.273.

[172] IRIN, *Rwanda: Special report on hopes for reconciliation under Gacaca court system*, (Dec. 4, 2002), http://www.irinnews.org/report.aspx?reportid=40010 (last visited Mar. 15, 2010). "The 1st phase of Gacaca was started on June 19, 2002: one sector in each Province/City of Kigali (12). The second phase of Gacaca Courts was launched on November 25, 2002: one sector in each District/ Town(106)." NATIONAL SERVICE OF GACACA JURISDICTIONS, *supra* note 115, at 11.

[173] Organic Law No. 40/2000, art. 6.

[174] IRIN, *supra* note 172.

[175] Clark, *supra* note 93, at 786. The provisional release of approximately 23,000 prisoners and the creation of solidarity camps in 2003 were particularly important.

[176] *See* Clark, *supra* note 93, at 786. *See also* Domitilla Mukantaganza, *Editorial*, at 2, *available at* http://www.inkiko-gacaca.gov.rw/pdf/ikusanya%20english.pdf. Data collection began in 8262 cells, 92% of all gacaca court cells (9013).

trial phase on March 10, 2005.[177]

In 2008, an amendment to the gacaca law was passed that shifted jurisdiction for category one crimes of sexual violence from the national courts to gacaca.[178] According to Tharcisse Karugarama, Attorney General of Rwanda, "The primary motive of bringing this bill forward is to ensure that the mandate as well as jurisdiction of traditional gacaca courts is extended to enable us deal with the bulk of genocide cases that still remain unresolved till now."[179] This phase was launched on June 23, 2008, implemented in January 2009 and ended in July 2010 (except for some cases which were subsequently reviewed).[180] This presented a brief time frame for the gacaca courts to address the 6608 cases of rape or sexual torture.[181] By the summer of 2009, approximately one million people had been or were in the process of being tried by gacaca, twenty percent were acquitted, and 35,000 people were still in jail.[182]

3. Categorization

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[177] Clark, *supra* note 93, at 787. The death penalty is only available in Category 1 cases. Organic Law No. 16/2004 art. 72.

[178] Organic Law No. 13/2008 art. 1 (amending Organic Law No. 16/2004). For an alternative analysis of the adjudication of sexual violence in gacaca *see* HUMAN RIGHTS WATCH, JUSTICE COMPROMISED: THE LEGACY OF RWANDA'S COMMUNITY-BASED GACACA COURTS, pt. IV (2011), *available at* http://www.hrw.org/en/node/99177/section/10.

[179] The vast majority of the cases transferred were cases of sexual violence. Sulah Nuwamanya, *Gacaca Courts to get more Powers*, WEEKLY OBSERVER, Mar. 6, 2008, *available at* http://allafrica.com/stories/printable/200803060759.html.

[180] GACACA COURTS PROCESS, *supra* note 6, at 11. *See also* HUMAN RIGHTS WATCH, *supra* note 178.

[181] *Id.*

[182] INST. OF LEGAL PRACTICE AND DEV., GACACA IN RWANDA 14 (2009) (powerpoint on file with author).

The 1996[183] and 2001

[183] Organic Law No. 08/96, Aug. 30, 1996, § 1-2.

[184] laws separated perpetrators' crimes into four categories.

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[184] Organic Law No. 40/2000, § 3-1-51:

Category 1:

a) The person whose criminal acts or criminal participation place among planners, organisers, incitators, supervisors of the crime of genocide or crime against humanity;

b) The person who, acting in a position of authority at the national, provincial or district level, within political parties, army, religious denominations or militia, has committed these offences or encouraged others to commit them;

c) The well-known murderer who distinguished himself in the location where he lived or wherever he passed, because of zeal which has characterised him in killings or excessive wickedness with which they were carried out;

d) The person who has committed rape or acts of torture against person's sexual parts.

Category 2:

a) The person whose criminal acts or criminal participation place among authors, co-authors or accomplices of deliberate homicides or serious attacks against persons which caused death.

b) The person who, with intention of giving death, has caused injuries or committed other serious violences, but from which the victims have not died.

Category 3:

The person who has committed criminal acts or has become accomplice of serious attacks, without the intention of causing death to victims.

Category 4 :

The person having committed offences against assets. However, the author of the mentioned offences who, on the date of this organic law enforcement, has

Crimes of sexual violence were classified in category one (the highest category).[185] The 2004 gacaca law merged the old categories of two and three to form a new category two, and shifted what was previously known as category four crimes to category three.[186] These changes, meant to streamline the gacaca process, did not affect the adjudication of category one crimes.

The categorization scheme established in the 1996 Genocide Law placed sexual violence as a category one crime and thus under the jurisdiction of the national courts. During the initial draft of the 1996 law, however, crimes of sexual violence were not classified in category one.[187] In fact, this type of crime was originally cast in category four.[188] Women's rights activists argued that sexual violence should be included in category one so it would be recognized "as among the most serious of genocide-related offences, subject to the harshest penalties available."[189] The mobilization of women's rights activists and Rwandan women parliamentarians resulted in a categorization scheme which kept crimes of sexual violence out of gacaca for the majority of time it was functioning.

4. Definition of the crime

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[185] *Id.*

[186] Organic Law No. 16/2004 art. 51. This change also shifted the courts in which crimes of the second and third level were adjudicated, however category 1 crimes remained within the jurisdiction of the national courts. *Id.* art. 2 (specifying that people whose committed acts fall under Category 1 are tried in "ordinary jurisdictions").

[187] Wells, *supra* note 18, at n.97.

[188] Interview with Usta Kaitesi, Lecturer, National University of Rwanda, in Kigali, Rwanda (July 28, 2009) (noting that a it was at the urging of women's groups that the sexual violence was classified as a category 1 crime, and that it was a female parliamentarian then recommended that instead of "rape" it be referred to as "sexual torture"). *See also,* Nahla Valajji, *Supporting Justice: An evaluation of UNIFEM's Gender and Transitional Justice Programming in Rwanda* (1994-2008), (September 2008) at 19 (noting the impact of local women's organizations on securing category one status for sexual violence crimes).

[189] Wells, *supra* note 18, at 184.

As discussed, *supra,* starting in 1996, acts of sexual violence were considered a first category crime. However, throughout the gacaca process, the written language defining the crimes under category one changed:

> **1996 law, art. 2**: ". . . persons who committed acts sexual torture."
>
> **2001 law, art. 51**: "The person who has committed rape or acts of torture against person's sexual parts."
>
> **2004 law, article. 51**: "The person who committed acts of torture against others, even though they did not result into death, together with his or her accomplices; . . . The person who committed acts of rape or acts of torture against sexual organs, together with his or her accomplices; . . . The person who committed dehumanising acts on the dead body, together with his or her accomplices."
>
> **2007 law, art. 11**: "[T]he person who committed acts of rape or sexual torture, together with his or her accomplices."
>
> **2008, art. 9(5):** "[A]ny person who committed the offence of rape or sexual torture, together with his or her accomplice."

After the dissemination of the 1996 genocide law, there was a concern that rape was not punishable under the law because there was no clear direction that rape was considered an act of sexual torture.[190] In a November 30, 2001 memorandum from Pierre R. St. Hilaire, U.S. Resident Legal Advisor to Rwanda, to the Prosecutor General of Rwanda, St. Hilaire recommends the adoption of a uniform definition of rape, and a

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[190] PIERRE ST. HILAIRE, U.S. DEP'T OF JUSTICE, MEMORANDUM REGARDING PROSECUTION OF GENDER-BASED VIOLENCE IN RWANDA, at D-3, *available at* http://pdf.usaid.gov/pdf_docs/PDABW706.pdf.

determination of which specific acts constitute rape.[191] St. Hilaire discusses prosecutors' differing interpretations of what constitutes a rape, drawing a distinction between a perpetrator who uses violent and forcible means to have intercourse and a perpetrator who has intercourse with a woman he has saved from execution.[192] He wrote that appropriate training for judges—including teaching them that both of these scenarios constitute rape—could not occur without a guiding definition.[193]

In the genocide and gacaca laws, there was no definition or elements of the crime of sexual torture or rape to guide judges' decisions. Similarly, judges could not find much guidance within the national laws. According to article 360 of the 1977 Rwandan Penal Code, rape was a crime punishable by five years imprisonment.[194] The 1997 Rwandan Penal Code prohibits rape, defilement, torture and sexual torture. Rape is defined only as "unlawful sexual intercourse."[195] Article 316 of the Rwandan Penal Code states that "a person who commits 'torture or acts of barbarity' during the commission of a crime incurs the same punishment as one who commits murder."[196]

There was never clear direction on what type of sexual violence committed during the genocide would be considered a crime under the laws.[197] While in spirit Rwandan law aimed to criminalize sexual violence, it lacked the details necessary to inform the gacaca process and ensure uniform prosecution, a topic discussed further in Part II.D.3.

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[191] *Id.*

[192] *Id.* at D-5.

[193] *Id.*

[194] PENAL CODE § 360.

[195] *Id.*

[196] *Id.* § 316; NOWROJEE, *supra* note 8, at 32.

[197] Interview with Usta Kaitesi, Lecturer, National University of Rwanda, in Kigali, Rwanda (July 28, 2009) (asking, "What if the perpetrator uses a sexual organ on a non-sexual organ of the victim? Is that sexual torture?").

5. Jurisdiction

Jurisdiction over crimes from the genocide was split between three courts, the International Criminal Tribunal for Rwanda (ICTR), the national courts and gacaca. Rwandan courts had jurisdiction over crimes in categories two, three and four, and shared jurisdiction over category one crimes with the ICTR. Under the 2001 law, category one crimes were supposed to be adjudicated in Rwanda's national courts, while categories 2, 3, and 4 were adjudicated within gacaca.[198] Within gacaca, according to the 2001 law, category two crimes were tried by sector level gacaca, while category three crimes were tried by cell level gacaca.[199]

The ICTR possesses superseding jurisdiction over the Rwandan national courts.[200] There was no explicit principle dictating how category one suspects should be distributed between the two court systems; however, an "unofficial division assumes that the ICTR will hear the cases of suspects considered among the most important planners and perpetrators of the genocide," and therefore would not hear the cases of perpetrators charged exclusively with acts of sexual violence.[201]

There was some confusion regarding the jurisdiction of gacaca tribunals over types of sexual violence. In one pre-gacaca hearing, the prosecutor announced that "anyone who attacked a woman, especially in a sexual way, will be considered a major

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[198] Organic Law No. 40/2000 art. 2 (stating "[t]he persons whose committed acts or criminal participation acts put in categories 2, 3 and 4 as defined by Article 51 of this organic law are answerable to Gacaca Jurisdictions referred to in Title II of this organic law. Gacaca Jurisdictions exclusively apply the provisions of this organic law. Persons coming under category 1 are answerable to ordinary jurisdictions which apply the common law content and procedure rules subject to exceptions provided for by this organic law.").

[199] INSTITUTE OF LEGAL PRACTICE AND DEV., *supra* note 182, at 9.

[200] Statute of the International Criminal Tribunal for Rwanda art. 8, *available at* http://www.un.org/ictr/statute.html.

[201] Clark, *supra* note 93, at 791. This system of division has resulted in conflict between the Rwandan national courts in ICTR when both sought jurisdiction over the same genocide suspects. *See* Philip Gourevitch, *Justice in Exile*, N.Y. TIMES, June 24, 1996, at A15.

criminal" and "fall in Category 1" (thus outside the scope of the gacaca jurisdiction).[202] However, in another gacaca proceeding, the prosecutor asked a witness directly and openly for testimony regarding rape.[203]

Category one crimes were not wholly within the jurisdiction of the national courts. Perpetrators that confessed to committing a category one crime before being listed by the Prosecutor General as a category one offender were eligible to be sentenced in gacaca.[204] In the 1996 confession and plea procedure, perpetrators of category 2, 3, and 4 crimes could receive reduced sentences if they confessed and plead guilty; however, category one confessors could not.[205] Originally, gacaca courts could not impose the death penalty, but the national courts could. The 2004 law also allowed for *genocidaires* to confess and receive reduced sentences; however, those confessions could not be in public.[206] There were some concern confessions were not made with the best intentions; one government official reported that some rape confessions were actually lies intended to hurt the victim's family.[207]

There is no data on the number of sexual violence

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[202] Carpenter, *supra* note 15, at 646.

[203] *Id.*

[204] *See* Organic Law No. 40/2000 art. 56 ("The persons whose criminal acts or criminal participation place in the first category do not enjoy penalty commutation . . . However, the persons who will have offered confessions and guilt plea without their names being previously published on the list of persons of the first category referred to in Article 51 of this organic law will be classified in the second category."). *See also* Wells, *supra* note 18, at n.107.

[205] Organic Law No. 08/96, Aug. 30, 1996, art. 2-5.

[206] Organic Law No. 16/2004 art. 58 (outlining the procedure for confessions and guilty pleas) n108 Perpetrator's confession to a category 1 offence must include a detailed description of the offence, reveal the co-authors of the offence and apologize for the offence. *Id.* at art. 54 (addressing the procedure confessions prior to forwarding files to gacaca jurisdictions). The defendant is eligible for a reduced sentence if the court accepts the confession, guilty plea and apology. *Id.* arts. 55–56.

[207] Interview with Domitilla Mukantaganzwa, Executive Secretary of Gacaca Jurisdiction, in Kigali, Rwanda (July 23, 2009).

perpetrators who were charged under the gacaca system through confession.[208] However, there were "very few cases" in the national courts.[209] Rwandan women's organization AVEGA estimated that less than 100 genocide rape cases were heard in the national courts,[210] but one scholar estimated that there were "much less than 1,000."[211]

That very few of the sexual violence cases were completed in the national courts, compounded by practical needs to complete all trials and end gacaca, resulted in a 2008 amendment to the gacaca law that shifted jurisdiction for category one crimes of sexual violence from the national courts to gacaca.[212] The 6,608 files of sexual violence cases waiting to be heard in the national courts were sent to the appropriate gacaca jurisdictions for adjudication before the official closing of all gacaca.[213] The cases that had begun in the national courts but had not been decided were transferred to the appropriate gacaca court.[214] The 2008 law also repealed the provision in the 2004 law that allowed for first category perpetrators who followed the confession procedure to receive commuted sentences.[215]

6. Discovery

The official gacaca court system operated in three stages;

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[208] *Id.*

[209] Interview with Grace Bunyoye, Witness Protection Officer, Ministry of Justice, in Kigali, Rwanda (July 8, 2009).

[210] VALJI, *supra* note 13, at 20–21.

[211] Interview with Usta Kaitesi, Lecturer, National University of Rwanda, in Kigali, Rwanda (July 28, 2009).

[212] Organic Law No. 13/2008 art. 1 (amending Organic Law No. 16/2004 art. 2). *See also id.* art. 7 (amending Organic Law No. 16/2004 art. 42).

[213] GACACA COURTS PROCESS, *supra* note 6, at 11.

[214] Organic Law No. 13/2008 26-3.

[215] Organic Law No. 13/2008 art. 10 (repealing Gacaca Law of 2004 art. 55).

during the first 'information gathering' stage, the General Assembly (adult population of the cell) met weekly to gather the information that would form the basis of the preliminary files on the perpetrators.[216] The ideal phase one comprised of six meetings.[217] One scholar reports that the cell was mandated to produce four lists: first, all those people who lived in the cell before October 1, 1990; second, all the people who were killed in the cell between October 1, 1990 and December 31, 1994; third, the damage to individuals or property inflicted during this time; and fourth, the suspects and the corresponding category of their alleged crime or crimes.[218] A report from the executive secretary of the Gacaca Jurisdiction states that there were three types of information collected during this time, first: "[i]nformation relating to the preparation of the genocide in the Cell"; second, "[i]nformation relating to implementation of the genocide and its consequences in the Cell"; and third, "[i]nformation on the role of each accused person."[219]

According to scholar Usta Kaitesi, "it was unclear if information could be gathered about sexual violence cases."[220] A training officer of the gacaca jurisdiction stated, however, that during the pilot phase, victims of sexual violence were supposed to bring their allegation to a gacaca judge, who would then take

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[216] According to the 2004 law, during the first phase, cell level courts were supposed to create seven lists: (1) those who reside in the cell; (2) those who resided in the cell before the genocide and their locations and routes; (3) those who resided in the cell and were killed in the cell; (4) those who resided in the cell but were killed elsewhere; (5) those who resided elsewhere but were killed in the cell (6) property damage; (7) the people who alledgedly committed crimes in the aforementioned six categories. Organic Law No. 16/2004 § 2-1-5-33.

[217] Clark, *supra* note 93, at 792.

[218] *Id.* at 791. Riddell finds a slightly different set of lists were mandated. She wrote that a list is compiled of those who lived in Cell before the genocide, a list of those killed in the Cell, a list of those from the Cell who were killed in other Cells, a list of damages suffered by members of the Cell and those damages for which compensation has already been received, and a list of accused. Riddell, *supra* note 164, at 68.

[219] Mukantaganza, *supra* note 176, at 3.

[220] Interview with Usta Kaitesi, Lecturer, National University of Rwanda, in Kigali, Rwanda (July 28, 2009).

it to a prosecutor.[221] In 2004, the gacaca law stated that there was a restriction on publicly gathering information on sexual violence. Victims of sexual violence could choose to submit their complaint verbally or in writing to one or more of the *inyangamugayos*,[222] or to the public prosecutor.[223] The 2008 law amended this rule to allow victims to also submit their complaint to the judicial police.[224] A manual for the *inyangamugayos* states, "the victim can bring the case to the area of gacaca justice where the crimes took place. The victim is the one who has the major authority to bring the rape crimes or other sexual abuse to court."[225] Unlike in cases of murder or looting, third parties could not report a rape;[226] gacaca required women to report their own rapes unless they were deceased.[227]

The "judicial files" created during the information gathering process were sent to one of three places, depending on the category of crime.[228] The files of those accused of category

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[221] Interview with Nadine Uwamahoro, Training Officer Gacaca Jurisdiction, in Kigali, Rwanda (July 27, 2009).

[222] "Kinyarwanda for 'wise or respected elder." Clark, *supra* note 93, at 785.

[223] Organica Law No. 16/2004 art. 38.

[224] Organic Law No. 13/2008, May 19, 2007 (amending Organic Law No. 16/2004 art. 38).

[225] THE GACACA JURISDICTION, IBURANISHWA RY'ICYAHA CYO GUSAMBANYA KY GAHATO CYANGWA KWANGIZA IMYANYA NDAGAGITSINA MU NKIKO GACACA [THE TRIAL OF RAPE OR SEXUAL ABUSE CRIMES IN GACACA COURT] (2008) [hereinafter GACACA JURISDICTION, TRIAL OF RAPE CRIMES] (copy of handout on file with author).

[226] Organic Law No. 16/2004 art. 38. Augustin Nkusi, chief legal advisor to the Gacaca Commission, argues that: "At gacaca, the truth ultimately comes from the population. We know that people will tell who is responsible because they saw what [the perpetrators] did. They stood there as it happened and they saw everything with their own eyes. There will be no confusion about who is responsible for these things." Clark, *supra* note 93, at 810.

[227] Organic Law No. 13/2008, May 29, 2007 (amending Organic Law No. 16/2004).

[228] Mukantaganza, *supra* note 168, at 3.

one crimes were sent to the Public Prosecution Office of the appropriate Province or the City of Kigali.[229] The files of those of accused of category two crimes were forwarded to Sector Gacaca Courts and the files of people accused of category three crimes were sent to the Cell Gacaca.[230]

7. Training and Support

One of the significant changes in the 2004 gacaca law was the inclusion of victim protection mechanisms. According to the 2004 law, victims of sexual crimes were supposed to give evidence *in camera* to a single judge of their choosing or, if they did not trust any of the judges, to give evidence directly to the Public Prosecutor.[231] Third parties were also prohibited from *publicly* reporting sexual violence crimes (through confession or utterances before or during trial). This law did not preclude perpetrators from confessing in order to enter the plea procedure; however, the confession could not be made in public.

Despite the amendments in the 2004 law, some judges still failed to act in the best interest of sexual violence victims.[232] The *inyangamugayos* are the elected local community members who

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[229] *Id.*

[230] *Id.*

[231] Organic Law No. 13/2008, May 29, 2007 ("It is prohibited to publicly confess commission of any of the above crimes [rape and sexual torture]. No person shall be permitted to initiate proceedings in respect to any of the above offences against another in public. All formal proceedings in respect to the above offences shall be held in camera.").

[232] Waldorf, *supra* note 96, at n.362.

act as judges and oversee gacaca trials.[233] Gacaca judges share many of the powers held by judges in the national courts: they can summon witnesses to testify at hearings, issue search warrants and sentence those found guilty. If a victim has a problem with an assigned gacaca judge, the law guarantees her the right to submit her case to the public prosecutor.[234] Due to the fact that judges are members of the community in which they are adjudicating, there is a high risk of conflict of interest. Judges are supposed to withdraw themselves from any case involving friends or family members to the second degree of relation,[235] and an individual who took part in genocidal activities is ineligible to become an *inyangamugayo*. However, women's rights advocates report that there have been occurrences where a rapist is the *inyangamugayo* during a sexual violence gacaca trial.

Even in 2001, Western reports identified the need for

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[233] *Id.* Gacaca judges must be: Rwandan nationals over 21 years old; without any previous criminal convictions or having ever been considered a genocide suspect (except in relation to property crimes). Additionally they must be honest, trustworthy people, "free from the spirit of sectarianism" but also "characterized by a spirit of speech sharing." Judges may not have at any time been elected officials, part of the government, NGO employees, nor trained judges or lawyers. Additionally, they may not be former members of the police, armed services, nor clergy. "This exclusion is intended to ensure that gacaca is a popular process, run by citizens at the local level and free from actual or perceived political or legal interference." Clark, *supra* note 93, at 792. Judges can be illiterate, (only members of the coordination committee elected for each gacaca court need to be able to read and write Kinyarwanda. *See* Organic Law No. 16/2004 art. 11.). Further, most gacaca judges lack a legal education. Paul Kagme, *Rwanda's Grass Courts*, N.Y. TIMES, July 10, 2004, *available at* http://www.nytimes.com/2004/07/10/opinion/10SAT4.html?scp=6&sq=gacaca&st=cse.

[234] Organic Law No. 16/2004 art. 38 ("In case of mistrust in the Seat members, she submits it to the organs of investigations or the Public Prosecution.").

[235] Clark, *supra* note 93, at 793.

gender training for gacaca participants and leaders.[236] *Inyangamugayos* received limited training on issues of gender. In 2001, USAID gave $117,000 to SERUKA, a Rwandan women's organization, to train women to serve as gacaca judges.[237] Further training of female judges has been funded by NURC, UNIFEM and the Belgian Government.[238] In its gender report, USAID notes the need for gender sensitization training, especially for male judges.[239] In June 2002, Rwanda's Minister of Gender and Women's Development, Angeline Muganza, launched an eighteen month USAID-funded program to address gender and sexual violence in the country.[240] The program included training for *gacaca* judges on ways to help women and girls who suffered violence during the genocide and the development of sensitization and training materials.[241] In 2004, UNIFEM provided funding for PROFEMME, a Rwandan umbrella women's organization, to increase women's capacity to participate in gacaca.[242] In addition to media awareness campaigns, this project involved training two-hundred and nine community leaders on gacaca procedures and the importance of

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[236] "There is an important need to add a gender perspective to the discussions about gacaca. The key issue here is that, if no special efforts are made, women will simply not participate in the gacaca process. With few exceptions, they will not be elected into the sièges, and they will not provide testimony. During discussions on restitution and compensation, they may be neglected as well, contrary to the law." UVIN, *supra* note 122, at 17. *See also,* SYLVIE MOREL-SEYTOUX & HELENE LALONDE, INTERNATIONAL CENTER FOR RESEARCH ON WOMEN, GENDER ASSESSMENT AND ACTION PLAN FOR USAID/ RWANDA (March 2002), *available at* http://pdf.usaid.gov/pdf_docs/ PDABW706.pdf.

[237] MOREL-SEYTOUX & LALONDE, *supra* note 236.

[238] USAID, AFRICA BUREAU FRAGILE STATES FRAMSWORK: GENDER ISSUES AND BEST PRACTICE EXAMPLES 8 (2005), *available at* http:// www.ansaafrica.net/uploads/documents/publications/

Africa_bureau_gender_issues_Aug2005.pdf.

[239] MOREL-SEYTOUX & LALONDE, *supra* note 236.

[240] PROTECTION AVAILABLE TO WOMEN, *supra* note 7.

[241] *Id.*

[242] VALJI, *supra* note 13, at 42.

participation.[243] However, because rape and sexual torture were not under the jurisdiction of gacaca at that time, targeted training was not provided on issues related to those cases.[244] The National Women's Council conducted two sensitization programs in 2005 and 2007; both were aimed at increasing women's participation and not at providing gender sensitization to judges.[245]

After the jurisdictional shift, discussed *supra,* the gacaca jurisdiction conducted two levels of training sessions for gacaca personnel between July 11 and September 10, 2008.[246] First, the jurisdiction completed three-day training for a group of people who would then train the *inyangamugayos* about the judgment procedure of cases.[247] During the three-day training, conducted by Utsa Kaitesi, a lawyer, and Jeanne Marie Ntete, a clinical psychologist, two hundred and fifty people were trained—one-hundred and seventeen coordinators of gacaca, and sixteen lawyers and one-hundred and seventeen trauma counselors. These people then immediately had to do a two-day training of judges in which the coordinators and counselors did the trainings and the lawyers supervised.[248] Through this process, the gacaca jurisdiction eventually trained 16,974 judges.[249]

In twelve training centers, *inyangamugayos* were trained, first, on the law on sexual violence and mutilation, and second, on preventing shock and trauma to witnesses and victims and

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[243] *Id.*

[244] *Id.*

[245] The Ministry reports that the 2007 training reached six-hundred women in solidarity camps. REPUBLIC OF RWANDA, MINISTRY OF GENDER AND FAMILY PROMOTION, NATIONAL WOMEN'S COUNCIL (2009), *available at* http://www.migeprof.gov.rw/index.php?option=com_content&task=view&id=114&Itemid=219&limit=1&limitstart=1.

[246] Interview with Nadine Uwamahoro, Training Officer Gacaca Jurisdiction, in Kigali, Rwanda (July 27, 2009).

[247] *Id.*

[248] *Id.*

[249] *Id.*

how to assist during a trauma episode.[250] The training packet for the legal training identifies the importance of this training,

> Because of the particularity of this crime, in its carrying out, in its consequences on the genocide victims, on the offenders, on their families, and on the national culture, it requires more care in its trial; it is necessary to provide enough and a lot of knowledge on the laws governing the trial so that the trial will happen with transparency and clearness in order to eradicate the [? Missing word] and culture of impunity in our country; in the interests of unity and reconciliation of all Rwandans.[251]

This training also aimed to instill in the judges an understanding of what it meant for the victims to testify during the trial, it explained "to go in public as a raped person, it is as though to be hurt anew."[252]

The second aspect of the training directly focused on victim trauma. The training packet emphasized the importance of listening to victims, and helping them feel supported and respected.[253] The authors of the packet pointed out that trauma can start right after the event or long after the event, it can have different progressions, it can be physical or mental, and it affects minors as well as adults.[254] The packet also emphasized that a Hutu, or someone who committed genocide, can also experience

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[250] *Id.*

[251] GACACA JURISDICTION, TRIAL OF RAPE CRIMES, *supra* note 225.

[252] *Id.*

[253] THE GACACA JURISDICTION, IHUNGABANA N'UBURYO BWO GUFASHA UWAHUNGABANYE MU NKIKO GACACA [PSYCHOLOGICAL TRAUMA AND TREATMENT FOR THE TRAUMATIZED VICTIM IN GACACA JUSTICE] (2008) [hereinafter GACACA JURISDICTION, TREATMENT FOR THE VICTIM] (on file with author).

[254] *Id.*

trauma.[255] The authors wrote:

> Psychological trauma is not a mistake by the victim, it is not a weakness, it is not madness. It can happen to anyone. Families and friends must provide help in order to reduce the number of trauma victims. Gacaca judges can take part in reducing the number of victims of trauma by finding the truth and by handling cases with fairness. Judges can also decrease the number of traumatized victims by trying to listen to them and by understanding the harm they experienced.[256]

Judges were not only subjected to consciousness raising, but also given tangible psychological information; the packet listed the four symptoms of trauma and explained post-traumatic stress disorder.[257] The training also tried to explain the differences between the way men and women experience trauma. It states:

> Normally, the ladies are more likely to become traumatized than men, because they aren't used to hiding and covering their emotions like men do. There is one Rwandan proverb which more clearly defines this sentiment, "the tears of a man pour on the inside." It means that the culture allows ladies and women to mourn or to lament or to show it whether she is sad, but

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[255] *Id.*

[256] *Id.*

[257] *Id.* (explaining the criteria of trauma: 1. the person should have gone through bad events (e.g. war, earthquake), 2. they are re-living that experience (visualizing someone coming at you with a machete), 3. the person is changed (e.g. no longer joyful, hating what you previously liked), 4. mixture of symptoms including abnormally repeated fears, always being read for harm, lack of sleep, being fed up with living, abnormal forgetfulness, tiredness (e.g. when you hear a guy you think the war has started again). GACACA JURISDICTION, TREATMENT FOR THE VICTIM,Ihungabana N'uburyo Bwo Gufasha Uwahungabanye Mu Nkiko Gacaca (Psychological trauma and treatment for the traumatized victim in gacaca justice), Gacaca Jurisdiction, *supra* note 255.

is not the case for man.[258]

The training targeted both women and men, an improvement on past trainings.

A major concern of scholars and activists has been the need for trauma counseling and support for victims of sexual violence.[259] In response to this, gacaca made a series of changes to its original process. The 2008 law states, "Delegates of the National Service in charge of the follow up, supervision and coordination of the activities of Gacaca Courts, security officers, and Trauma Counsellors may follow up a matter being tried *in camera*."[260] During the trial there were supposed to be six people in the room: the victim, the accused, the judge, a security officer, the gacaca representative and a trauma counselor.[261] The coordinator was supposed to report any problems to the gacaca jurisdiction.[262] The trauma counselor was chosen by the victim, professional counselors are offered from three NGOs: IBUKA, AVEGA,[263] and SOLACE ministries.[264] Typically, the trauma counselors were not professionals; they were trained by IBUKA,

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[258] *Id.*

[259] *See* discussion *infra* Part II.A.

[260] Organic Law No. 13/2008, May 19, 2007 (amending Organic Law No. 16/2004 art. 38).

[261] Interview with Usta Kaitesi, Lecturer, National University of Rwanda, in Kigali, Rwanda (July 28, 2009).

[262] Interview with Nadine Uwamahoro, Training Officer Gacaca Jurisdiction, in Kigali, Rwanda (July 27, 2009).

[263] AVEGA is an organization for genocide widows, and has 25,000 members. Zraly, *supra* note 15, at 11.

[264] Morgan C., *International Symposium on the Genocide Against Tutsi 2009 (Day 3)*, MORGAN IN AFRICA (Apr. 22, 2009, 1:49 PM), http://morganinafrica.blogspot.com/2009_04_01_archive.html.

the survivor's organization in Rwanda.[265] It is unclear whether the trauma counselor could provide support to the perpetrator; the counselor came from a survivor's organization, and the victim got to decide.[266] The counselors could offer advice and intervene in any case of trauma.[267] There were two university trained clinical psychologists per district to follow up with the volunteer counselors.[268]

In contrast, there were no counselors during the trials in the national courts. A representative from AVEGA, a women's organization in Rwanda, stated that many women were traumatized from their experiences in the national courts, reporting that they would vomit and cry during the trial.[269] They were not offered *in camera* trials, and their privacy was not preserved.[270] For trials in the national courts, women also had to travel (sometimes considerable distance) at their own expense and pay court fees.[271]

The emphasis on allowing *in camera* trials for victims of sexual violence was meant to benefit victims. In the judges' training, the need to protect the privacy of the victims was considered vital. The training packet emphasizes that the judges

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[265] Interview with Usta Kaitesi, Lecturer, National University of Rwanda, in Kigali, Rwanda (July 28, 2009). A representative from AVEGA stated that all of the trauma counselors were women, community volunteers, who were trained to give psychological support in Gacaca cases. The training lasted for three days. Interview with Assupmtha, AVEGA employee, in .Kigali, Rwanda (July 28, 2009).

[266] Interview with Usta Kaitesi, Lecturer, National University of Rwanda, in Kigali, Rwanda (July 28, 2009).

[267] *Id.* (Usta Kaitesi likens the counselors to the Red Cross.).

[268] Interview with Nadine Uwamahoro, Training Officer Gacaca Jurisdiction, in Kigali, Rwanda (July 27, 2009).

[269] Interview with Assupmtha, AVEGA employee, in Kigali, Rwanda (July 28, 2009).

[270] MORGAN IN AFRICA, *supra* note 264.

[271] Interview with Usta Kaitesi, Lecturer, National University of Rwanda, in Kigali, Rwanda (July 28, 2009).

cannot decide the case in public or read aloud the decision in public. In cases where the person charged with rape or other crimes of sexual abuse was also charged with other crimes, and he committed those crimes against one person, all those crimes were to be tried *in camera*.[272] In a case in which a person charged of rape crimes or other sexual abuse was charged of other crimes committed against other people, those additional crimes are tried in public, while the sexual violence case was heard *in camera*.[273] The training manual also emphasizes that people attending *in camera* rape or sexual abuse trials could not reveal information learned during the course of that trial to the public; if they did, they would be charged under the ordinary penal law.[274]

The gender training conducted in 2008 addressed many of the concerns cited by civil society actors and victims with the adjudication of sexual violence crimes in gacaca. Unlike previous trainings, the Gacaca Jurisdiction invested in giving gender training to all judges active in the gacaca process. These trainings, however, aimed to improve the experience of sexual violence victims within a system that was built in a gendered manner. By offering women the option to shield themselves from severe pain through *in camera* interviews, the court also institutionalized the idea that women should be fearful or ashamed of speaking about crimes of sexual violence and kept these women's experiences outside of the community narrative; these issues will be further investigated in Part III.

D. Sexual Violence in International Law

Historically, the international community has disregarded

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[272] GACACA JURISDICTION, TRIAL OF RAPE CRIMES, *supra* note 225.

[273] *Id.*

[274] *Id.*

sexual violence,[275] both in criminalizing it and understanding its effects on victims.[276] Rape has been conceptualized as an inescapable product of war[277] or as a challenge to honor.[278] During the early 1990s, the UN system began to recognize that violence against women is in breach of international law.[279]

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[275] Carpenter, *supra* note 15, at 633 (detailing the many instances in which the international legal community ignored sexual violence during conflict); *Sexual Violence and Armed Conflict: United Nations Response*, WOMEN2000, Apr. 1998, at 2, *available at* http://www.un.org/womenwatch/daw/public/w2apr98.htm (discussing sexual violence during armed conflict and the UN response). *See generally* Rhonda Copelon, *Gender Crimes As War Crimes: Integrating Crimes Against Women Into International Criminal Law*, 46 MCGILL L.J. 217 (2000).

[276] *See generally* BROWNMILLER, *supra* note 40 (analyzing the history of rape in the context of war); Catharine MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN'S L.J. 59 (1993) (discussing the history of rape in the context of war as an assertion of male dominance).

[277] Tamara L. Tompkins, *Prosecuting Rape as a War Crime: Speaking the Unspeakable*, 70 NOTRE DAME L. REV. 845, 851 (1995) (noting General Patton's statement that rape is "an inevitable byproduct of war").

[278] This is problematic not only because it fails to identify rape as a violent crime, but because of its implicit allusion to women's worth being measured in chastity, and their ownership by men. It also contributes to rape's typical conception as a "lesser" crime. For example, Fourth Geneva Convention art. 27 prohibits "any attack of [women's] honor, in particular against rape, enforced prostitution, or any form of indecent assault." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 27. *See also* Protocol Relating to the Protection of Victims of Non-International Armed Conflicts [Protocol II], art. 2(e),1125 U.N.T.S. 3, 16 ILM 1442 (1977) (characterizing rape as "outrage against personal dignity"). *See also* Rhonda Copelon, *Rape and Gender Violence: From Impunity to Accountability in International Law*, HUMAN RIGHTS DIALOGUE 2.10 (2003), *available at* http://www.cceia.org/resources/publications/dialogue/2_10/articles/1052.html.

[279] The Beijing Platform for Action included women and armed conflict as one of the twelve areas of concern. Fourth World Conference on Women, September 4-15, 1995, P135, U.N. DOC. A/CONf.177/20, § c ¶¶ 131, 135 (Oct. 17, 1995). *See also* Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights, U.N. DOC. A/CONF.157/24, part 2 ¶ 38 (Oct. 13, 1993) (stating that that "[a]ll violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response."); Declaration on the Elimination of Violence Against Women, G.A. Res 48/104, U.N. DOC. A/RES/48/104 (Feb. 23, 1994) (addressing the particular vulnerability of women during conflict).

Under international law,[280] sexual violence can be prosecuted as a grave breach of the Geneva Conventions,[281] a war crime,[282]

[280] *See generally* Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424 (1993).

[281] Geneva Convention Relative to the Protection of Civilian Persons in Time of War [Fourth Geneva Convention], art. 14, Aug. 12, 1949, 6 U.S.T. 3526, 75 U.N.T.S. 287.

[282] The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 [Fourth Geneva Convention], arts. 27, 147, 75 U.N.T.S. 287 (specifying that "torture or inhumane treatment" and "willfully causing great suffering or serious injury to body or health" are war crimes, or grave breaches of the conventions"). *See also* Protocol Relating to the Protection of Victims of Non-International Armed Conflicts [Protocol II], art. 4(2)(e) (forbidding "violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation" and "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault," as well as "slavery and the slave trade in all their forms."). *See also* Fourth Geneva Convention, art. 27 (requiring that States protect women against rape and enforced prostitution.).

torture,[283] a crime against humanity[284] and an act of genocide.[285] The development of an international jurisprudence that recognizes sexual violence as a violation of the fundamental principles of human rights began in the context of the war in the former Yugoslavia.[286]

The international community was slow to recognize crimes of sexual violence during the Rwandan genocide.[287] The 1994 preliminary report of the Commission of Experts, a group mandated by the Security Council to investigate violations of international humanitarian law during the genocide, did not include any reference to sexual violence.[288] Ultimately, sexual

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[283] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 23 I.L.M.1027 (1984). *See also* Special Rapporteur on Torture, Comm'n on Human Rights, *Question of the Human Rights of all Persons Subjected to any form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶19, U.N. DOC. E/CN.4/1995/34 (Jan. 12, 1995).

[284] U.N. Secretary-General, *Paragraph 2 of Security Council Resolution 808: Rep. of the Secretary General*, ¶ 48, U.N. DOC. S/25704 (May 3, 1993) (stating that crimes against humanity are "inhumane acts of a very serious nature . . . committed as part of a wide-spread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.").

[285] Sexual violence can be considered an act of genocide. *See* Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T (Int'l Crim. Trib. For Rwanda Sept. 2, 1998) (holding that rape can be an act of genocide). Genocide is distinguished from other crimes by the intent of the perpetrators in committing the crime. Proving genocide for any crime, including sexual violence, requires specific intent, not merely committing the act in the context of a genocide. *See also* Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, G.A. Res. 260(III)(A) (Dec. 9 1948) . *See further* NOWROJEE, *supra* note 8, at 7 (stating that ninety percent of judgments at the ICTR contained no rape convictions, and that there were double the number of acquittals for rape as there were convictions).

[286] *See* Prosecutor v. Tadic, Case No. IT-94-1-I, Indictment (Feb. 13, 1995), amended, Case No. IT-94-1-I (Sept. 1, 1995), amended, Case No. IT-94-1-I (Dec. 14, 1995).

[287] Carpenter, *supra* note 15, at 635.

[288] *See* U.N. Secretary-General, *Preliminary Report of the Commission of Experts Established Pursuant to Security Council Resolution 935, delivered to the Security Council*, U.N. DOC. S/1994/1125 (Oct. 4, 1994).

violence was included in the reports of the UN Special Rapporteur because of pressure from NGOs.[289]

Article one of the 1996 genocide law said to look to the Genocide Conventions and Geneva Conventions for the definition of the crimes the perpetrators were charged with in gacaca: genocide and crimes against humanity.[290] The International Criminal Tribunal for Rwanda, in the Akayesu judgment, decided upon an expansive definition of sexual torture that allowed for the inclusion of the types of crimes committed

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[289] *Sexual Violence and Armed Conflict: United Nations Response*, *supra* note 275, at 7 (stating "[t]he NGO community was ultimately responsible for insisting that the international community place the issue on its agenda."). *See also Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935*, PP136-37, U.N. DOC. S/1994/1405 (Dec. 9, 1994) (referencing information submitted by the NGO African Rights).

[290] Article 1:

> a) either the crime of genocide or crimes against humanity as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, in the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and its additional protocols, as well as in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968, the three of which were ratified by Rwanda ; or
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> b) offences set out in the Penal Code which the Public Prosecution Department alleges or the defendant admits were committed in connection with the events surrounding the genocide and crimes against humanity.

during the genocide.[291] The ICTR struggled with defining the

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[291] The ICTR Statute lists rape as a crime against humanity. ICTR Statute, S.C.Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), *available at* http://www1.umn.edu/humanrts/peace/docs/scres955.html. The ICTR Statute also expressly refers to crimes such as "rape, enforced prostitution, and any form of indecent assault" as being violations of Common Article 3 of the Geneva Conventions. However, in the first few years of the court, there was "little attempt" to prosecute individuals for crimes of sexual violence. Carpenter, *supra* note 15, at 636. The first charge on the grounds of sexual violence was the Akesayu case. *See* Akayesu Indictment, Case No. ICTR-96-4-T (rape was not included in the initial indictment, only after hearing repeated evidence and pressure from NGOs).

In Akesayu, the court did not define rape as a specific act, or series of acts; rather it looked to a contextual approach. According to the Tribunal, rape is:

> [A] physical invasion of a sexual nature, committed on a person under circumstances which are coercive . . . Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.

Id., at 687–88.

The Tribunal found that "sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact," including forced nudity. *Id.* at 6, 596–98, 688. It recognized that "the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts" and noted "the cultural sensitivities involved in public discussion of intimate matters" and noted "the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured." *Id.* at 687.

Rape was found to be an act of genocide under paragraph 3(b) of the ICTR statute. *Id.* at 731–35 (constituting serious bodily or mental harm). The court found evidence that though the rapes were often committed before murder, they were used to destroy the Tutsis will to live. The ICTR emphasized that rape can constitute torture in many instances, including when it is "used for such purposes as intimidation, degradation, humiliation, or discrimination, punishment, control, or destruction of a person." Further, "[r]ape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Id.* at 598. Under paragraph (d), the court held that measures intended to prevent births could be sexual mutilation, sterilization, separation of the sexes, or forced birth control. *Id.* at 731–34. "The deliberate rape of a woman with intent to impregnate her falls within the scope of this provision in patriarchal societies

crime and its scope in later cases.[292]

While there is little consensus on the definition and elements of sexual violence within international law, the establishment has begun to recognize what victims have always known—sexual violence is more than penetration without consent. In recognizing the importance of context to the crimes committed during the genocide, the ICTR mirrored the decisions of Rwandan leadership to identify sexual violence as more than an attack on a person, but as an act of genocide.

II. What factors determined the level of adjudication of sexual violence crimes?

A. Cases were not completed within the national courts.

The categorization scheme established in the 1996 Genocide Law placed sexual violence as a category one crime and thus under the jurisdiction of the national courts. Experts report that "very few cases" of genocide sexual violence were heard in the national courts;[293] one scholar estimates that there were "much less than 1,000."[294] In the beginning of 2009, 6,608 cases of rape or sexual torture were transferred from the national courts to the gacaca jurisdiction.[295] These files represented all the sexual violence cases that had been initiated by that time and

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where membership of the group moves through the father." Carpenter, *supra* note 15, 649.

[292] *See* Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence (May 15, 2003); Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Summary of Judgment, (Apr. 28, 2005). *See also* Rebecca L. Haffajee, Note, *Prosecuting Crimes Of Rape And Sexual Violence at the ICTR: The Application Of Joint Criminal Enterprise Theory*, 29 HARV. J.L. & GENDER 201 (2006).

[293] Interview with Gace Bunyoye, Witness Protection, Ministry of Justice, in Kigali Rwanda (July 8, 2009). *See also* Waldorf, *supra* note 96, at 62 (stating that only forty-nine out of a sample of 1051 suspects were prosecuted for rape or sexual torture, and only nine of those were convicted).

[294] Interview with Usta Kaitesi, Lecturer, National University of Rwanda, in Kigali, Rwanda (July 28, 2009).

[295] GACACA COURTS PROCESS, *supra* note 6.

that were not yet adjudicated in the national courts or plead out into gacaca courts through the confession procedures. As discussed *supra,* until 2009, crimes of sexual violence were either: adjudicated in the national courts, plead out into gacaca, informally heard or not heard at all.[296] Therefore, not counting cases that were informally heard or plead out,[297] there were less than 8000 cases of sexual violence tried in Rwanda. Even considering a number in the thousands for cases informally heard or plead out, this is significantly less than the minimum 250,000 cases of sexual violence that occurred during the genocide. The question therefore arises: why were so few cases of sexual violence adjudicated?

Rwandan women's groups demand that crimes of sexual violence be adjudicated within the national courts was "driven by the need to ensure that there is punishment commensurate with the horrific acts perpetrated, but also that these individuals do not remain in the same communities, posing an on-going security threat to victims and compounding existing trauma."[298] Scholar Sarah Wells wrote that Rwandan activists and survivors supported the classification of sexual violence as a category one crime (and therefore within the jurisdiction of the national courts) because, "in the context of the 1994 genocide, rape often constituted a form of torture because it was often accompanied by sexual slavery, which resulted in acute physical and

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[296] *Id.*

[297] It is unclear how many cases were adjudicated informally or plead out into gacaca. The statistics available at the time of writing only identified crimes under the cause of action 'genocide,' therefore no statistics were available identifying how many perpetrators were found guilty of sexual violence within the gacaca courts. See, *infra,* Part II.D.2 for an in-depth discussion of the discovery, filing and confession procedures which this author believes lead to a limited number of sexual violence crimes being plead out into gacaca in the beginning years. Anecdotal reports reveal that some women did show up at gacaca hearings for perpetrators confessing to another crime, and accuse them of sexual violence; this accusation was then discussed by the community with differing outcomes. Interview with Assupmtha, AVEGA employee, in Kigali, Rwanda (July 28, 2009).

[298] VALJI, *supra* note 13, at 11. *See also supra* note 188, discussing women's groups involvement in the inclusion of sexual violence in category one.

psychological trauma."[299] Rape was intended to produce a "living death,"[300] this existence, activists argued, was "far more painful than being murdered," and therefore was placed above murder within the hierarchy of crimes from the genocide.[301]

Since gacaca's inception, scholars and activists have argued that sexual violence crimes should not be placed under its jurisdiction. In the literature, scholars argue that gacaca is not a suitable location to hear crimes of sexual violence because of the social and cultural constraints on Rwandan women.

B. Scholars argue that norms and perceptions inhibited women's participation in gacaca.

1. Social and cultural norms inhibited women's participation in gacaca.

Scholars argue that victim participation in gacaca was constrained by social attitudes towards sex in Rwanda. An oft-quoted line, to emphasize the degree to which Rwandans do not talk about sex, is: "the words to describe some sexual acts do not even exist in Kinyarwanda."[302] Academics write that it is impossible to successfully adjudicate crimes of sexual violence within gacaca because the survivors are unwilling to publicly

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[299] Wells, *supra* note 18, at 184.

[300] *See supra* note 20 and accompanying text. *See also* L. Sharlach, *Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda*, 22 NEW POL. SCI. 89, 99 (2000) ("Survivors report that Hutu men diagnosed with HIV raped Tutsi women during the civil was, then told the women that they would die slowly and gruelingly from AIDS.").

[301] Wells, *supra* note 18, at 184.

[302] Carpenter, *supra* note 15, at 647 (*citing* Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, *Report of the Mission to Rwanda on the Issues of Violence against Women in Situations of Armed Conflict*, U.N. DOC. E/CN.4/1998/54/Add.1 (1998), at pt III.A, *available at* http://www2.ohchr.org/english/issues/women/rapporteur/annual.htm.) This Author questions the inference that this statement reveals a sexually repressed society. Certainly, without a specific word, one could still use two, three or four words to describe an experience sufficiently.).

share their story due to shame and stigma.[303] Maya Sosnov reported that:

> In Rwanda, rape victims fear they will become ineligible to marry and will face ostracism from their families and husbands. Frequently, parents refuse to allow young girls to testify because of a commonly held belief that discussing sexual abuse will only worsen ethnic tension and harm the reconciliation process.[304]

Sarah Wells wrote, "[v]ictims fear that testifying and consequently exposing their experiences of sexual abuse will lead to community ostracism, ineligibility to marry and other secondary harms."[305] Megan Carpenter concludes: "The gacaca tribunals are simply not designed to accommodate this cultural context."[306] The former IBUKA president stated: "Gacaca is

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[303] Women's reticence to speak publicly about experiences of sexual violence has been discussed by scholars outside the context of the Rwandan genocide. *See* Beth Goldblatt & Sheila Meintjes, *Gender And The Truth And Re-Conciliation Commission* (1996), *available at* http://www.justice.gov.za/trc/hrvtrans/submit/gender.htm (arguing that the testimony of sexual violence survivors must be placed in a different context in order for them to overcome the stigma associated with their testimony). It is also echoed by Rwandans; Marie Immaculee Ingabire, who helped victims of sexual violence who are participating in gacaca, stated, "sexual issues in Rwandan culture are secret." Interview with Marie Immaculee Inabire, UNIFEM, in Kigali, Rwanda, (June 26, 2009); *See also* WHAT WOMEN DO IN WARTIME: GENDER AND CONFLICT IN AFRICA (Meredith Turshen & Clothilde Twagiramariya, eds., 1998); Waldorf, *supra* note 96, at 62.

[304] Sosnov, *supra* note 124, at 138.

[305] Wells, *supra* note 18, at 187. *See also* Tamara L. Tompkins, *Prosecuting Rape as a War Crime: Speaking the Unspeakable*, 70 NOTRE DAME L. REV. 845, 878-80 (1995) (noting that the social stigma attached to rape results in its victims becoming unmarriageable); NOWROJEE, *supra* note 8, at 3; Kamahsazi notes that historically, women who became pregnant out of wedlock could be "banished [or] thrown in long pits." Kamashazi, *supra* note 96, at n. 109.

[306] Carpenter, *supra* note 15, at 647. Carpenter looks to the lack of specialized victim or witness protection mechanisms, which she writes will exacerbate the already trying conditions created by lack of counsel and cultural context.

public. You cannot say you've been raped in public—that's humiliating . . . Some young girls have married and their husbands don't know, their children don't know."[307] Human Rights Watch reported that rape victims rarely came forward to testify in public about crimes committed against them during the pilot phase.[308]

Western scholars arguing for gacaca's unsuitability draw their conclusions, in part, from survey data. A 2002 survey conducted by the Rwandan National Unity and Reconciliation Commission (NURC) found that sixty percent of sexual violence survivors thought that women would testify significantly less than men because of the intimate nature of the crimes committed against them.[309] All of those surveyed agreed that the risks[310] of testifying for female survivors are much greater than those of men[311] and that many families will prevent young girls from testifying about their experiences of wartime sexual violence.[312] The International Rescue Committee conducted surveys in 2002, 2005 and 2006, which showed that Rwandans belief in the appropriateness of gacaca to deal with sexual violence cases has

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[307] *Id.*

[308] Waldorf, *supra* note 96, at 63.

[309] Wells, *supra* note 18, at 187.

[310] The Ministry of the Interior is tasked with guaranteeing the security of judges, suspects, and the community at large during gacaca hearings, usually by providing one or two armed security personnel during all sessions. Clark, *supra* note 93, at 793.

[311] Wells, *supra* note 18, at 187.

[312] The National Unity and Reconciliation Commission survey found that twenty-seven percent of the respondents believed that children would not be able to reveal themselves as a victim of sexual violence. Wells, *supra* note 18, at 187. "Young women are considered least likely to reveal that they have been victims of sexual violence as they must 'guard their sexuality' and will not reveal the possibility they may be infected with AIDS since this may render them ineligible for marriage and childbirth." *Id.*

actually diminished over time.[313] Penal Reform International states that sexual violence survivors faced "enormous" pressure from their communities not to testify because of the classification of sexual violence in category one, which mean perpetrators could receive harsh punishments.[314]

2. Trauma and fear inhibited women's participation in gacaca.

Experiencing trauma is a significant risk from participation in gacaca; some scholars write that forcing women to testify is re-victimization.[315] One survivor said, "A negative effect of gacaca is that for many people it increases the trauma. Among people who had just found a way to cope with it, I notice a relapse because they must talk about the genocide and they remember the events again."[316] A report from the Gacaca Jurisdiction shows that some people did experience trauma after participating in gacaca; however, the statistics are not available separated by gender or by cause of action. The 2005 progress report includes amongst its reported statistics the number of victims who showed trauma symptoms during trials: Two-hundred and seventy three in sector courts, forty-three in appeals courts and six-hundred and thirty seven during the data collection phase.[317] The NURC reported that fifty-eight percent of women report that they have already "suffered too much to be interested in gacaca."[318]

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[313] VALJI, *supra* note 13, at 25 ("In response to the statement 'Women will have difficulties revealing themselves as victims of sexual violence' respondents increased from 53% agreement with the statement to 63% over the four year period.").

[314] *See* PENAL REFORM INT'L, *supra* note 116, at 40.

[315] Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73 (2002), at n.255; *see also* Wells, *supra* note 18, at 186–88.

[316] MOLENAAR, *supra* note 168, at 110.

[317] GACACA JURISDICTIONS, 2005 PROGRESS REPORT, *available at*, www.inkiko-gacaca.gov.rw/pdf/introduction%20english.pdf.

[318] Wells, *supra* note 18, at 187.

Survivors of sexual violence also fear reprisals from their testimony.[319] AVEGA representatives referred to the attacks as "part of a 'silent conflict', signaling the everyday threat of violence in the lives of survivors."[320] Clementine Nyinawumuntu said:

> I never went to the gacaca court when they were being tried because I could not bear to see them again. I also could not tell the gacaca judges what I am telling you [the book's authors], because the rapists' supporters would have mocked and intimidated me. I don't want to give them the satisfaction of seeing me traumatized again.[321]

Wells wrote, "female survivors have abstained from making accusations against wartime rapists despite recognizing them in their communities or elsewhere in the country."[322] One scholar wrote that victims have reason to believe that their perpetrators would be especially violent because, early in gacaca, perpetrators of rape who confessed had often done so to escape

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[319] Bolocan, *supra* note 2, at 391; *see also* Alana Erin Tiemessen, *After Arusha: Gacaca Justice in Post-Genocide Rwanda*, 8 AFR. STUD. Q. 57 (2004). Bert Ingelaere found that there was an increase in perceptions of insecurity amongst Tutsis since the 2005. He found that feelings of insecurity increased with the launching of gacaca and more specifically with the national roll out in 2005. VALJI, *supra* note 13, at 23 (citing Bert Ingelaere, *Living the Transition: A Bottom-up Perspective on Rwanda's Political Transition* (2007)). Penal Reform International reported that "the anxiety for the future among the Tutsi population in general and the genocide survivors in particular translates itself in a strong feeling of insecurity among this population group, especially amidst the most vulnerable such as women and elderly people." PENAL REFORM INT'L, *supra* note 116, at 16.

[320] Zraly, *supra* note 15, at 142.

[321] DE BROUWER & CHU, *supra* note 17, at 116.

[322] Wells, *supra* note 18, at 187.

the death penalty.[323] While gacaca judges can imprison anyone who threatens a witness,[324] the killing and threatening of witnesses and survivors was ongoing during gacaca.[325] Despite the Gacaca Jurisdiction's early efforts to protect victims of sexual violence, a 2001 study found that most Rwandans were

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[323] *Id.* at 188 n.120. Certain individuals falling within category 1 could be sentenced to death in the 1996 and 2004. Genocide Law of 1996, art. 14(a) ("[P]ersons whose acts place them in Category 1 are liable to the death penalty"); *Id.* art. 5(" Notwithstanding the provisions of paragraph (1), persons who fall within Category 1, as defined in Article 2, shall not be eligible to the reductions in penalties set out in Articles 15 and 16."). Art. 72 of Organic Law No.16/2004 states that:

> [D]efendants falling within the first category who refused to have recourse to confess, plead guilty, repent and apologise, as stipulated under Art. 54 of the organic law, or whose confession, plea of guilt, repentance and apologies have been rejected, incur a death penalty or life imprisonment. Defendants falling within the first category who confessed, pleaded guilty, repented and apologized as stipulated in Article 54 of this organic law, incur a prison sentence ranging from twenty five (25) to thirty (30) years of imprisonment.

See also Article 13, Organic Law No. 10/2007. *See also*; Article 17 of Organic Law No 13/2008, amending Article 72 of Organic Law No. 16/2004. However, today the death penalty is constitutionally forbidden. *See Rwanda abolishes death penalty*, AMNESTY INTERNATIONAL (August 2, 2007), http://www.amnesty.org/news-and-updates/good-news/rwanda-abolishes-death-penalty-20070802 (last visited Mar. 15, 2010).

[324] The 2000 law stated that the jurisdiction would prosecute those who harassed a witness, the 2004 gacaca law established fixed sentences for individuals found guilty of harming or harassing gacaca witnesses or interfering with judges' investigations of genocide-related crimes; *See* Organic Law, No. 16/2004 art. 30. (prison sentences ranging from three months to two years); Organic Law No. 40/2000 art. 37 ("The 'Gacaca Jurisdiction' prosecutes and sentences to the same penalties as persons who refuse to testify or make false denunciations, any person who exercises or attempts to exercise pressures on witnesses or members of the seat of the 'Gacaca Jurisdiction'.").

[325] *See* Karen McVeigh, *Spate of Killings Obstructs Rwanda's Quest for Justice*, THE OBSERVER, Dec. 3, 2006, at 41, *available at* http://www.guardian.co.uk/world/2006/dec/03/rwanda.karenmcveigh.

not aware of these options.[326]

C. The literature does not reflect the heterogeneity of women's experiences in gacaca; some victims of sexual violence wanted access to justice.

Many academic authors' argument for not adjudicating crimes of sexual violence in gacaca hinges on the necessity of fighting against patriarchal exclusion of women's voices from the judicial structuring process. When considering how to better reflect women's experiences in gacaca, scholars have concluded that the possible negative impact due to social mores prohibits the process from working effectively for women. However, this idea of women solely as objects of shame has come to overwhelm the literature on gacaca. It is critical to be mindful of the problems with viewing the women narrowly; each survivor is much more than a "victim of sexual violence."[327] African feminist Omolara Ogundipe-Leslie says:

> More narratives of African women's identities and lives, roles and statuses remain to be told. The dignity of African women will not be found, for now, in their coital and conjugal sites, though it should be. They, however, have dignity in other areas. All African women have multiple identities, evolving and accreting over time, enmeshed in one individual. Yet African women continue to be looked at and

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[326] Wells, *supra* note 18, at 190. A survey conducted by Johns Hopkins University found that of the eighty-two percent of Rwandans had heard of gacaca jurisdictions, and only nine percent knew that gacaca tribunals would not try cases involving genocide-related rape and sexual violence. GABISIREGE & BABALOLA, PERCEPTIONS ABOUT THE GACACA LAW IN RWANDA: EVIDENCE FROM A MULTI-METHOD STUDY (2001), *available at* www.jhuccp.org/pubs/sp/19/English/19.pdf. *See also* Waldorf, *supra* note 96 (stating that a gacaca president publicly disclosed the identity of a rape victim communicated in writing by the woman's mother).

[327] Nichole Hogg also addresses the common misbelief that women did not participate as perpetrators. In a recent article she finds that that the nature of women's conduct during the genocide was diverse and in some cases included directly taking part in the killings. Nicole Hogg, *Women's Participation in the Rwandan Genocide: Mothers or Monsters?*, 92 INT'L REV. RED CROSS 69 (2010).

> looked for in their coital and conjugal sites, which seem to be a preoccupation of many Western analysts and feminists.[328]

All Rwandan women were not driven by a singular set of factors determining their participation in gacaca. Rather, their attitudes reflect heterogeneity of experience. As Western critics, we risk taking away Rwandan women's agency by defining them only by their incapacities. The testimony of one survivor, Béatrice Mukandahunga, exemplifies the multi-faceted nature of women's participation in gacaca:

> I decided to share my testimony so that every country in the world knows genocide took place in Rwanda. I hope that everyone who hears my story helps us to find treatment for our sicknesses. I have forgiven those who hurt me. I do not remember them, and I would not recognize even one of them if I met him on the street. I don't go to the gacaca courts, because there is no justice in gacaca courts. The thought of those courts disturbs me. The courts are far away from where I live, and I have no money for bus tickets to go there. I also do not feel safe there. When I started praying and started to forgive the rapists, I felt no need to go to gacaca courts any longer. I actually don't really have a choice: it is hard to hate someone you don't even know. I just wish to have a normal life.[329]

Béatrice cited numerous reasons for not attending gacaca, she did not remember the perpetrators, did not perceive justice in the courts, did not need the justice offered by the courts, was disturbed by the experience, could not travel to get to gacaca and was fearful of what could happen if she participated.

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[328] Zraly, *supra* note 15, at 23 (quoting OMOLARA OGUNDIPE-LESLIE, RE-CREATING OURSELVES: AFRICAN WOMEN AND CRITICAL TRANSFORMATIONS 251 (1994)).

[329] DE BROUWER & CHU, *supra* note 17, at 129.

Both academic commentators and woman's rights activist indicated strong concerns about placing sexual violence crimes under the jurisdiction of gacaca because of the significant stigma and social ostracisms that victims would face during these trials.[330] By allowing perpetrators of sexual violence crimes to plead into gacaca in the original legislation, however, the government indicated that they did not see gacaca as a wholly unsuitable forum for crimes of sexual violence to be discussed. Moreover, Wells wrote, "Many Rwandan survivors' rights activists believe women have 'an obligation to testify,' since revelations of the truth depend on these women, given that the survivor population is comprised mostly of women."[331]

Generally, the residents of Rwanda were in favor of gacaca. A survey from a Rwandan human rights organization found that ninety-three percent favored gacaca, while Arthur Molenaar found ninety-six percent favored gacaca.[332] A Johns Hopkins study found that eighty-nine percent of Rwandans planned to "actively provide evidence during the court sessions."[333] More recently Amaka Megwalu and Neophytos Loizides surveyed 227 Rwandans regarding their participation in gacaca.[334] This study concluded that eighty-two percent of respondents attended gacaca, and 42.7 percent of those said they participated on a weekly basis.[335] Megwalu and Loizides also found that 74.4 percent of respondents agreed that gacaca is doing a good job of delivering justice and 13.7 percent remained neutral.[336]

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[330] See *supra* Part II.A.

[331] Wells, *supra* note 18, at 183.

[332] MOLENAAR, *supra* note 166, at 73. However there are concerns whether this reflects the 'actual' intentions of Rwandans; Molenaar identifies a tendency among Rwandans to give foreigners the answer they assume the foreigner wants. *Id.* at 74.

[333] GABISIREGE & BABALOLA, *supra* note 326, at 13–14.

[334] Megwalu & Loizides, *supra* note 4, at 2.

[335] *Id.* at 15.

[336] *Id.* at 16.

Gacaca offers access to justice for typically marginalized groups. Megwalu and Loizides measured the correlation between gacaca participation and three demographic characteristics. They found that people were far more likely to attend gacaca weekly if they were rural, did not obtain higher education and lost relatives during the genocide.[337] As an accessible medium, gacaca is more valued amongst those who traditionally are excluded from accessing the courts.

While there are women who do not want to participate in gacaca because of fear, shame and stigma, others want to 'shout it from the rooftops'. At the end of her testimony, one survivor said:

> So now, at your home, you will not keep silent about people whose rights are being violated. You will shout it out. This may be the reason why Violet shouts, convinced that the bad things which were done to her will never be done to anyone else. This is the same war you will fight when you get back there. Every time you hear about it, it will grieve you and you will ask yourself, "why?"[338]

The five survivors this Author spoke to all stated a desire to participate in gacaca for the sexual violence crimes committed

[337] They found that rural residents were 3.65 times more likely to attend gacaca weekly than their urban counterparts. They also found that people with a maximum of a high school education were 2.97 times more likely to attend gacaca weekly than those with higher education levels. Those who lost relatives during the genocide were 2.56 times more likely to participate than those who did not. *Id.* at 16.

[338] Zraly, *supra* note 15, at 23.

against them, and all wanted justice.[339]

Victims of sexual violence from the genocide seek acknowledgement of their suffering. After conducting interviews with rape survivors about their expectations from the ICTR, Binaifer Nowrojee found that the women are seeking acknowledgment of their pain:

> [T]hey say that they are looking for public acknowledgment of the crimes committed against them. They want the record to show that they were subjected to horrific sexual violence at the hands of those who instigated and carried out the genocide.[340]

The revealing of truth can be a powerful tool promoting

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[339] Interview with Alima, in Kigali, Rwanda (July 30, 2009). (These personal interviews with survivors of sexual violence during the Rwandan genocide were conducted with assistance from the Rwanda Women's Network in July 2009. Last names, while on file with the author, were not published to protect the identity of the victims.) Human Rights Watch, in contrast, found that sexual violence survivors did not want to participate in gacaca. The authors of the 2011 report interviewed twenty sexual violence survivors and only *one* stated that she had a preference for her case to be heard in gacaca. *See* HUMAN RIGHTS WATCH, *supra* note 178.

[340] Binaifer Nowrojee, *Your Justice is Too Slow: Will the ICTR Fail Rwanda's Rape Victims?* 7 (Boston Consortium on Gender, Security and Human Rights, Working Paper No. 105, 2002), *available at* http://www.genderandsecurity.umb.edu/Nowrojee.pdf [hereinafter *Your Justice is Too Slow*].

emotional healing.[341] Lawrencia, a survivor, stated that her leaders provided her with the hope and confidence to talk about the crimes perpetrated against her, and that the process was a valuable way to heal. The process, she says, was empowering.[342] Alima, who was gang raped and kept as a sex slave during the genocide, testified at the gacaca of one of her nine attackers. She said that she remembers her heart skipping as she faced him, but felt happy that he could never take away her pride. She now feels confident that justice was done; however, she wishes she could face the other attackers to find out why they did what they did. She said she has faith in gacaca because it is how "Rwandans have always done it," and after the trial she felt "set free."[343]

Pumla Gobodo-Madikizela, a psychologist, says that beyond revealing truth, justice mechanisms offer victims the opportunity to affirm the "wrongness" of the crime committed against them: "many victims conceive of justice in terms of revalidating oneself, and of affirming the sense 'you are right, you were damaged, and it was wrong'."[344]

After interviewing women in Rwanda, Anne-Marie de

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[341] As per Clark:

> Through interviews with the participants, the author discovered that over time, many in the General Assembly had come to view gacaca as an important means of discovering the truth of what happened to their loved ones in 1994. This discovery had in turn aided many survivors' ability to deal with emotions of anger and loss by providing the necessary facts about the death of their friends and family, thus allowing them to understand precisely what had happened and to speak more clearly and confidently about their experiences.

Clark, *supra* note 93, at 797.

[342] Interview with Lawrencia, in Kigali, Rwanda (Aug. 3, 2009).

[343] Interview with Alima, in Kigali, Rwanda (July 30, 2009).

[344] Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* 60 (1998) (quoting James C. McKinley, Jr., *As Crowds Vent Rage, Rwanda Excuses 22 for '94 Massacres*, N.Y. TIMES, Apr. 25, 1998).

Brouwer and Sandra Ka Hon Chu concluded, "[s]urvivors in Rwanda want accountability. They wish to see the perpetrators of the genocide brought to justice." One of those women is Marie Odette Kayitesi, who told her story in *The Men Who Killed Me*:

> When we got to the little house, one of them removed my clothes. When I was completely naked, he asked his mates who was going to be the first. A fight between them then ensued, because everyone wanted to be the first on me. In the end, one of the Interahamwe, who looked to me to be like a homeless man, pushed me on the floor and went on me. After he was finished, another one came. I remember at least ten of them on me, but I don't know the exact number of those who followed, because I fell unconscious . . . . What saddens me most is that the men who raped me are walking freely in the streets today and have never been held accountable.[345]

Lawrencia, another survivor, was gang raped but does not know who attacked her. While she says that nothing can ever allay the pain she feels in her heart, gacaca offers a chance at justice she wishes she could have.[346]

Another survivor, Mary Louise, who participated in gacaca as an *inyangamugayo*[347] and a witness in her own case, says that participating in gacaca was necessary for her to live without fear.[348] Anna Maria survived severe mutilation and torture by "many" perpetrators. At first, after other people reported the crimes committed against her, she said felt that gacaca would be of no value and only shameful. However, after speaking with

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[345] DE BROUWER & CHU, *supra* note 17, at 37.

[346] Interview with Lawrencia, in Kigali, Rwanda (Aug. 3, 2009).

[347] Local leader who acts as a judge in gacaca trials.

[348] Interview with Mary Louise, in Kigali, Rwanda (July 30, 2009).

counselors, she decided to participate. She said she was happy she went because gacaca did a lot for her, including getting her compensation.[349]

Despite the reports identifying the reticence of survivors to participate because of stigma and shame, it is clear that some sexual violence survivors did want to participate in gacaca.[350] The intent of the perpetrators was to shame and stigmatize these women, to create a living death. As will be discussed, *infra*, the post-genocide judicial process was created to cradle this stigmatization, rather than address the risks and provide a safe space for women to access justice.

D. The structure of gacaca limited women's participation.

1. Women's participation in gacaca was hindered by legal and procedural features of the gacaca laws.

The full answer to why so few cases of sexual violence went un-adjudicated is not to be found in the social particulars of Rwandan culture, but rather in the legal and political features of the gacaca law. Legislation led to a series of implementation decisions that did not promote the adjudication of sexual violence crimes. Rather, the implementation hindered the reporting and prosecution of these crimes.

Due to reporting procedures, files were not created for crimes of sexual violence, limiting the amount of crimes that went to trial. When cases of sexual violence were heard in gacaca or the national courts, there was little guidance on what constituted crimes of sexual torture and rape, which lead to confusion and judicial discretion. While sexual violence was classified as a category one crime in order to indicate the seriousness of the crime, the manner in which the crime was cast to the side indicates an institutional decision to treat victims of sexual violence as less deserving of justice. The classification of sexual violence as a category one crime did not achieve its

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[349] Interview with Anna Maria, in Kigali, Rwanda (July 30, 2009).

[350] Interviews conducted July 30, 2009 and August 3, 2009.

intent.

2. Discovery and filing procedures for crimes of sexual violence resulted in an underreporting of crimes.

Throughout gacaca, there was a limited number of ways crimes of sexual violence could be reported: by perpetrator confession or by the victim to an authority. Sexual violence crimes, unlike crimes of murder or looting, could not be reported by third parties starting in 2004, and possibly before.[351] This rule was created to protect victims from the shame and stigma that would occur if they were 'outed' as a sexual violence survivor. However, this rule also meant that crimes of sexual violence could not be reported in the manner most familiar with Rwandans.[352] Though the information gathering process was created with the intent to shield women from shame or stigma, the process also limited the number of cases that were heard.

One of the ways a crime could be recorded was if a perpetrator confessed to the crime. Starting in 2001, if the perpetrator confessed before he or she was placed on the official rolls, the case would go to gacaca and not into the national courts (if a file was made for the crime). However, evidence shows that very few perpetrators confessed to a crime of sexual violence.

The vast majority of confessions were to being a member of the *interahamwe,* not for having killed or raped someone.[353] Molenaar wrote that murders "are often pinned on people who

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[351] Organic Law No. 16/2004 art. 38.

[352] Interestingly, while this rule impacted filing procedures, it may have had limited impact during the gacaca proceedings themselves. Anecdotal reports from victims indicate that their rapes were sometimes discussed during gacaca hearings. Victims report leering from perpetrator's family members as well as efforts from community members to get the crimes included in the charges.

[353] MOLENAAR, *supra* note 166, at 115; *see also* Waldorf, *supra* note 96, at 62; PENAL REFORM INTERNATIONAL, RESEARCH ON THE GACACA: REPORT V (2003), *available at* http://www.penalreform.org/publications/gacaca-research-reports.

are either dead on in exile."[354] A Rwandan journalist stated, "I've never heard anybody confessing to more than one murder. You'd think nobody in Rwanda killed twice."[355]

Many of the individuals who committed sexual violence during the genocide and entered gacaca through the confession procedures were never put on trial for their sexual violence crime.[356] One reason for this may be what Molenaar calls "half-truthful confessions."[357] In order to avoid the harsher sentences of category one crimes, perpetrators did not confess to crimes of sexual violence.[358] Le Mon argues that the accused were motivated to confess because a gacaca trial would start quicker than a trial in the national courts, meaning they would most likely face a shorter term of imprisonment overall.[359]

Molenaar finds that, of all 1881 confessing prisoners in the province of Gikongoro, not a single one confessed to committing rape or sexual torture.[360] Survivors complained that detainees only confessed to minor acts.[361] Marie Odette Kayitesi, a sexual violence survivor said, "[e]ven if I felt like forgiving, it is not easy, because those Interahamwe continue to lie during their trials."[362] In two-thirds of the confessions that Molenaar observed in gacaca, there was controversy over whether the

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[354] MOLENAAR, *supra* note 166, at 115.

[355] *See* Stephan Faris, *Open Court*, TIME, Mar. 13, 2005, *available at* http://www.time.com/time/magazine/article/0,9171,1037615,00.html.

[356] MOLENAAR, *supra* note 166, at 115.

[357] *Id.*

[358] *Id.*

[359] Christopher J. Le Mon, *Rwanda's Troubled Gacaca Courts*, 14 HUM. RTS. BRIEF 16, 17 (2007).

[360] MOLENAAR, *supra* note 166, at 115.

[361] *Id.* at 140.

[362] DE BROUWER & CHU, *supra* note 17, at 40.

testimony was truthful.[363]

It is logical that perpetrators would be strategic in their confessions. While establishing a complete narrative is in the best interest of the country, Molenaar points out that it might be "somewhat naïve" to expect people to put the collective interests of justice and reconciliation ahead of their own interests.[364] He wrote, "[h]uman beings usually act in accordance with what they believe to be in their best self-interest or group-interest and will seldom behave differently."[365]

There were also incidents in which judges accepted bribes to ensure that cases were not classified in category one, allowing for the perpetrator to attend ordinary court.[366] The Rwandan news media has found a number of incidences where judges were accused of bribery or removed from their position.[367]

The other way crimes of sexual violence could be reported was by the victim bringing it to the attention of an authority: police, judges and prosecutors. However, there were problems with this occurring, including fear, lack of recognition and lack of information. Women had reason to be fearful of participation in gacaca; there have been many allegations of witness disappearances, beatings and killings.[368] There is a pervasive

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[363] MOLENAAR, *supra* note 166, at 140.

[364] *Id.* at 105.

[365] *Id.* (noting that in only one case in the study did Hutu participants in a gacaca hearing accuse someone of genocide).

[366] Le Mon, *supra* note 359, at 17 (citing *Gacaca Judges Arrested Over Corruption*, NEW TIMES (KIGALI), Sept. 26, 2006).

[367] *Id.* (citing *Gacaca Judges Arrested Over Corruption*, NEW TIMES (KIGALI), Sept. 26, 2006); Emmy Namurinda, Gacaca Judges, Leaders Grilled, NEW TIMES (KIGALI), Nov. 19, 2006; *Corrupt Inyangamugayo Will Hurt Gacaca Justice*, NEW TIMES (KIGALI), Sept. 30, 2006; *Graft Threatens Gacaca Courts*, NEW TIMES (KIGALI), Sept. 27, 2006; *Gacaca President Held Over Corruption*, NEW TIMES (KIGALI), Sept. 19, 2006.

[368] *See* AMNESTY INT'L, RWANDA: THE HIDDEN VIOLENCE: "DISAPPEARANCES" AND KILLINGS CONTINUE (1998), *available at* http://www.amnesty.org/en/library/info/AFR47/023/1998.

belief that people make false allegations to settle family disputes, political issues, land or property issues, or personal scores.[369] Some women thought that no one would believe their claims. A 2004 study, found that the main reason women stated they did not seek assistance from local authorities when they were a victim of violence was because they did not trust the community social services and did not expect any help.[370]

Human Rights Watch found that fifty percent of women they interviewed who were raped during the genocide between 1998 and 2003 reported that "authorities had never registered their rape complaints." Even in a case where a survivor went to the police "several times," upon attending her attacker's trial, she found that the prosecutor did not mention her rapes. The men, upon provisional release, offered to pay the victim for her silence.[371] Lawyers without Borders found similar official tendencies before 1998.[372] Human Rights Watch found that rape complaints were "neglected" during the trial stage as well. In judgments that mentioned witness testimony related to sexual violence, the prosecutor and judge did not pursue the line of inquiry, and the final rulings did not reference crimes of sexual violence.[373]

Human Rights Watch identified problems in Rwanda with minimizing rape or blaming the victims. They interviewed government officials who stated that sexual relations between adult men and women were "usually consensual." They also identified individuals stating that women were participants in their own victimization, such as bringing on a rape by being drunk. Officials explained the rarity of formal complaints by stating that "there are good reasons to disbelieve adult women when they report rape, or blamed the women themselves for

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[369] Sosnov, *supra* note 124, at 139.

[370] VALJI, *supra* note 13, at 5.

[371] NOWROJEE, *supra* note 8, at 34–35.

[372] *Id.* at 34.

[373] *Id.* at 35.

assaults that are reported."[374] In the conventional courts, sexual assault prosecutions were rarely pursued.[375]

During the discussion of a new gender-based violence bill in August 2006, the legislature acknowledged that "Rwandan society had come to tolerate, even accept with impunity, acts of violence against women."[376] De Brouwer and Chu wrote:

> Traditional attitudes towards women's rights tacitly condone violence against women. A culture of pre-existing gender inequality that turns a blind eye to sexual violence in the family helps create an environment for targeted violence against women during armed conflict.[377]

This indifference impacted the final adjudication of genocide sexual violence crimes; Megan Carpenter wrote, "[t]he particular cultural operatives at play with regard to crimes of sexual violence . . . may mean that these crimes do not in fact get dealt with in this setting, and consequently fall through the cracks, whether or not those crimes are directly within the jurisdiction of the gacaca."[378]

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[374] *Id.* at 34.

[375] As per de Brouwer and Chu:

> Inadequate police training in the effective investigation of sexual assault and the absence of a standard protocol for conducting such inquiries have reportedly led to inconsistent court verdicts, confusion among law enforcement and government officials, and inattention to sexual violence against women.

DE BROUWER & CHU, *supra* note 17, at 20. In 2008 a new law was passed on the prevention and punishment of gender-based violence. The law outlaws conjugal rape, sexual slavery, harassment and other gender-based crimes. Organic Law 59/2008 of 10/09/2008.

[376] *Id.*, at 149.

[377] *Id.*

[378] Carpenter, *supra* note 15, at 646–47.

Women also faced practical hurdles to reporting crimes. Structurally the reporting process for sexual violence crimes was much different than that for other crimes. In most cases, during the information gathering stage, crimes were put on the lists in the cells. Sexual violence crimes were probably not put on these lists because of the prohibition on third party reporting. The Executive Secretary of Gacaca Jurisdiction reported that sexual violence cases had to be raised in sector courts, not the cell level courts as all the other crimes were, because of their classification as a category one crime.[379]

Some women were not aware that reporting a crime of sexual violence was necessary, and were simply waiting for their attackers to come up on trial for murder in order to attend the trial and accuse them. One survivor stated that she was "waiting for her sister to tell me that he [the perpetrator] was at gacaca."[380] In other cases, women felt unable to report acts of sexual violence because they did not know their attackers. This could be because a victim was raped by a man she did not know, such as a member of the military[381] or someone encountered while she was running;[382] or because she does not remember: one woman reported "blacking out" during a gang rape.[383] This survival mechanism hindered these women's ability to identify their rapists. Mark Drumbl wrote, "[i]n the chaos of mass violence, finding a survivor who can identify—let alone swear to —precisely which militant murdered which specific victim at what time of the day on the order of which specific superior officer simply is unrealistic."[384] Some women did not report their attacker because they believe the attacker is in The

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[379] Interview with Domitilla Mukantaganzwa, Executive Secretary of Gacaca Jurisdiction, in Kigali, Rwanda (July 23, 2009).

[380] Interview with Alima, in Kigali, Rwanda (July 30, 2009).

[381] Interview with Mary Louise, in Kigali, Rwanda (July 30, 2009).

[382] Interview with Alima, in Kigali, Rwanda (July 30, 2009).

[383] Interview with Lawrencia, in Kigali, Rwanda (Aug. 3, 2009).

[384] Mark A. Drumbl, *Law and Atrocity: Settling Accounts in Rwanda*, 31 OHIO N.U. L. REV. 41, 52 (2005).

Democratic Republic of the Congo.[385] One survivor reported that she checks with neighbors each time a group of men return to Rwanda to see if one of her rapists has returned.[386] Another woman stated that she did not report her attacker because she knows he is dead.[387] Other women were unable to report because of their living situation. As discussed *supra*, some of the survivors were living in poverty, with children, relying on subsistence farming, and have HIV or AIDS. If a crime occurred in a village far from where the survivor currently resides, she may have been be unable to take time to go to gacaca.

Whether because of practical limitations, fear or lack of information, there were many reasons women did not report their attackers. Perpetrators did not confess because they did not want to face the serious penalties or did not consider what they did wrong. Without the ability for third parties to report the crimes, sexual violence acts were never put on the books to be sent to trial.

3. There was insufficient guidance on the definition of the crimes of sexual torture and rape.

When cases went to trial, either under the jurisdiction of

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[385] Organic Law No. 08/96 art. 33 provides in part for this kind of situation:

> The Public Prosecution Department may institute proceedings against persons having no known domicile or residence in Rwanda or who are outside the country and against whom there are corroborating evidence or substantial evidence of guilt, whether or not such persons have been previously examined by the Public Prosecution Department.

See also Organic Law No. 40/2000 (stating that people can be charged in abstentia).

[386] Interview with Mary Louise, in Kigali, Rwanda (July 30, 2009).

[387] Ernestine Nyirangendahayo said:"The men who raped me are all dead. They were killed by the Inkotanyi. I don't know if I would have forgiven them if they were still alive, but I don't think so." DE BROUWER & CHU, *supra* note 17, at 141.

gacaca or the national courts, there was little guidance on what constituted a crime of sexual torture or rape. Without guidance, judges were free to disregard certain acts that the legislators may have intended to include as part of the crime. This not only led to confusion and exclusion, but also did not convey a sense of surety to victims that their case would be taken seriously. This uncertainness further undermined the respect for the court process in the eyes of the sexual violence victims and dissuaded their participation.

There was no guidance provided by Rwandan national law in defining the genocide sexual violence crimes in the law, as discussed in Part I.C. Within the national courts, the lack of definition lead to both difficulty and inconsistency in prosecuting gender-based crime,[388] and increased judicial discretion.[389] Human Rights Watch reports:

> An examination of judgments in genocide trials reveals that the failure to define rape in the Penal Code has contributed to considerable confusion among witnesses, accused, prosecutors, and judges. The reliance on judicial discretion to characterize an act of sexual violence has produced inconsistent guilty verdicts and punishments. Thus, some judgments categorize an act of rape as 'sexual torture.' Other judgments we examined reserved this term for acts of sexual mutilation or gang rape.[390]

The decision to include "sexual torture" as a category one offense was intended to be more inclusive of all the attacks on women during the genocide.[391] However, without a definition of

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[388] ELIZABETH PEARSON, THE INITIATIVE FOR INCLUSIVE SECURITY, DEMONSTRATING LEGISLATIVE LEADERSHIP: THE INTRODUCTION OF RWANDA'S GENDER-BASED VIOLENCE BILL 18 (Elizabeth Powley, ed. 2008).

[389] NOWROJEE, *supra* note 8, at 32.

[390] *Id.*

[391] Wells, *supra* note 18, at 184.

what "sexual torture" meant, there were inconsistent verdicts in the sexual violence trials.[392] Gacaca sectors were allowed relative autonomy when it came to their decision-making procedure, which resulted in inconsistent verdicts. One report states, "Some judgments categorize an act of rape as sexual torture. Other judgments we examined reserved this term for acts of sexual mutilation or gang rape."[393]

Interestingly, the definition, despite its gender-neutral capacity, has never been interpreted as including male rape. The 2008 law includes language that indicated that both women and men could be victims of sexual violence.[394] Despite evidence that male rape occurred during the genocide,[395] the Executive Director of Gacaca Jurisdictions stated that there has never been a case addressing male rape in gacaca.[396] This veil of silence surrounding the sexual violation of men is derived from the stigma and shame that matches and perhaps even exceeds that of

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[392] NOWROJEE, *supra* note 8, at 32.

[393] *Id.*

[394] Organic Law No. 13/2008 art. 6 ("A victim of the offence of rape or sexual torture may submit *her or his* complaint to the Sector Gacaca Court where the offence was committed from, the judicial police or the public prosecution . . . ."); *Id.* art. 9(5) (stating that "any person who committed the offence of rape or sexual torture, together with *his or her* accomplice." (emphasis added)).

[395] In their book, *The Men Who Killed Me*, de Brouwer and Chu present the stories of genocide sexual violence survivors. Among these horrific tales is one of a man who survived sexual violence during the genocide. Age thirteen in 1994, he was kidnapped and raped repeatedly. He says, "It was a very difficult experience, and not all men are brave enough to talk about it. It is considered shameful to be raped by a woman." He first spoke about this experience in 2007, 13 years after the genocide. DE BROUWER & CHU, *supra* note 17, at 91–97.

[396] Interview with Domitilla Mukantaganzwa, Executive Secretary of Gacaca Jurisdiction, in Kigali, Rwanda (July 23, 2009).

women who are victims of sexual violence.[397] Despite the legal availability of the mechanism, no cases were brought because of the social context. There was most certainly de facto amnesty for all crimes of sexual violence committed against men and boys during the genocide.

4. The classification of sexual violence as a category one crime did not achieve its intent.

Despite the classification of sexual torture as a category one crime, very few genocide sexual violence cases were adjudicated within the national courts. By and large, cases of sexual violence were pushed off to the side for the first seven years of gacaca, while more pressing matters were pursued. By not completing these cases until fifteen years after the Genocide, the government marginalized women in their pursuit of justice.

In 2008, a law was passed that moved the adjudication of category one sexual violence crimes from the national courts to

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[397] *See* Pauline Oosterhoff, Prisca Zwanikken & Evert Ketting, *Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret*, 12(23) REPROD. HEALTH MATTERS 68, 70 (2004) ("The silence that envelopes sexual torture of men in the aftermath of the war in Croatia stands in strange contrast to the public nature of the crimes themselves"); *see also* Lara Stemple, *Male Rape and Human Rights*, 60 HASTINGS L.J. 605, 612 (2009) (noting only three percent of 4076 NGO's that address rape during wartime and other forms of political sexual violence discussed the experience of males in their informational materials); Dustin A. Lewis, *Unrecognized Victims: Sexual Violence Against Men In Conflict Settings Under International Law*, 27 WIS. INT'L L.J. 1 (2009).

gacaca.[398] The explanations for the changed law are mostly pragmatic. The government wanted to finish the backlog of cases so the judicial sector could move forward with non-genocide cases.[399] This phase was launched on June 23, 2008, implemented in January 2009 and ended with the closing of gacaca in 2010.[400] This presented a short time frame for the gacaca courts to address the 6608 cases of rape or sexual torture.[401]

The 2008 amendment further stifled sexual violence survivor's ability to access justice. Women who had not wanted to pursue their cases in national courts[402] but did want to participate in gacaca were not offered the opportunity to initiate the prosecution of their case. While there is no statute of

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[398] Organic Law No. 13/2008 art. 1 states that:

> Any person or an accomplice prosecuted for an act that puts him or her in the first category, paragraph 3, 4 and 5, the second and third category as provided in Article 9 of this law, shall be tried by Gacaca Courts referred to in Title II of this law. Gacaca courts shall apply the provisions of this law.

Article 7 states that:

> The Gacaca Sector Courts shall hear at the first level cases of persons who committed offences that put them in the first category, point 3, 4 and 5 and in the second category as stipulated in article 9 of this law together with reviewing of cases that were determined in absence of an accused . . . .").

Id. at art. 7 (amending Organic Law No. 16/2004 art. 42)

[399] *See* Sulah Nuwamanya, *Gacaca Courts to Get More Powers*, OBSERVER, Mar. 6, 2008.

[400] GACACA COURTS PROCESS, *supra* note 6.

[401] *Id.* at 11.

[402] Interview with Usta Kaitesi, Lecturer, National University of Rwanda, in Kigali, Rwanda (July 28, 2009) (stating that "the ordinary courts were law, far from the victims of sexual violence, many of whom have HIV. They victims would have to go back and forth to the court and they did not think it was worth it.").

limitations for crimes of genocide,[403] the information gathering process was closed and no new files could be opened.[404]

The rationale for placing sexual torture in the first category was that it would be treated as one of the most serious crimes, more serious than murder.[405] PRI suggests that the inclusion of sexual torture in category one did not benefit the sexual violence victims, since it limited the number of cases heard and did not increase the amount of guilty verdicts reached:

> [T]he classification of rape in Category One, doesn't make it likely that many women who were raped will hear this pronouncement as this entails a death sentence or at least a very heavy sentence . . . such sentences are seldom produced due to the difficulty of producing evidence.[406]

For survivors, the classification of sexual violence as a category one crime was a double-edged sword; while it served as recognition of the severity of their pain, it also placed hurdles between the women and justice.[407]

III. The manner in which genocide sexual violence was adjudicated in Rwanda did not reflect a heterogeneity of women's experience, promoted the exclusion of women's experiences from community narrative building and diminished the preventative impact of the judicial process.

A. The process of genocide sexual violence adjudication resulted in survivors' exclusion from community

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[403] *See* Organic Law No. 13/2008 art. 25.

[404] Interview with Domitilla Mukantaganzwa, Executive Secretary of Gacaca Jurisdiction, in Kigali, Rwanda (July 23, 2009).

[405] *See supra*, note 188 (discussing women's groups involvement promoting the inclusion of sexual violence in category one).

[406] Riddell, *supra* note 164, at 105.

[407] Fierens, *supra* note 94, at 7.

narrative and future building.

The Rwandan government saw gacaca as more than a judicial structure. The posters advertising gacaca called them "*ukuri kakiza*" (or truth hearings).[408] Maya Goldstein-Bolocan identified the public hearings as crucial both "as communal experiences and as sources of information."[409] She wrote, "truth in Gacaca emerges communicatively in a dialogue involving all community members, including victims, offenders, supporters and other interested parties."[410] The 'truth' discovered in each gacaca hearing is added together to create a complete narrative of the genocide. In a country filled with mass graves of unidentified bodies, there were many unanswered questions that gacaca aimed to answer.[411] By adjudicating only a small portion of sexual violence crimes overall and completing those trials that transpired *in camera,* the gacaca process minimized the power of women to participate in the creation of the community narrative.[412]

The goals of gacaca are not only found in the revealing of truth but the process that it takes to find that truth.[413] Gacaca helps establish a sense of a shared community by facilitating the

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[408] Christine M. Venter, *Eliminating Fear Through Recreating Community In Rwanda: The Role Of The Gacaca Courts*, 13 TEX. WESLEYAN L. REV. 577, 593 (2007). The Hirondelle Foundation also reported that some prison gacacas were being colloquially referred to as "truth commissions." *Id.*

[409] Bolocan, *supra* note 2, at 382 (noting that both victim and perpetrator testimonies must be included).

[410] *Id.*

[411] *See U.N. Discovers Mass Graves in Rwanda*, N.Y. TIMES, Oct. 7, 1994, *available at* http://www.nytimes.com/1994/10/07/world/un-discovers-mass-graves-in-rwanda.html.

[412] *See* Clark, *supra* note 93, at 823.

[413] Bolocan, *supra* note 2, at 382.

conversation of a shared past.[414] Amaka Megwalu reports that during her field work, she found that after gacaca Rwandans would gather together with "friends, family and neighbours" to discuss and reflect on the day's events, the events of the genocide or other related issues.[415] Even testimony of legal irrelevance, such as emotions, is critical to creating a shared narrative and a "common terminology" of the genocide.[416] The survivors of sexual violence have only one step in the communal past. Their language, their living death and the experience of living post-trauma are not part of the common language that will move the country forward.

The process of a state-administrated trial also validates the victim's story as truth and perhaps serves as vindication of suffering that they had long been denied.[417] Christine Venter wrote:

> The real value of gacaca may come in the form of it providing a kind of truth commission, a community-wide discussion about what really took place during the genocide, and a beginning of the response to the question—How do we form a common society, knowing that one portion of society was bent upon the complete destruction of the other?[418]

Trials can create "the most authoritative" version of the truth.[419] By leaving women's experiences out of the community narrative, their stores are never included in the community-

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[414] *See* Matthew Bersagel Bralcy, *Rooting, Reforming, Restoring: A Framework for Justice in Rwanda*, 4 J. LUTHERAN ETHICS (2004), *available at* http://www2.elca.org/jle/article.asp?k=254 (referring to gacaca as a "powerful tool").

[415] Megwalu & Loizides, *supra* note 4, at 22.

[416] Venter, *supra* note 408, at 593.

[417] Bolocan, *supra* note 2, at 364.

[418] Venter, *supra* note 408, at 591.

[419] Bolocan, *supra* note 2, at 359.

defined, state-approved version of the truth.

Gacaca established a common experience for all Rwandans by defining a shared history.[420] Matthew Bersagel Braley wrote in *The Journal of Lutheran Ethics* that a prerequisite for Rwandans to live together in the future is to engage in "community practice."[421] Rwandans must establish a common framework for living, or, as Mark Drumbl said, be able to "imagine . . . themselves as Rwandans."[422] Part of this process involves recognizing that all members of the Rwandan community are interdependent. "Gacaca," Braley writes, "is not capable of creating and sustaining a comprehensive and cohesive system of perfect justice. What it may be capable of is empowering a disenfranchised citizenry and offering an institutional space in which alienated individuals and groups can recognize a degree of interdependence."[423] Gacaca is more than a legal institution; it is a social institution as well. Through communication community members developed an understanding of who they were as a people after the genocide. More than that, it provided the foundation for community members to conceptualize how they will engage with their neighbors in the new Rwanda.

Lastly, what the communal process offers victims is the acknowledgement of their suffering.[424] Experts from the South African Truth Commission report that many victims "wanted the nation to see their tears and hear their suffering."[425] Journalist Tina Rosenberg suggests that individuals need someone to seriously listen to their story and validate them with "official acknowledgment."[426] This "narrative process" of the TRC gave

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[420] Venter, *supra* note 408, at 593.

[421] Braley, *supra* note 414, at 5.

[422] Drumbl, *supra* note 153, at 1295.

[423] Braley, *supra* note 414, at 40.

[424] *See Your Justice is Too Slow*, *supra* note 340.

[425] Venter, *supra* note 408, at 594.

[426] *Id.*

victims acknowledgement of their suffering and in "most cases" resulted in "psychologically beneficial effects."[427] The public testimonies provided a chance for the nation, and individuals, to heal.[428] Zraly argued that, "[t]he process of speaking the truth and bearing witness among survivors is potentially powerful."[429] Without it, women will never be able to get out of their "spirit injuries,"[430] which Adrienne Wing identified as "defilement, silence, denial, shame, guilt, fear, blaming the victim, violence, self- destructive behaviors, acute despair/emotional death, emasculation, trespass, and pollution."[431] By not facilitating access to justice for sexual violence survivors, the laws also prevented women from accessing this form of psychological and emotional healing.

B. The process of genocide-sexual violence adjudication impacted the prevention of further genocide sexual violence.

Deterrence is a main component of any justice sector and a key part of Rwanda's approach to post-genocide re-construction. "Never Again" is a slogan plastered around the country, reminding the people to work towards preventing another horrific attack. Truth-telling through gacaca serves as a manner to develop a common language of morality. Zraly identifies the need for sexual violence survivors to speak out as the "survivor mission," finding it a "culturally meaningful strategy for striving

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[427] Bolocan, *supra* note 2, at 364; *See also* Jonathan Allen, *Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 315 (1999) (arguing that the TRC conferred on victims dignity, consideration and respect by providing them with a forum where they could recount their stories of oppression in a way that forensic constraints of a courtroom would not permit).

[428] *Id.*

[429] Zraly, *supra* note 15, at 408.

[430] Adrien Katherine Wing & Mark Richard Johnson, *The Promise of a Post-Genocide Constitution: Healing Rwandan Spirit Injuries*, 7 MICH. J. RACE & L. 247, 249 (2002).

[431] *Id.* at 289.

to prevent future genocide-rape."[432] The insistence on *in camera* trials takes the discussion of sexual violence during the genocide out of the public narrative, and, therefore, it is not woven into the common morality.

Establishing a community dialogue provides a platform for engaging with social norms by affirming or changing them.[433] In the context of a post-genocide society, where social norms were subverted for radical evil, gacaca provides a space for a re-negotiation of the mores of everyday society.[434] Gacaca not only punishes those who committed crimes, but defines those crimes as immoral or wrong in society, or what Christine Venter calls, "the sorts of things we don't do."[435] They need to establish a language of morality, not a system of principals or legal structure, but a language developed by the speakers establishing a common moral system.[436] Venter looks to Richard Rorty's suggestion that morality should be seen as "the voice of ourselves as members of a community, speakers of a common language."[437] Rorty endorses the notion of Wilfrid Sellars, who defines an immoral action as "the sort of thing we don't do."[438]

A realization of the creation of societal morality would be if the perpetrators recognize what they did as 'wrong.' Mark Drumbl wrote of interviewing hundreds of prisoners in Kigali in 1998, and finding "[a]lmost every interviewee did not believe he or she did anything 'wrong,' or that anything really 'wrong'

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[432] Zraly, *supra* note 15, at 398.

[433] Bolocan, *supra* note 2, at 382.

[434] Laura Stovel, When the Enemy Comes Home: Restoring Justice After Mass Atrocity 9 (Sixth International Conference on Restorative Justice Discussion Paper, 2003), *available at* http://www.sfu.ca/crj/database/scholar/130_03.htm.

[435] Venter, *supra* note 408, at, 594.

[436] MICHAEL OAKESHOTT, ON HUMAN CONDUCT 78 (1975).

[437] Venter, *supra* note 408, at 594.

[438] *Id.*

happened in the summer of 1994."[439] The prisoners, he wrote, thought their actions were necessary as self-defense; they saw themselves as "honorable citizens tasked to do the dirty work of furthering the interests of the state."[440] Drumbl wrote, "[t]hese prisoners, even after years in jail, have not been disabused of the propaganda fed to them by extremist Hutu leaders, according to which the Tutsi were out to attack them, so, therefore, this attack had to be preempted by killing all the Tutsi."[441]

This lack of identification of the crimes as "wrong" is further exacerbated in cases of sexual violence. Human Rights Watch's investigation into the attitudes towards sexual violence revealed that the crime was often ignored, but if it was recognized the crime was minimized or blamed on the victim.[442] The combination of tendencies in Rwanda to minimize sexual violence as a crime, a lack of identification of genocide crimes as "wrong," and a limited community discussion regarding sexual violence crimes provides for a worrisome future outlook. A positive note may be found in Drumbl's note that this feeling has "thawed" since his first interviews, citing the large number of confessions;[443] however, there have not been mass confessions for crimes of sexual violence. In fact, it has been quite the opposite.[444] In order to mitigate the future risk of violence, the common language developed by gacaca must not only include the stories of sexual violence, but also identify the crimes as wrong.

C. Women's experiences cannot be excluded from the judicial structuring process.

In her article *Gendered Subjects of Transitional Justice*,

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[439] Drumbl, *supra* note 384, at 50.

[440] *Id.* at 51.

[441] *Id.*

[442] *See supra* Part III.A. *See also* NOWROJEE, *supra* note 8, at 34.

[443] Drumbl, *supra* note 384, at 49.

[444] *See supra* Part II.D.

Katherine Franke differentiated between two forms of transitional justice: that of redistribution and that of recognition.[445] For women who survived the genocide, the most pressing concerns are often of redistribution, not recognition; they want healthcare, food, housing and safety.[446] Prosecutions, Franke wrote, are unlikely to result in remedies that transfer "money, power or other resources from perpetrators to victims."[447] Given the gravity of the crime they experienced, some victims simply felt, emotionally, it would provide no help to attend the trial.[448] Some articles conclude that addressing these concerns is more important than judicial redress; this Article does not argue with those claims, but rather is meant to evaluate the judicial structures that *were* put in place.

Survivors have their own ideas on what would be the best version of justice for them. For some women, no judicial structure could bring justice without very harsh punishments; one woman, who saw her family gunned down and survived brutal rapes and sex slavery during the genocide, said that "the gacaca courts do not bring justice" unless the *genocidaires* are

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[445] Franke, *supra* note 9, at 814.

[446] *See* DE BROUWER & CHU, *supra* note 17, at 11. *See also*, AMNESTY INT'L, *Rwanda: "Marked for Death": Rape Survivors Living With HIV/AIDS in Rwanda* (2004), *available at* http://www.amnesty.org/en/library/info/AFR47/007/2004; *see also* Wells, *supra* note 18, at 196.

[447] She explains, "Even if all of the wealth of the defendants could be made available as restitution to their victims, it would be an offensively inadequate reparation for the harm they have caused to their victims." Franke, *supra* note 9, at 819.

[448] "Some women simply do not believe in the possibility of a justice for female survivors of sexual violence." Wells, *supra* note 18, at n.159.

put to death or kept in jail for life.[449] Survivor Françoise Kayitesi had her own opinion on what punishments the perpetrators should receive:

> I don't feel that I forgive the Interahamwe, not yet. No one has asked for my forgiveness, and no one wants to talk about it. I still live among them, and the very best I can do is ignore them. I wouldn't have the courage to accuse those who raped me in the gacaca courts, but I know that even if I did, they would not receive the punishment they deserve. I couldn't accuse the ones who raped me even if I wanted to, since those rapes happened far from Kigali, and I don't know who those men are. When killers confess to their crimes, they are quickly released. I would rather see them in prison for the rest of their lives. Although I have attended gacaca three times, each time I go I become very traumatized, seeing myself being raped in the forest again. I think that the people who are now released from prison should help the survivors of the genocide by building them houses and digging their fields. If I was a judge, I would sentence them to carry out general works to help the community.[450]

Other survivors asked for more training so they could feel more comfortable living next door to their attackers. Pascasie Mukasakindi stated:

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[449] Marie Louise Niyobuhungiro:

> [O]ver five days, I was raped five times a day. The rapist didn't say anything to me. In the forest, the local people often saw me being raped by this man. The local people, and Interahamwe militiaman and other Hutu would watch the soldier rape me and did not even raise their little finger to stop it. They didn't care, because I was Tutsi. They were silent.

DE BROUWER & CHU, *supra* note 17, at 33.

[450] DE BROUWER & CHU, *supra* note 17, at 135–36.

> Some of the Interahamwe militiamen who raped me were imprisoned but they are now being released. This is not justice. Gacaca courts were supposed to bring justice and reconciliation, but they are bringing more tears than smiles. The men who killed me should be better trained on how to treat survivors after they return to society.[451]

The needs and desires of sexual violence victims vary, and, when discussing the impact of judicial structures, the multiplicity of their voices must be allowed. The establishment of a narrative of gendered shame silences the heterogeneity of voices of survivors of the genocide. While the academy may value an uncomplicated narrative of the victim experience, it is critical in evaluating the law to understand that there are varied experiences, expectations and views of justice.[452]

CONCLUSION

There was no simple answer to adjudicating crimes from the genocide. Gacaca was chosen due to its traditional roots and combination of punishment and reconstruction. Crimes of sexual violence posed an especially problematic task due to social and cultural forces. While the government tried to address many of these issues, it failed to develop a coherent method for addressing crimes of sexual violence. Victims of sexual violence have been left behind as the community narrative was inscribed. In order to achieve the recognition that women desire, it is critical for cases of sexual violence to be included in the community narrative while concurrently protecting individuals who might be injured in the process. However, there is a tension between the policy goal of shining the light on these sorts of violations and maintaining rule of law, empowering women in the process and an ethical and legal obligation in individual cases to protect women who testify and might be vulnerable.

This difficult tension could have been mitigated by

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[451] *Id.* at 77.

[452] *See* Anthony Alfieri, *Stances*, 77 CORNELL L. REV. 1233, 1244 (1992).

developing a different law regarding the adjudication of crimes of sexual violence. By originally placing sexual violence crimes within the jurisdiction of gacaca courts and developing a well-known, safe system for reporting crimes, they could have increased the number of cases adjudicated within the courts. Offering a definition for the crimes, along with guidance and training for judges and counselors from the outset might have improved the experience within gacaca for survivors of sexual violence and through that engendered more participation, allowing for crimes of sexual violence to be included in community narrative building.

The possible implications of how sexual violence crimes were treated are dire. Victims may never feel their suffering was truly recognized by their community and never deemed 'wrong' by their society. Crimes of sexual violence may continue to be minimized and dismissed by authorities, the lasting legacy of post-genocide adjudication's failure to fully address these crimes. This is only the worst outlook, however, and the strength of the survivors and their country may allow them to overcome any hurdle. I hope that Rwandan women continue to rebuild themselves—like their country—as vibrant and flourishing, looking towards a better tomorrow.